



ALBERTA
LAW REFORM
INSTITUTE



DOWER ACT



FINAL REPORT

118

SEP 2022





DOWER ACT

FINAL
REPORT || **118**

SEPTEMBER 2022

ISSN 0834-9037

ISBN 978-1-896078-87-8

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/2022/09/dower-act-final-report-118/

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/

Table of Contents

Alberta Law Reform Institute	i
Acknowledgments	iii
Summary	v
Recommendations	ix
Table of Abbreviations	xv
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 Act</i>	5
d. The <i>Dower Act</i> is outdated	5
C. Scope of the Project	5
D. The Current Project	7
1. Early consultation	7
a. Exploratory survey	7
b. Roundtables and meetings	8
c. Interviews and individual comments	8
2. Reports for Discussion and general consultation	8
a. General survey	9
b. Technical survey	9
c. Presentations and meetings	9
d. Written comments	9
3. Confidentiality	9
E. Guiding Principles	10
1. General principles	10
2. Access to justice and protection for the vulnerable	10
3. Equal protection for spouses and adult interdependent partners	12
F. Structure of this Report	12
CHAPTER 2 Consent to Disposition	15
A. The Requirement for Consent	15
B. Consent to Disposition	15
1. Ensuring compliance	15
a. Corporations and co-owners	16
b. Individual owners	16
2. Opting out	18
a. Dower release	18
b. Agreement releasing dower rights	19

3.	Consequences for disposition without consent	20
a.	Offence	20
b.	Action for damages.....	20
C.	Problems with Consent to Disposition.....	21
1.	Inefficient requirements	21
a.	Real estate procedures	21
b.	Separated spouses.....	22
c.	Other inefficiencies.....	22
2.	Ineffective protections	23
a.	Circumventing the requirement.....	23
b.	Lack of informed consent	23
c.	Ineffective protection in relationships with an imbalance of power.....	23
d.	Gaps in protection	24
CHAPTER 3	The Life Estate.....	25
A.	The Dower Life Estate	25
1.	Life estate in land.....	25
2.	Election	26
3.	Opting out.....	26
4.	Life estate in personal property	27
B.	Problems with the Life Estate	28
1.	Life estates are rarely used.....	28
2.	The life estate is an inflexible source of support	29
a.	Lack of need	29
b.	Difficulty liquidating a life estate	29
c.	Difficulty valuing a life estate.....	30
3.	Potential for conflict between a life tenant and the owner of the remainder interest	31
a.	Postponing inheritance	32
b.	Lack of clarity about responsibility for expenses during the life estate	32
4.	Uncertainty about how the life estate affects other claims.....	33
a.	Payment of debts.....	33
b.	Calculating the value of the estate for intestate succession..	34
c.	Family maintenance and support from an estate	35
CHAPTER 4	What Is the Purpose of the Dower Act?	37
A.	Abolish or Reform?	37
B.	What Was the Historical Purpose of the <i>Dower Act</i> ?	37
C.	What Has Changed Since the <i>Dower Act</i> Was Enacted?	39
1.	Joint tenancy.....	39
2.	Property division under the <i>Family Property Act</i>	40
3.	Order for exclusive possession under the <i>Family Property Act</i> or <i>Family Law Act</i>	42
4.	Inheritance under a will or by intestate succession.....	43
a.	Inheritance under a will.....	43
b.	Intestate succession.....	44
c.	The life estate is in addition to any other inheritance.....	44
5.	Family maintenance and support from an estate.....	44
6.	Temporary possession of the family home after the owner's death.....	45

CHAPTER 5 Who Is Protected by the <i>Dower Act</i>?	47
A. Who Is Affected?	47
B. Why Should Legislation Treat Spouses and Adult Interdependent Partners Alike?	50
1. Spouses and adult interdependent partners	50
2. Summary of consultation results	50
3. Arguments in favour of including adult interdependent partners	52
4. Arguments against including adult interdependent partners	54
5. Are there other options?	55
6. ALRI's recommendation	56
CHAPTER 6 Should the Requirement for Consent to Disposition Be Abolished?	57
A. Introduction	57
B. Summary of Consultation Results	57
C. Arguments in Favour of Abolishing Consent to Disposition	58
1. The <i>Dower Act</i> is outdated	58
2. Consent to disposition is unnecessary	58
3. The home should belong to the owner	58
4. There are other protections for spouses and partners	59
5. The right to withhold consent could be misused	59
6. Consent to disposition is inefficient and inconvenient	60
7. Abolishing consent to disposition would be an easy route to modernization	60
D. Arguments Against Abolishing Consent to Disposition	61
1. A home is a special asset	61
2. Relationships involve sharing	61
3. Consent to disposition protects a non-owner	62
a. Consent to disposition provides automatic protection	62
b. Consent to disposition provides protection upon relationship breakdown	63
c. Consent to disposition can protect an innocent person from fraudulent or secret dispositions	63
4. Abolishing consent to disposition might shift risk and inconvenience to the vulnerable	64
5. Consistency with other jurisdictions	65
E. Are There Other Options?	66
F. ALRI's Recommendation	67
CHAPTER 7 Should the Life Estate Be Abolished?	69
A. Introduction	69
B. Summary of Consultation Results	69
C. Arguments in Favour of Abolishing the Life Estate	69
1. The owner's wishes should prevail	70
2. Few people rely on the life estate	70
3. An automatic life estate is not tailored to actual needs	71
4. A life estate gives a spouse's interest priority over others	71
5. Abolishing the life estate would be consistent with most other Canadian jurisdictions	72
6. Abolishing the life estate would be an easy route to modernization	73
D. Arguments Against Abolishing the Life Estate	73

1.	Importance of a home.....	73
a.	A non-owner should not lose their home	74
b.	A couple's home belongs or should belong to the non-owner	74
c.	Reflecting the owner's wishes	74
2.	A life estate provides support for a surviving non-owner	74
3.	An automatic life estate offers protection without litigation	75
E.	Are There Other Options?.....	75
F.	ALRI's Recommendation	77
CHAPTER 8 Why Is New Legislation Needed?		79
A.	The Need for Reform	79
B.	Issues Raised in Consultation.....	79
1.	Outdated language.....	79
2.	Inconsistency with other Alberta legislation	80
3.	Rules could be in other legislation.....	80
4.	The need for clear legislation	81
C.	ALRI's Recommendation	81
CHAPTER 9 How Could Redefining the Property Affected Resolve Problems?.....		83
A.	Redefining the Property Affected.....	83
B.	The Definition of Homestead	83
C.	Summary of Consultation Results	84
D.	What Property Should Be Included?.....	86
1.	Occupancy	86
a.	Background	86
b.	Consultation results.....	88
c.	ALRI's recommendation	88
2.	Past occupancy and the effect of moving out or separation.....	89
3.	Multiple homes.....	89
a.	Background	89
b.	Consultation results.....	90
c.	ALRI's recommendations	91
4.	Amount of land	92
a.	Background	92
b.	Consultation results.....	93
c.	ALRI's recommendations	93
5.	Interests in land	95
a.	Background	95
b.	Consultation results.....	97
c.	ALRI's recommendations	97
6.	Mobile homes.....	99
a.	Background	99
b.	Consultation results.....	100
c.	ALRI's recommendations	101
7.	Property owned by someone other than an individual	102
E.	What Property Should Be Excluded?	103
1.	Property other than a home	103
2.	Residential tenancies	104
3.	Land on reserves.....	105
F.	Summary	105

CHAPTER 10 Are Any Adjustments Required to Treat Spouses and Adult Interdependent Partners Alike?	107
A. Introduction.....	107
B. Proving an Adult Interdependent Relationship.....	107
1. Consent to disposition	108
2. Life estate.....	109
C. Overlapping Rights.....	110
CHAPTER 11 Which Homes Should be Affected by Consent to Disposition?	113
A. Introduction.....	113
B. Time Limits.....	113
1. Background	113
2. Consultation results	114
3. ALRI's recommendation.....	116
C. Property Owned By Someone Other Than an Individual	117
1. Co-owners	117
a. Background.....	117
b. Consultation results.....	118
c. ALRI's recommendation	119
2. Property owned by a corporation	120
a. Background.....	120
b. Consultation results.....	122
c. ALRI's recommendation	122
CHAPTER 12 How Can Procedures for Obtaining Consent to Disposition Be Improved?	125
A. Introduction.....	125
B. Which Dispositions Should Require Consent?.....	125
1. Background	125
2. Consultation results	126
3. ALRI's recommendations.....	126
C. What Information or Advice Should Non-owners Receive When Providing Consent or Making a Release of Dower Rights?	127
1. Background	127
2. Consultation results	128
a. Difficulty giving or getting appropriate advice	128
b. Screening for abuse or coercion.....	129
c. Inconvenience and cost	129
3. Are there other options?.....	130
a. Release of dower rights.....	130
b. Other ideas.....	131
4. ALRI's recommendation.....	132
5. Requirements for making release of dower rights.....	133
D. Caveats.....	133
1. Background	133
2. Consultation results	134
3. ALRI's recommendations.....	135
E. How Else Could Reform Reduce Inefficiencies and Improve Protections?	138
1. Transfers between spouses or partners	138
a. Background.....	138
b. Consultation results.....	138

c. ALRI's recommendation	139
2. Capacity	139
a. Background	139
b. Consultation results.....	140
c. ALRI's recommendations	140
3. Orders dispensing with consent.....	141
a. Background	141
b. Consultation results.....	142
c. ALRI's recommendations	142
F. Other Improvements to Forms or Procedures	143

CHAPTER 13 What Should Be the Consequences of Disposition without Consent?.....147

A. Should a Disposition Without Consent Be Void or Voidable?	147
1. Background	147
a. Real estate purchase contracts before registration.....	148
b. Dispositions that do not result in a transfer of title.....	149
2. ALRI's recommendation.....	150
B. Should Making a Disposition Without Consent Be an Offence?.....	151
1. Background	151
2. Consultation results	151
3. ALRI's recommendation.....	152
C. How Should the Action for Damages Be Reformed?	152
1. Background	152
a. Availability	153
b. Reported cases.....	153
c. Assessing damages.....	155
d. Factors to consider	156
e. Payment from the General Revenue Fund.....	156
f. Effect of the end of the relationship.....	157
2. Consultation results	158
3. ALRI's recommendation.....	158

CHAPTER 14 How Should Debt Affect Consent to Disposition?163

A. Background	163
1. Civil enforcement and bankruptcy	163
2. Exemption for a principal residence	164
B. Protection for a Non-owner	165
1. Background	165
2. Consultation results	166
3. ALRI's recommendation.....	166
C. Attaching a Non-owner's Rights.....	167
1. Background	167
2. Consultation results	168
3. ALRI's recommendation.....	168

CHAPTER 15 Which Homes Should Be Affected by the Life Estate?.....171

A. Introduction.....	171
B. Time Limits.....	171
1. Past occupancy and the effect of moving	171
2. Effect of separation.....	172
3. Consultation results	173
4. ALRI's recommendations.....	174

C. Property Owned By Someone Other Than an Individual	175
1. Co-owners	176
2. Property owned by a corporation	177
3. Are there other options?	179
CHAPTER 16 How Can the Life Estate Be Improved?	181
A. Introduction	181
B. Clarifying the Obligations of a Life Tenant and the Owner of the Remainder Interest.....	181
1. Background	181
2. Consultation results	182
3. ALRI's recommendation.....	182
C. Other Claims Against an Estate	183
1. Background	183
2. Consultation results	185
3. ALRI's recommendations.....	185
D. Valuation of the Life Estate	186
1. Background	186
2. Approaches to valuing a life estate.....	186
a. Case law	186
b. Legislated rules.....	188
c. Options for legislated rules	189
3. Consultation results	190
4. ALRI's conclusion	190
E. Other Improvements to Forms or Procedures	191
CHAPTER 17 How Can the Life Estate in Personal Property Be Improved? .193	
A. Does the Life Estate in Personal Property Serve a Valid Purpose?...193	
B. Reforming Rights to Personal Property	195
1. Personal property to be included	195
2. Rights and responsibilities	197
Appendix.....	199

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 KC (Chair)
 DM McKenna KC (Vice Chair)
 A Barnsley-Kamal
 B Billingsley
 C Fox
 Hon Judge DG Hancock
 C Hutchison
 C Johnson KC
 J Koshan
 DL Molzan KC
 KA Platten KC
 Hon Justice JM Ross
 K Ryan KC
 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
 University of Alberta, Faculty of Law
 Law Society of Alberta
 University of Calgary, Faculty of Law
 Alberta Justice and Solicitor General
 Member at Large
 Member at Large
 Member at Large
 Member at Large

ALRI Staff Members

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

www.alri.ualberta.ca

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

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 this project. We extend our thanks to everyone who took time to provide input on how the law should operate in this area. From early consultation to identifying issues, to survey responses, to round table participation, to one on one meetings, we greatly appreciate the time people volunteered to share their views and experiences.

As before, we continue to recognize the work of two scholars who have contributed to the analysis of dower law in Alberta. Professor Bruce Ziff led our previous project on the *Dower Act* and wrote our report on *The Matrimonial Home* (RFD14, 1995). 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.

Over the course of the project, the following people provided information about the prevalence of dower rights or their interaction with other aspects of the law.

- Curtis Woollard, Marie-Louise Vieira, and Jill Baker of the Land Titles Office
- Russell Davidson, Senior District Registrar, Teranet Manitoba
- Professors Tamara Buckwold and Roderick Wood, University of Alberta, Faculty of Law

We are grateful to have had the opportunity to share our research with and hear the views of members of the following Canadian Bar Association sections:

- Creditor & Debtor Law (North)
- Family 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. She also undertook the writing of both reports for discussion and this final report. ALRI expresses its particular thanks to Ms Buckingham for her carriage of this project.

The research and consultation phases were carried out by ALRI's full team of legal counsel which includes Katherine MacKenzie, Matthew Mazurek, Jennifer Taylor, and Stella Varvis.

Jenny Koziar prepared the report for publication. Barry Chung provided support with surveys and consultation. Sandra Petersson, Executive Director, contributed project and editorial support. Summer student, Sarah Ormandy undertook additional research and checked the footnotes.

As always, we appreciate the guidance and input of the ALRI Board in developing both initial and final recommendations.

Summary

In this report, ALRI recommends replacing the *Dower Act* with new legislation.

The *Dower Act* protects a spouse if the couple's home is solely owned by the other spouse. It applies to a "homestead", which is land where the owner lives or has lived. It protects a non-owner spouse from losing their home, either during the homeowner's lifetime or after the homeowner's death. It has two key features:

- Consent to disposition: The homeowner cannot sell, lease, mortgage, or otherwise transfer the homestead without the non-owner's consent.
- Life estate: After the homeowner's death, the non-owner can keep the homestead for the rest of their life.

The *Dower Act* has been part of the law of Alberta for more than one hundred years. The last substantial reforms were in 1948. ALRI's research and consultation shows that it mostly functions as intended, but is outdated.

Who gave input on these recommendations?

ALRI sought input from stakeholders throughout this project. ALRI consulted with lawyers, real estate agents and brokers, estate and financial planners, land and energy professionals, and the general public.

Our consultation included three online surveys:

- An exploratory survey in fall 2020 to identify issues with the current law. The exploratory survey was aimed at professionals who deal with the *Dower Act* in their work. There were 105 respondents.
- A general survey in winter 2021-2022. The general survey was aimed at the general public. There were 586 respondents.
- A technical survey in winter 2021-2022. The technical survey was aimed at professionals and sought feedback on specific proposals for reform. There were 258 respondents.

Our consultation also included:

- Roundtable meetings with lawyers;
- Meetings with professional associations and other stakeholder organizations;

- Interviews; and
- Comments by email, phone, and social media.

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. ALRI considered whether other legislation has effectively replaced the *Dower Act*.

After extensive research and consultation, ALRI has concluded that the protection in the *Dower Act* is still necessary and should continue. It fills a gap not covered by other legislation, protecting a spouse from becoming homeless due to circumstances largely beyond their control. Unlike other legislation, it operates automatically. Consultation showed many people rely on this unique protection. Abolishing it would put new burdens on spouses or partners when they are particularly vulnerable. Abolishing it could also increase conflict and litigation.

While the protection should continue, there are many problems with the *Dower Act* in its current form. This report also considers how to make consent to disposition and the life estate work better.

Who should benefit from the protections?

The *Dower Act* applies only to legally married spouses. It is out of step with other Alberta legislation that treats spouses and adult interdependent partners alike. ALRI recommends new legislation should provide the same rights to spouses and adult interdependent partners.

Which homes should be included?

The definition of "homestead" in the *Dower Act* does not serve its purpose well. The purpose of consent to disposition and the life estate is to protect a spouse or partner from losing their home. The current definition is too broad, sometimes affecting property that is not or has never been the spouse's or partner's home.

New legislation should include a new definition of the property affected. Protections should focus on property that is actually the spouse's or partner's home. New legislation should apply to a home where a couple lives or lived together. Protections should last while they live in the home together, but not indefinitely after a move or separation. ALRI recommends time limits with a transition period after a move or separation. At the end of the transition period, protections would no longer apply to a former home.

The *Dower Act* does not apply to mobile homes. ALRI recommends that new legislation should apply to mobile homes.

This report also includes recommendations to clarify the kinds of homes, interests in land, and amount of land affected.

How could new legislation solve practical problems?

This report recommends other changes to reduce administrative burdens, increase efficiency, and strengthen protections. There are also recommendations that would clarify obligations and the rights of third parties.

How could consent to disposition work better?

Obtaining consent to disposition is sometimes difficult. Redefining the property affected would solve some problems, as fewer transactions would require consent. Additional reforms would help streamline the process of obtaining consent when required. One reform would make it easier for a spouse or partner to release their rights, meaning they would not need to consent multiple times. Another would help spouses or partners put a notice on title to alert others that consent is required. Others would smooth the process when a homeowner transfers a home to their spouse or partner and clarify whether a power of attorney allows another person to consent on behalf of the spouse or partner. A final reform would ensure there is a way to resolve disputes if a couple cannot agree.

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

ALRI reviewed the consequences for violating the *Dower Act*. Under the *Dower Act*, it is an offence for a homeowner to sell, lease, mortgage or transfer a home without their spouse's consent. ALRI recommends abolishing the offence as there are other ways to address the problem. The *Dower Act* allows a spouse to sue the homeowner in this circumstance. This option should remain available but there should be reform to provide more flexibility.

How could new legislation clarify the rights of third parties?

The *Dower Act* does not only affect a couple living in a home. It can affect third parties, including home buyers, mortgage lenders, creditors, trustees in bankruptcy, and family members of a deceased homeowner. There are unresolved legal issues about how the *Dower Act* affects their interests. This report includes recommendations to clarify the rights of third parties, improving certainty for everyone.

How can the life estate be improved?

A life estate means a non-owner spouse or partner may keep the home for the rest of their life. They may also keep some of the things that make a house a home, like furniture and appliances. It is not clear what responsibilities a non-owner has during the life estate, which can lead to conflict between the non-owner and other heirs. This report recommends legislated rules to clarify the responsibilities of all parties.

Recommendations

RECOMMENDATION 1

Adult interdependent partners should have the same rights as spouses regarding consent to disposition and the life estate. 56

RECOMMENDATION 2

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

A spouse or adult interdependent partner should have the ability to prevent a disposition of a home by withholding consent. 67

RECOMMENDATION 3

The surviving spouse or adult interdependent partner of a homeowner should automatically receive a life estate in a home when the homeowner dies. 77

RECOMMENDATION 4

The *Dower Act* should be replaced with new legislation. 81

RECOMMENDATION 5

Consent to disposition and the life estate should apply only to a home where both spouses or both adult interdependent partners live or lived together. 89

RECOMMENDATION 6

If the spouses or adult interdependent partners have lived in more than one home within the last three years, consent to disposition should be required for each home. 91

RECOMMENDATION 7

A surviving spouse or adult interdependent partner should have a life estate for only one home. 92

RECOMMENDATION 8

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. 92

RECOMMENDATION 9

Consent to disposition should be required for all the land included on the certificate of title for the land where the home is located. 95

RECOMMENDATION 10

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. 95

RECOMMENDATION 11

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

If consistent with Metis Settlements General Council policy, consent to disposition should be required for the following interests in land that can be registered: Metis title, provisional Metis title, or an allotment.98

RECOMMENDATION 12

Consent to disposition should not be required if the homeowner’s interest is a life estate.98

RECOMMENDATION 13

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

If consistent with Metis Settlements General Council policy, a surviving spouse or adult interdependent partner should have a life estate if the homeowner had Metis title.

A surviving spouse or adult interdependent partner should have the homeowner’s interest for the remaining term if the homeowner had a leasehold estate for more than three years. If consistent with Metis Settlements General Council policy, a surviving spouse or adult interdependent partner should have the homeowner’s interest for the remaining term if the homeowner had provisional Metis title or an allotment.....98

RECOMMENDATION 14

Consent to disposition should be required for a mobile home.102

RECOMMENDATION 15

A surviving spouse or adult interdependent partner should have the right to keep a mobile home for the rest of their life.102

RECOMMENDATION 16

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.....117

RECOMMENDATION 17

If spouses or adult interdependent partners live together in a home that one of them co-owns with a third party, consent to disposition should be required for any disposition of that spouse’s or adult interdependent partner’s interest in the home.....120

RECOMMENDATION 18

If spouses or adult interdependent partners live together in a home owned by a closely held corporation controlled by one of the spouses or partners, consent to disposition should be required for any disposition of the corporation’s interest in the home.....123

RECOMMENDATION 19

Consent to disposition should be required for any disposition that could result in the spouse or adult interdependent partner of the homeowner losing their home.....126

RECOMMENDATION 20

Consent to disposition should be required only for dispositions that take effect during the lifetime of the homeowner.127

RECOMMENDATION 21

A spouse or adult interdependent partner should have to meet separately with a witness when giving consent to disposition.....133

RECOMMENDATION 22

A spouse or adult interdependent partner should have to meet separately with a witness when making a release of dower rights.....133

RECOMMENDATION 23

Legislation should state that a spouse or adult interdependent partner of a homeowner may register a caveat stating their interest in a home.137

RECOMMENDATION 24

There should be clear procedures for removing a caveat registered by the spouse or adult interdependent partner of a homeowner.....137

RECOMMENDATION 25

Legislation should state that consent to disposition is not required when a homeowner makes a disposition in favour of their spouse or adult interdependent partner.139

RECOMMENDATION 26

An attorney appointed under a power of attorney should be able to consent to disposition on behalf of a spouse or adult interdependent partner.141

RECOMMENDATION 27

A homeowner should only be able to consent to disposition on behalf of their spouse or adult interdependent partner if the homeowner is appointed as the attorney under an enduring power of attorney and the spouse or adult interdependent partner has lost capacity to give consent.141

RECOMMENDATION 28

A court should be able to grant an order dispensing with consent to disposition if a homeowner cannot obtain the consent of their spouse or adult interdependent partner for any reason.....142

RECOMMENDATION 29

A court should have discretion to grant an order dispensing with consent if in the opinion of the court it is fair and reasonable to do so in the circumstances.143

RECOMMENDATION 30

A court should be able to include any terms and conditions the court considers appropriate in an order dispensing with consent.143

RECOMMENDATION 31

A disposition should be unenforceable against a homeowner until their spouse or adult interdependent partner provides consent or until consent to disposition is no longer required.151

RECOMMENDATION 32

The offence for making a disposition without consent should be abolished.152

RECOMMENDATION 33

If a homeowner makes any disposition that requires consent without the consent of their spouse or adult interdependent partner, the homeowner should be liable to the spouse or adult interdependent partner in an action for damages.158

RECOMMENDATION 34

A court should have discretion to assess damages for disposition without consent.160

RECOMMENDATION 35

Legislation should include a list of factors for a court to consider in awarding damages.160

RECOMMENDATION 36

If a spouse or adult interdependent partner is awarded damages for disposition without consent but is unable to collect the damages or the full amount of damages from the homeowner, the spouse or adult interdependent partner should be able to seek payment of damages, excluding punitive damages, from the General Revenue Fund.160

RECOMMENDATION 37

A court should be able to award damages for a disposition without consent after spouses have divorced or adult interdependent partners have become former adult interdependent partners.161

RECOMMENDATION 38

If a civil enforcement agency is instructed to sell a homeowner's home or if a trustee in bankruptcy is appointed for a homeowner, the civil enforcement agency or trustee in bankruptcy should not be able to dispose of the home without the consent of the homeowner's spouse or adult interdependent partner or an order dispensing with consent. ..167

RECOMMENDATION 39

Only a spouse or adult interdependent partner of a homeowner, or their attorney appointed under a power of attorney, should have the right to consent to a disposition of a home or prevent a disposition of a home by withholding consent.169

RECOMMENDATION 40

A life estate should be available if both spouses or both adult interdependent partners lived together in the home at any time.....175

RECOMMENDATION 41

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.....175

RECOMMENDATION 42

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.175

RECOMMENDATION 43

A surviving spouse or adult interdependent partner should receive a life estate for a home where both spouses or both adult interdependent partners lived together if the deceased homeowner was the sole owner of the home.179

RECOMMENDATION 44

Legislation should list the obligations of the life tenant and the owner of the remainder interest.....183

RECOMMENDATION 45

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.185

RECOMMENDATION 46

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.....185

RECOMMENDATION 47

A surviving spouse or adult interdependent partner should have the use and enjoyment of personal property related to a home.....195

RECOMMENDATION 48

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.197

RECOMMENDATION 49

A court should have the power to resolve any dispute about which items are household goods.197

RECOMMENDATION 50

Legislation should list the obligations of a surviving spouse or adult interdependent partner relating to personal property.....198

RECOMMENDATION 51

A surviving spouse or adult interdependent 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.198

Table of Abbreviations

ALBERTA LEGISLATION

<i>Dower Act</i>	<i>Dower Act</i> , RSA 2000, c D-15
<i>Family Property Act</i>	<i>Family Property Act</i> , RSA 2000, c F-4.7
<i>Wills and Succession Act</i>	<i>Wills and Succession Act</i> , SA 2010, c W-12.2

OTHER CANADIAN LEGISLATION

BC Act	<i>Land (Spouse Protection) Act</i> , RSBC 1996, c 246
Manitoba Act	<i>The Homesteads Act</i> , CCSM, c H80
Newfoundland Act	<i>Family Law Act</i> , RSNL 1990, c F-2
Ontario Act	<i>Family Law Act</i> , RSO 1990, c F.3
Saskatchewan Act	<i>The Homesteads Act</i> , 1989, SS 1989-90, c H-5.1

LAW REFORM PUBLICATION

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
--------	---

CHAPTER 1

Introduction

A. Introduction

[1] In this report, ALRI recommends replacing the *Dower Act* with new legislation.

[2] 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.¹

[3] The *Dower Act* protects a non-owner 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”.

[4] 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.

[5] ALRI asked two questions in this project. Has the *Dower Act* outlived its usefulness? If it is still useful, what updates does it require? We did extensive research and consultation to answer these questions.

[6] ALRI has concluded that the key features of the *Dower Act* are still useful and necessary. Consent to disposition and the life estate both provide important protection to non-owners. The protection they provide is unique. While other legal rules about support, family property, and inheritance meet most needs, they are not enough to ensure a non-owner can keep their home. However, the *Dower Act* is out of date and does not function well in its current form. ALRI

¹ *Dower Act*, RSA 2000, c D-15, s 1(d) [*Dower Act*].

recommends replacing it with modern legislation that will better meet the needs of those affected.

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 14.² 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.³ This recommendation has never been implemented. The prescribed form of affidavit remains inconsistent with the statute.⁴

[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.⁵ It

² 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].

³ 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].

⁴ Professor Jonnette Watson Hamilton has also noted this issue. In an ABlawg post, she wrote the form of affidavit "needs to be changed because it is misleading as well as wrong.": Jonnette Watson Hamilton, "The Harsh Consequences of Ignoring the *Dower Act*" (14 March 2017), ABlawg (blog), online: <www.ablawg.ca/2017/03/14/the-harsh-consequences-of-ignoring-the-dower-act/> [perma.cc/2Z6T-NM7A].

⁵ 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>.

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

[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.⁷ This recommendation was not implemented. Other recommendations in the project were nearly implemented but did not come into force.⁸

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.⁹

[14] At approximately the same time, court decisions highlighted difficulties applying certain parts of the *Dower Act*.¹⁰ Professor Jonnette Watson Hamilton wrote blog posts exploring the issues.¹¹ The cases and blog posts suggested that the whole statute was in need of review.

⁶ 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>.

⁷ 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>.

⁸ 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.

⁹ 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].

¹⁰ *Joncas v Joncas*, 2017 ABCA 50; *Estate of Johnson, Rick Allen (Re)*, 2017 ABQB 399 [*Johnson Estate*].

¹¹ Jonnette Watson Hamilton, "The Harsh Consequences of Ignoring the *Dower Act*" (14 March 2017), ABlawg (blog), online: <www.ablawg.ca/2017/03/14/the-harsh-consequences-of-ignoring-the-dower-act/> [perma.cc/2Z6T-NM7A]; Jonnette Watson Hamilton, "The Impact of a *Dower Act* Life Estate on the Valuation and Distribution of Intestate Estates" (18 July 2017), ABlawg (blog), online: <www.ablawg.ca/2017/07/18/the-impact-of-a-dower-act-life-estate-on-the-valuation-and-distribution-of-intestate-estates/> [perma.cc/4AE6-QNR5].

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

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.¹²

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

[18] When the *Dower Act* was first enacted more than a century ago, 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 any 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

¹² 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*, RSA 2000, c M-8, 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, note 9.

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.

[20] Chapter 4 discusses these legislative changes in more detail.

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, when it was last updated. 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.

C. Scope of the Project

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

[25] 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, such as dependent adult children, should have similar protections. While there may be merit to these arguments, this kind of change would raise many new issues beyond a review of the *Dower Act*.
- Whether Alberta law should recognize relationships involving more than two partners. We are aware that some people have relationships where more than two people share their lives at the same time. Reform may be needed to address the needs of people in these relationships but there are many interconnected issues. Reform should be considered broadly, not piecemeal.

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

[27] 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.¹³ 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*.¹⁴

[28] The *Dower Act* applies to homes on Metis Settlements. The Metis Settlements General Council holds fee simple title to all the land on Alberta's

¹³ 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].

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

eight Metis Settlements but individual members may hold interests in land such as Metis title, provisional Metis title, or an allotment. The Metis Settlements Land Registry maintains records of individual interests. The Metis Settlements General Council has the power to make policies about the application of the *Dower Act* to those individual interests.¹⁵ The current land policy and the procedures of the Metis Settlements Land Registry provide non-owners with the same dower rights that apply to other land under provincial jurisdiction.¹⁶

D. The Current Project

[29] ALRI benefited from extensive consultation. We sought input at multiple points in this project. We asked for and received feedback from lawyers, real estate professionals, wills and estate professionals, other professionals like financial planners and land and energy professionals (sometimes known as land agents or landmen), and the general public.

1. EARLY CONSULTATION

[30] The preliminary recommendations in the Reports 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.

a. Exploratory survey

[31] In fall 2020, ALRI made a short online survey available (the “exploratory survey”). The exploratory survey was aimed at professionals who deal with the *Dower Act* in their work. It 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.

¹⁵ *Metis Settlements Act*, RSA 2000, c M-14, s 222(1)(v).

¹⁶ For consent to disposition see *Metis Settlements Land Registry Regulation*, Alta Reg 361/1991, s 79; for the life estate see Metis Settlements General Council, *Land Policy*, Policy GC-P9201 (Edmonton: Metis Settlements General Council, 1992) ss 2.12(e), 7.3, online: <msgc.ca/wp-content/uploads/2019/10/policy-land_policy_part_1.pdf> [perma.cc/WR7J-GDKQ]; <msgc.ca/wp-content/uploads/2019/10/policy-land_policy_part_2.pdf> [perma.cc/5CR4-QMCQ].

[32] There were 105 respondents to the exploratory 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.

b. Roundtables and meetings

[33] In November 2020, ALRI hosted three roundtable meetings. All the meetings were held 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] Between March and October 2022, we spoke at six Canadian Bar Association section meetings. Our presentations included a preview of some of the preliminary recommendations in the Reports for Discussion. Lawyers attending these meetings provided comments.

c. 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.

2. REPORTS FOR DISCUSSION AND GENERAL CONSULTATION

[38] In late 2021, ALRI published two Reports for Discussion: *Dower Act: Consent to Disposition*, Report for Discussion 36 and *Dower Act: Life Estate*, Report for Discussion 37.

[39] On the same day that the Reports for Discussion were published, we opened two online surveys. The surveys were open for approximately three months.

a. General survey

[40] One survey was aimed at the general public (the “general survey”). We used Survey Monkey Audience, which allowed us to collect a large number of responses very quickly. Survey Monkey Audience provided 559 responses from people in Alberta, balanced for gender and age. The general survey was also available on our website. There were an additional 27 people who accessed the survey directly, rather than through Survey Monkey Audience. Altogether, there were 586 responses to the general survey. The Appendix has more details about who responded to the survey.

b. Technical survey

[41] The other survey was aimed at professionals who deal with the *Dower Act* in their work, including lawyers, real estate professionals, estate planners or administrators, and others (the “technical survey”). There were 258 respondents, although some respondents did not answer all the questions. The Appendix has more details about who responded to the survey.

c. Presentations and meetings

[42] We had two further meetings with stakeholder organizations, where we received feedback on our proposals and some additional comments.

d. Written comments

[43] We also received eight written comments by email, on LinkedIn, and on YouTube.

3. CONFIDENTIALITY

[44] 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 consultation.

E. Guiding Principles

[45] 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

[46] 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.

[47] 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 given priority to consistency within Alberta legislation. 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

[48] 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 people can resolve legal issues effectively and fairly.¹⁷

[49] 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 the spouse or partner of a homeowner from becoming homeless.¹⁸ In our view, this objective is an important one.

¹⁷ 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.

¹⁸ 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 10 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.

[50] 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 due to the actions of their spouse or partner.

[51] Among the most vulnerable in this context are those experiencing domestic violence or coercive control. In consultation, respondents pointed out how the issues are linked. Sometimes the fact that one spouse or partner owns the couple's home is part of a pattern of control. A controlling sole owner might use a disposition or the threat of a disposition to control or abuse the non-owner. We also heard concerns that a controlling non-owner could withhold consent or threaten to withhold consent to a disposition.

[52] These are important issues, affecting a significant number of people. In a 2018 survey, Statistics Canada found that 44% of women and 36% of men had experienced "psychological, physical, or sexual violence by an intimate partner in their lifetime."¹⁹ The risk is not distributed evenly. The survey found that women are more likely to experience intimate partner violence than men and that women with disabilities were more likely to experience intimate partner violence than women without disabilities.²⁰ It also found that people "whose sexual orientation is gay, lesbian, bisexual, or another sexual orientation that is not heterosexual" were more likely to experience intimate partner violence than people who are heterosexual.²¹

[53] With these issues in mind, we have considered how our recommendations would affect those experiencing domestic violence or coercive control. These individuals stand to benefit the most from the protection the *Dower Act* provides. At the same time, the protections must be carefully designed so they actually help and do not increase the risk of harm.

[54] 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

¹⁹ Statistics Canada, "Intimate Partner Violence in Canada, 2018", *The Daily* (26 April 2021), online: <www150.statcan.gc.ca/n1/daily-quotidien/210426/dq210426b-eng.htm> [perma.cc/9U5B-UNVD].

²⁰ Statistics Canada, "Intimate Partner Violence in Canada, 2018", *The Daily* (26 April 2021), online: <www150.statcan.gc.ca/n1/daily-quotidien/210426/dq210426b-eng.htm> [perma.cc/9U5B-UNVD].

²¹ This description is from Statistics Canada's report of the survey results. The report mentions sexual orientation specifically but not gender identity or identification with another sexual minority. We recognize that the phrasing implies heterosexuality is the norm but use it here as it is how the statistics were reported: Statistics Canada, "Intimate Partner Violence in Canada, 2018", *The Daily* (26 April 2021), online: <www150.statcan.gc.ca/n1/daily-quotidien/210426/dq210426b-eng.htm> [perma.cc/9U5B-UNVD].

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

[55] Another guiding principle for this project is that spouses and adult interdependent partners should have the same rights, benefits, and obligations. Chapter 5 has a detailed discussion about our reasons for adopting this principle.

F. Structure of this Report

[56] There are five parts to this report.

[57] The first part introduces the project and the *Dower Act*. Chapter 1 summarizes the need for reform, the scope of the project, ALRI's consultation, and the guiding principles we have adopted for this project. Chapter 2 and 3 briefly describes the features of the *Dower Act*, how it works in practice, and some of the problems with it. Chapter 2 focuses on consent to disposition. Chapter 3 focuses on the life estate.

[58] The second part considers whether the key features of the *Dower Act* are still useful. In other words, should dower rights be abolished? Chapter 4 discusses the history and purpose of the *Dower Act*. Chapter 5 considers who is and who should be protected by the *Dower Act*. It includes our findings about the number of people likely to be affected and the reasons why one person might be the sole owner of a couple's home. It also explains our reasons for recommending that spouses and adult interdependent partners should have the same rights. Chapter 6 discusses arguments for and against abolishing consent to disposition. Chapter 7 discusses arguments for and against abolishing the automatic life estate. ALRI concludes that both features are still important and should be retained.

[59] The third part explains why comprehensive reform is required. Chapter 8 explains why the *Dower Act* is unsatisfactory in its current form and should be replaced. The following chapters consider issues that affect both consent to disposition and the life estate. Chapter 9 explains how replacing the definition of "homestead" could solve many practical problems and recommends a new definition. Chapter 10 discusses some specific issues about treating spouses and adult interdependent partners alike.

[60] The fourth part recommends reforms specific to consent to disposition. Chapter 11 is about which homes should be affected by consent to disposition. Specifically, it includes recommendations about a time limit and whether consent should be required when a couple lives in a home owned by someone other than an individual. Chapter 12 recommends reforms that could improve the process of obtaining consent to disposition. Chapter 13 considers the consequences for a disposition without consent. Chapter 14 discusses some specific issues that can arise when a couple's home is at risk of being sold to pay debts.

[61] The fifth part recommends reforms specific to the life estate. Chapter 15 is about which homes should be available for a life estate. Chapter 16 discusses reforms that could improve how the life estate works in practice. Finally, Chapter 17 recommends reforms to the life estate in personal property.

CHAPTER 2

Consent to Disposition

A. The Requirement for Consent

[62] One of the key features of the *Dower Act* is that a married owner cannot sell, lease, mortgage, or otherwise transfer a homestead without the consent of the non-owner spouse. The requirement is found in section 2(1):²²

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

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

unless the spouse consents to the disposition in writing, or unless the Court has made an order dispensing with the consent of the spouse as provided for in section 10.

[63] The word “disposition” used in section 2(1) is a defined term. It includes a transfer, an agreement for sale, a lease for more than three years, a mortgage or encumbrance, and a devise made by will.²³

[64] This chapter reviews how consent to disposition works as it currently applies to spouses. It also discusses problems with it.

B. Consent to Disposition

1. ENSURING COMPLIANCE

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

²² *Dower Act*, s 2(1).

²³ *Dower Act*, s 1(b). As we discuss in Chapter 12, a devise made by will is out of place as it is not an act *inter vivos*.

has consented.²⁴ The Metis Settlements Land Registry performs a similar function for dispositions of land on Metis Settlements.²⁵

a. Corporations and co-owners

[66] In some cases, the Land Titles Office can ascertain that consent to disposition is not required based on the title. Consent to disposition is only required if land is owned by an individual. If the land is owned by a corporation or other entity, the land is not a homestead and consent is not required. If the land is owned by two or more individuals, either as joint tenants or tenants in common, consent is not required.²⁶

b. Individual owners

[67] If the owner of land is an individual, the Land Titles Office will not register a disposition without one of three things:²⁷

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

i. Affidavit establishing that consent is not required

[68] If the owner is an individual but they are not married or the land is not a homestead, the owner must prove consent to disposition is not required by making an affidavit.²⁸ There is a prescribed form for this purpose.²⁹ The owner must select one of four options: the owner is not married, neither the owner nor their spouse have lived on the land since their marriage, the non-owner has

²⁴ Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure DOW-1 (Edmonton: Ministry of Service Alberta, 2021), online: <www.servicealberta.ca/pdf/ltmanual/DOW-1.pdf> [perma.cc/42XJ-2AJZ].

²⁵ *Metis Settlements Land Registry Regulation*, Alta Reg 361/1991, s 79.

²⁶ If the co-owners are spouses of each other, the land is a homestead but the requirement for consent is fulfilled by each executing the documents to complete the disposition: *Dower Act*, s 25(2). If the co-owners are not spouses of each other, the land is not a homestead: *Dower Act*, s 25(1).

²⁷ Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure DOW-1 (Edmonton: Ministry of Service Alberta, 2021), online: <www.servicealberta.ca/pdf/ltmanual/DOW-1.pdf> [perma.cc/42XJ-2AJZ].

²⁸ *Dower Act*, s 4(6).

²⁹ *Forms Regulation*, note 3, Form B.

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

ii. Consent and certificate of acknowledgment

[69] If the owner of land is an individual and the land is a homestead, the non-owner must provide their consent in writing.³⁰ When signing the consent, the non-owner must meet with a witness without the owner present.³¹ In that meeting, the non-owner must confirm that they are aware of the transaction, understand their dower rights, and are signing the consent voluntarily.³² The witness then completes a certificate of acknowledgment. Both the consent and the certificate of acknowledgment must be in prescribed forms.³³

[70] Real estate agents and brokers have additional requirements. We learned that in a typical residential real estate sale, a non-owner may be asked to sign documents at three different points in the transaction. It begins when the owner enters a listing agreement with a real estate broker. The standard listing agreement includes a term where the owner agrees the land may be encumbered to secure payment of the broker's commission. The encumbrance is a disposition, so the non-owner must consent. A non-owner may also be asked for consent when an offer is accepted. The standard form residential purchase contract has a space for the non-owner's signature and includes a term where the owner promises to provide the non-owner's consent. The non-owner's signature on the residential purchase contract is not the prescribed form of dower consent and is not accompanied by a certificate of acknowledgment, so it could not be used to register a transfer at the Land Titles Office. Finally, a non-owner must provide written consent in the prescribed form to the actual transfer of land. The seller's lawyer often prepares the consent with the other closing documents. The non-owner's consent and the certificate of acknowledgment accompany the transfer of land when it is submitted to the Land Titles Office for registration.

³⁰ *Dower Act*, s 4.

³¹ *Dower Act*, s 5(2).

³² *Dower Act*, s 5(1).

³³ *Dower Act*, ss 4(2), 5(2); *Forms Regulation*, note 3, Forms A, C.

iii. Order dispensing with consent

[71] In certain circumstances, an owner who cannot get the consent of the non-owner can instead apply for a court order dispensing with consent.³⁴ The owner must rely on one of the grounds listed in section 10 of the *Dower Act*.³⁵

[72] In most cases the owner must give notice of the application to the non-owner. The court may grant an exception if the grounds for the application are ones where it may be difficult to contact the non-owner: either that the non-owner has not lived in Alberta during the marriage or that the whereabouts of the non-owner are unknown.³⁶

2. OPTING OUT

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

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

a. Dower release

[75] A non-owner can give up all their dower rights in a specific property with a release of dower rights.³⁷ The non-owner must sign two documents: a release

³⁴ *Dower Act*, s 10.

³⁵ *Dower Act*, s 10(1). For ease of reference, section 10(1) reads:

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

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

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

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

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

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

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

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

(ii) a certificate of incapacity is not in effect under the Public Trustee Act,

may apply to the Court for an order dispensing with the consent of the spouse to the proposed disposition.

³⁶ *Dower Act*, s 10(2).

³⁷ *Dower Act*, s 7.

and an affidavit. There are prescribed forms for both.³⁸ The affidavit requires the non-owner to state that they are aware of their dower rights and are giving them up “freely and voluntarily without any compulsion” by the owner.³⁹ The non-owner must meet with a lawyer to sign the documents. The owner cannot be present at the meeting and the lawyer must not be acting for the owner.⁴⁰ In other words, the lawyer must be independent. Once the release is registered with the Land Titles Office, the land is no longer a homestead. The Land Titles Office provided us with data showing there are approximately 200 dower releases filed each month.

[76] A non-owner can unilaterally cancel a release and reclaim their dower rights by registering a caveat with the Land Titles Office.⁴¹

b. Agreement releasing dower rights

[77] The other option is to make an agreement releasing dower rights. The agreement must be in writing but there is no prescribed form.⁴² An agreement to release dower rights could be part of a separation agreement.⁴³ The requirements for making an agreement are similar to those for a release. The non-owner must meet with an independent lawyer, without the owner present, to sign the agreement.⁴⁴

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

³⁸ *Forms Regulation*, note 3, Forms D, E.

³⁹ *Forms Regulation*, note 3, Form E.

⁴⁰ *Dower Act*, s 7(3).

⁴¹ *Dower Act*, s 8.

⁴² *Dower Act*, s 9(2).

⁴³ *Dower Act*, s 9(2)(e).

⁴⁴ *Dower Act*, s 9(2).

3. CONSEQUENCES FOR DISPOSITION WITHOUT CONSENT

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

a. Offence

[80] First, it is an offence to dispose of a homestead without consent. The offence is punishable by either a fine of up to \$1,000, or a term of imprisonment “of not more than 2 years.”⁴⁵ It is unlikely that an owner would actually face this consequence, however. Our research suggests it is extremely rare for anyone to be prosecuted under this provision. There are no reported cases and we did not hear any anecdotal information about prosecutions.

b. Action for damages

[81] Second, the non-owner may sue for damages. Under section 11 of the *Dower Act*, an owner who disposes of a homestead without consent may be liable to pay damages to the non-owner.⁴⁶ Damages are only available if title has actually been transferred to another person.⁴⁷ If the disposition is a mortgage or other encumbrance, the non-owner would not receive damages unless the encumbrance resulted in a transfer of title.

[82] Damages are potentially a very serious consequence for the owner, given how they are calculated under the *Dower Act*. Section 11(2) says that the non-owner spouse is entitled to an amount equal to:⁴⁸

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

⁴⁵ *Dower Act*, s 2(3).

⁴⁶ *Dower Act*, s 11(1).

⁴⁷ *Dower Act*, s 11(1):

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

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

⁴⁸ *Dower Act*, s 11(2).

C. Problems with Consent to Disposition

1. INEFFICIENT REQUIREMENTS

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

a. Real estate procedures

[84] Several respondents said real estate practices requiring a non-owner to provide consent more than once are redundant and inconvenient. As discussed above, there are three points in a typical real estate transaction where a non-owner may be asked to sign documents.

[85] Only the last consent, where the non-owner consents to the transfer of land, is essential to the actual sale of the home.

[86] Some of the burden is caused by real estate procedures that require an owner to make more than one disposition. A real estate agent must ask a non-owner to consent to a listing agreement because the standard agreement includes a disposition in the form of an encumbrance to secure the broker’s commission. This disposition is for the benefit of the real estate broker.

[87] Some of the burden is caused by practices that exceed the requirements in the *Dower Act*. A non-owner’s signature on a residential purchase contract is not a prescribed form of dower consent and could not be used to register a transfer of land. It merely indicates that the non-owner is willing to give consent to the sale.

[88] Another practice that exceeds the requirements in the *Dower Act* is seeking consent from a non-owner who has already signed and registered a release of dower rights. We heard that real estate agents often require the non-owner to consent even if a release of dower rights is registered on title. The reason is that a non-owner may revoke a release at any time.⁴⁹ In consultation we heard that real estate agents developed this practice because experience shows non-owners sometimes do revoke releases before a sale is complete. Real estate agents obtain

⁴⁹ See *Dower Act*, s 8.

consent every time out of an abundance of caution, to avoid last-minute problems if the non-owner revokes the release.

b. Separated spouses

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

[90] These problems can be particularly frustrating when the home is one that the non-owner has never lived in. Because any residence where the owner lives or has lived is a homestead, a non-owner may have to give consent regardless of whether they lived there. We heard that this issue commonly arises when one spouse buys a new home after separation.⁵⁰

c. Other inefficiencies

[91] There are other, less common issues that increase burdens with little benefit. For example, a non-owner is often asked to consent even when the disposition is for their benefit, such as becoming a joint tenant with the owner.⁵¹ At least one respondent described this requirement as “silly”.

[92] Another example occurs if a non-owner has lost capacity. Even if the non-owner granted an Enduring Power of Attorney, the attorney cannot consent on their behalf. The owner has to make an application to dispense with consent.

⁵⁰ This issue can also arise when a couple marries but never lives together. A few respondents told us about scenarios where a homeowner married someone living in another country. Even though the spouse never came to Canada, their consent was required to a disposition of the home. There can be difficulties getting a properly executed consent and certificate of acknowledgment from another country in a timely way.

⁵¹ In *Scott v Cresswell* (1975), 56 DLR (3d) 268 (Alta CA), the Alberta Court of Appeal held that consent is not required when an owner makes a disposition in favour of their spouse. The Land Titles Procedures Manual mentions this exception but the standard forms do not reflect it: see Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure DOW-1 (Edmonton: Ministry of Service Alberta, 2021), online: <www.servicealberta.ca/pdf/ltmanual/DOW-1.pdf> [perma.cc/42XJ-2AJZ].

2. INEFFECTIVE PROTECTIONS

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

a. Circumventing the requirement

[94] The procedures for ensuring compliance with the requirement for consent to disposition are not infallible. An owner may circumvent the requirement for consent to disposition by making an incorrect affidavit.⁵² We heard some owners deliberately lie to circumvent the requirements and some may do so by mistake.⁵³

b. Lack of informed consent

[95] Some respondents were concerned that non-owners may give consent without understanding their rights. Although there are requirements intended to ensure a non-owner's consent is informed and voluntary, they may not be effective. A non-owner may receive little information about the effect of a dower consent.⁵⁴ There is no requirement that a non-owner receive or have an opportunity to receive independent legal advice. Although the non-owner must meet separately with a witness to sign the consent, the witness does not need to be a lawyer and is often acting for another party in the transaction.⁵⁵

c. Ineffective protection in relationships with an imbalance of power

[96] Another concern may arise when the couple's relationship involves domestic violence or coercive control. We heard that the certificate of

⁵² There are at least two examples in recent reported cases: *Joncas v Joncas*, 2017 ABCA 50; *VirtualLEDGER Inc v Neilson*, 2021 ABQB 458. Anecdotal information from our early consultation suggests these are not isolated incidents.

⁵³ Some respondents told us of owners who believed they were "not married" because they were separated from their spouse. One real estate lawyer described what they do if they suspect a deponent is incorrectly claiming to be "not married". This lawyer said they explain the difference between separation and divorce and sometimes require the deponent to show a divorce certificate before they will commission the affidavit. The lawyer said they have refused to commission an affidavit if they suspect the deponent is lying. It is doubtful that all lawyers and commissioners for oaths would or could go to these lengths.

⁵⁴ The witness must confirm that the non-owner is aware of certain dower rights and gives them up voluntarily but there is no requirement that the non-owner receive any information beyond the prescribed forms. For example, the witness must confirm that the non-owner "is aware that the *Dower Act* gives her (or him) a life estate in the homestead ..." but the forms do not explain what a life estate is: *Forms Regulation*, note 3, Form C.

⁵⁵ In early consultation, we heard common scenarios include a non-owner signing a consent before the owner's lawyer, an employee of the lender granting a mortgage to the owner, or a land and energy professional acting for the party acquiring rights from the owner.

acknowledgment does not perform its intended function and obtaining it can raise new problems. If a non-owner is compelled to sign a dower consent, meeting separately with a witness does not counteract the compulsion. As soon as they leave the meeting, they will face the situation that compelled them in the first place.

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

d. Gaps in protection

[98] Finally, the *Dower Act* applies only to property owned by an individual. Land is not a homestead and consent to disposition is not required if a third party is a co-owner.⁵⁶ Similarly, land is not a homestead if it is owned by a corporation and consent to disposition is not required.⁵⁷

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

⁵⁶ *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.

⁵⁷ In this context, the term “corporation” includes any legal entity, other than an individual, that may own land. The *Land Titles Act* includes a list of the kinds of corporations that may hold an interest in land: *Land Titles Act*, RSA 2000, c L-4, s 27(1) [*Land Titles Act*].

CHAPTER 3

The Life Estate

A. The Dower Life Estate

1. LIFE ESTATE IN LAND

[100] The other key feature 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.

[101] 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.⁵⁸

[102] A life tenant may occupy, use, and deal with the land until their death.⁵⁹ They may live on it or rent it out to earn income.⁶⁰ A life tenant may not alter or exploit the land, or buildings on the land, in a way that reduces its value.⁶¹ 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.⁶²

⁵⁸ See generally Ziff, note 18 at 197, 204.

⁵⁹ Jonnette Watson Hamilton, “The Impact of a *Dower Act* 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].

⁶⁰ Nancy L Golding, “Comparing Common Law and Marriage Succession Rights in Alberta” (2019) 38:2 *ETPJ* 147 at 148.

⁶¹ See Ziff, note 18 at 208–10.

⁶² 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].

[103] 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.⁶³

[104] 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, 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.⁶⁴ The surviving non-owner will not receive a life estate under the *Dower Act*.

2. ELECTION

[105] If an owner dies with more than one homestead, the surviving non-owner 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.⁶⁵ There is a prescribed form to register their choice.⁶⁶

[106] If the surviving spouse does not register their choice, the personal representative of the deceased owner's estate may apply for a court order.⁶⁷ The court will choose one of the homesteads for the surviving spouse's life estate.

3. OPTING OUT

[107] A non-owner may give up their dower rights, including the right to receive a life estate. While the owner is alive, they may do so by consenting to a disposition of the homestead,⁶⁸ signing a release of dower rights,⁶⁹ or making an agreement releasing dower rights.⁷⁰

[108] 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

⁶³ The rules for intestate succession are found in Part 3 of the *Wills and Succession Act*.

⁶⁴ *Dower Act*, s 25(1).

⁶⁵ *Dower Act*, s 19.

⁶⁶ *Dower Act*, s 19(2); *Forms Regulation*, note 3, Form F.

⁶⁷ *Dower Act*, s 19(4).

⁶⁸ If a disposition results in a transfer to a third party, the land is no longer a homestead: *Dower Act*, s 3(2)(a).

⁶⁹ *Dower Act*, s 7.

⁷⁰ *Dower Act*, s 9.

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.⁷¹

4. LIFE ESTATE IN PERSONAL PROPERTY

[109] A non-owner who receives a life estate in the homestead also receives a life estate in certain personal property. Section 23(1) says:⁷²

23(1) When a life estate in the homestead vests in the surviving spouse on the death of a married person, 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.

[110] 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.

[111] 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 the *Civil Enforcement Act*.⁷³ The *Civil Enforcement Act* and its regulations include these exemptions:⁷⁴

- 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

⁷¹ *Dower Act*, s 21; 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].

⁷² *Dower Act*, s 23(1).

⁷³ *Civil Enforcement Act*, RSA 2000, c C-15 [*Civil Enforcement Act*].

⁷⁴ *Civil Enforcement Act*, note 73, s 88; *Civil Enforcement Regulation*, Alta Reg 276/1995, s 37.

- 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.

[112] 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.

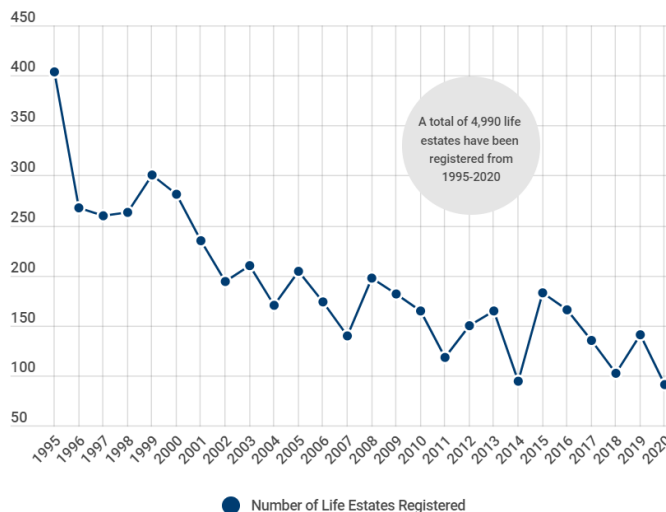
B. Problems with the Life Estate

1. LIFE ESTATES ARE RARELY USED

[113] 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.⁷⁵ This number includes all life estates, not just those arising under the *Dower Act*. For example, it would include life estates created by will.

[114] 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.

Number of Life Estates Registered from 1995-2020



⁷⁵ Communication from Land Titles Office to 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].

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

[116] 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

[117] The life estate can be understood as a form of support for the surviving non-owner.⁷⁶ Courts, legal academics, and some respondents have said that the purpose of the *Dower Act* is to ensure that a surviving non-owner will not become homeless.⁷⁷ An automatic life estate does not always accomplish this purpose.

a. Lack of need

[118] 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.

[119] 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. If a couple divides property informally, 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. Nonetheless, 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.⁷⁸ 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

[120] 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

⁷⁶ 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."

⁷⁷ *Kuehn v Otis Engineering* (1996), 179 AR 225 at para 6 (QB); *Havens Estate*, 2010 ABQB 91 at para 23; *Johnson Estate*, note 10 at para 19; Ziff, note 18 at 221.

⁷⁸ Land is a homestead if the owner lived there: see Chapter 9, below.

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.

[121] 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 some cases where a life tenant sought additional support from an estate, courts have converted a life estate into full ownership as it is more useful to the life tenant.⁷⁹

[122] 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.

[123] 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.⁸⁰ The remainder interest is probably also nearly impossible to sell, for similar reasons.

[124] 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

[125] 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.

[126] In practice, wills and estates lawyers have found other ways to value a life estate.⁸¹ We heard of at least two approaches that have been used in Alberta.

⁷⁹ See eg *Ebeling-Argue (Estate of) v Hutchinson*, 2008 ABQB 299; *Re Fliczuk Estate*, 2019 ABQB 946.

⁸⁰ *Re Stojkovich Estate*, 2006 ABQB 467 at para 22 [*Stojkovich Estate*]; see also *Johnson Estate*, note 10 at para 22.

⁸¹ 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](https://www.sagecounsel.com/wp-content/uploads/2019/02/DEATH-DOWER-2019.pdf)> [perma.cc/3HH8-AP4E].

[127] 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.⁸² We heard that some lawyers may use a similar approach without help from an actuary.

[128] 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.⁸³

[129] 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.⁸⁴

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

[130] 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.

[131] Our consultation turned up examples of conflict between a life tenant and the owner of the remainder interest.⁸⁵ 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.

⁸² 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).

⁸³ *Nauss v The Queen*, 2005 TCC 488 at paras 23-25.

⁸⁴ *Stojkovich Estate*, note 80; *Johnson Estate*, note 10.

⁸⁵ See eg *Stadler Estate (Re)*, 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.

[132] 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.⁸⁶ 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.⁸⁷

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

a. Postponing inheritance

[134] 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.

[135] This situation can be particularly problematic when the other heirs are minor children or otherwise in need.⁸⁸ 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

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

[137] 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.⁸⁹ In general, the life tenant is responsible for recurring expenses like taxes, utilities, and regular maintenance,

⁸⁶ *Re Slager Estate*, 2019 ABQB 191.

⁸⁷ *Stadler Estate (Re)*, 2001 ABQB 408.

⁸⁸ The other heirs might make an application for family maintenance and support under the *Wills and Succession Act*, s 88: see eg *Nelson Estate*, 2013 ABQB 15 [*Nelson Estate*]. As discussed below, there is some doubt about whether a court has the power to make an order that would override a life estate that arises under the *Dower Act*.

⁸⁹ See generally Ziff, note 18 at 210–12; see also *Kachur Estate*, 2017 ABQB 786 at paras 97–109.

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.⁹⁰

[138] 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

[139] 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 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.⁹¹ On the other hand, some case law suggests the entire value of a homestead is part of a deceased's estate.⁹²

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

a. Payment of debts

[141] 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 adult children from an earlier relationship.⁹³ 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

⁹⁰ 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.

⁹¹ 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].

⁹² *Nelson Estate*, note 88 at para 52.

⁹³ *Kosic v Kosic*, 2002 ABQB 325.

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.⁹⁴ 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

[142] 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% of the net value of the estate, whichever is greater.⁹⁵ The question is whether the value of the life estate is part of the net value of the estate or whether it should be deducted to determine the net value of the estate.

[143] *Johnson Estate* illustrates the difficulty.⁹⁶ 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.⁹⁷

⁹⁴ *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.

⁹⁵ *Wills and Succession Act*, s 61(1)(b); *Preferential Share (Intestate Estates) Regulation*, Alta Reg 217/2011, s 1.

⁹⁶ *Johnson Estate*, note 10.

⁹⁷ Jonnette Watson Hamilton, "The Impact of a *Dower Act* 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].

c. Family maintenance and support from an estate

[144] 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.⁹⁸

[145] 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.⁹⁹ In *Nelson Estate*, a 2013 decision of the Court of Queen's Bench, the Court considered the issue.¹⁰⁰ The deceased in *Nelson Estate* had a surviving spouse and two adult children from a previous relationship. The biggest asset in the estate was a home. The surviving spouse received a life interest in the home and the children received the remainder interest. One of the children, who had disabilities that prevented her from working, made a claim for additional support from the estate. The claim was made under the *Dependants Relief Act*, the legislation that applied before the *Wills and Succession Act* came into force.¹⁰¹ Like the *Wills and Succession Act*, the *Dependants Relief Act* was silent on whether a life estate has priority over another dependant's claim for support. The adult child argued that the life estate was part of the deceased's estate and the Court had the power to vary the life estate when necessary to provide support to another dependant. The spouse argued that the life estate was not part of the deceased's estate and the Court could not vary it. On this issue, the Court said:¹⁰²

Therefore, I agree with both parties' position that Mr. Nelson has a dower interest in the subject house vested in him under the *Dower Act*. However, I am of the opinion that this dower right, as an entitlement of a surviving spouse which this Court cannot override,

⁹⁸ 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.

⁹⁹ 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.

¹⁰⁰ *Nelson Estate*, note 88.

¹⁰¹ *Dependants Relief Act*, RSA 2000, c D-10.5.

¹⁰² *Nelson Estate*, note 88 at paras 51-52.

takes precedence over the Represented Adult's dependant relief claim pursuant to the DRA, which is governed by the Court's discretionary jurisdiction. That said, the Court retains the authority to make an order conditional on a spouse relinquishing dower rights and interest if necessary, to make adequate provision out of a deceased's estate for the proper maintenance and support of a dependant: *Re Willan Estate*; DRA, s 3(1).

Is the house part of the Deceased's estate? The simple answer to this question, in my view, is that the house is a constituent part of the Deceased's estate, subject to the life estate vested in the surviving spouse by the *Dower Act*. The practical effect of this regime is that this Court may vary the life estate granted in the Deceased's Will, while taking into account the dower interest to which the surviving spouse (i.e. Mr. Nelson) is entitled pursuant to the *Dower Act*. This allows the Court to deal with the remainder interest in the house, if necessary for the ends of fairness and equity.

[146] In any event, the spouse offered to waive his dower rights. The Court ordered that the house be sold and the proceeds split between the spouse and the adult child. The result implies that a life estate is part of a deceased's estate.

CHAPTER 4

What Is the Purpose of the *Dower Act*?

A. Abolish or Reform?

[147] Before considering possible reforms, it is important to consider whether the key features of the *Dower Act* still serve a valid purpose. If not, the *Dower Act* should be abolished instead of reformed.

[148] This part considers whether the *Dower Act* is still relevant. This chapter discusses the history of the *Dower Act* and how its place in family and succession law has changed. Chapter 5 considers who benefits from the *Dower Act* today and whether adult interdependent partners should have the same benefits as spouses. The next two chapters discuss arguments for and against abolishing consent to disposition and the life estate.

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

[149] 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.¹⁰³ For the purpose of this report, only a small part of that history need be repeated.

[150] 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.¹⁰⁴

[151] 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.¹⁰⁵ In advocating for the

¹⁰³ See RFD 14 at 8-17; Margaret E McCallum, "Prairie Women and the Struggle for a Dower Law, 1905-1920" (1993) 18:1 *Prairie Forum* 19; Wilbur F Bowker, "Reform of the Law of Dower in Alberta" (1955) 1:6 *Alta L Rev* 501 at 501-502 [Bowker]; Catherine Anne Cavanaugh, *The Women's Movement in Alberta as Seen Through the Campaign for Dower Rights 1909-1928* (MA Thesis, University of Alberta, 1986) [unpublished].

¹⁰⁴ 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.

¹⁰⁵ Margaret E McCallum, "Prairie Women and the Struggle for a Dower Law, 1905-1920" (1993) 18:1 *Prairie Forum* 19. The campaign was focused on the prairies because common-law dower had previously been

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.¹⁰⁶ The second was more abstract. They argued that women's work contributed to acquiring and maintaining property and women therefore deserved some rights in the property.

[152] 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.¹⁰⁷ 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.

[153] 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.¹⁰⁸

[154] By 1948, the *Dower Act* had assumed its current form. It now included five dower rights, which applied equally to both spouses:¹⁰⁹

1(c) "dower rights" means ...

- (i) the right to prevent disposition of the homestead by withholding consent,

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.

¹⁰⁶ 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.

¹⁰⁷ *The Dower Act*, SA 1917, c 14.

¹⁰⁸ 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.

¹⁰⁹ *Dower Act*, s 1(c). It is essentially identical to the 1948 version.

- (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
- (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;

[155] 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.

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

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

1. JOINT TENANCY

[157] Today, many couples choose to own their homes as joint tenants. Joint tenants are equal owners and share the whole property.¹¹⁰ 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.

[158] Although the *Dower Act* applies to property that a couple holds as joint tenants, it rarely has any impact on joint tenants.¹¹¹ They are unlikely to rely on

¹¹⁰ 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% share in the property and the other 25%. 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.

¹¹¹ *Dower Act*, s 25(2):

Continued

dower rights, as they have greater protection. Both joint tenants must agree to a disposition and the surviving joint tenant will receive the whole property when one of them dies.

2. PROPERTY DIVISION UNDER THE *FAMILY PROPERTY ACT*

[159] One of the arguments for adoption of the *Dower Act* was that both spouses contributed to acquiring and maintaining property and therefore both should have some interest in the property. For many years, the limited rights in the *Dower Act* were the way that the law recognized a non-owner's contributions.

[160] Dower rights give a non-owner some control over property while a marriage lasts, but nothing if the marriage ends in divorce. This gap became evident as the divorce rate rose. By the 1960s and 1970s, many divorced and separated women found themselves with nothing to show for their contributions to family property.¹¹² Second wave feminists advocated for reform. ALRI made recommendations for new legislation in its 1975 *Matrimonial Property* report.¹¹³ Most of the majority's recommendations were implemented when Alberta adopted the *Matrimonial Property Act* in 1978. In our 2018 *Property Division: Common Law Couples and Adult Interdependent Partners* report, ALRI recommended that the legislation apply to adult interdependent partners.¹¹⁴ The

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

The Court of Appeal recently confirmed that "[d]ower rights underlie a joint tenancy between married spouses": *Guapo*, note 47 at para 24. See also *Karafiat v Webb*, 2012 ABCA 115 at paras 20–22; *Bank of Montreal v Pawluk* (1994), 158 AR 97 at para 53 (QB) [*Pawluk*].

¹¹² Alberta, like most Canadian jurisdictions, had legislation establishing separation of property. Either spouse could acquire, hold, and dispose of property in their own name. Upon separation or divorce, each spouse kept their own separate property. In practice, for much of the twentieth century few married or cohabiting women had much property in their own names. The well-known case of *Murdoch v Murdoch* (1973), [1975] SCR 423 was often used to illustrate the need for reform. Irene Murdoch and her husband were ranchers in Alberta. They worked together, first hiring themselves out as a couple and then on their own ranch. For many years Mr Murdoch worked off the ranch for several months a year. During those times Mrs Murdoch took care of all the ranch work, as well as housekeeping and childcare. They separated in 1968 after an incident where Mr Murdoch broke Mrs Murdoch's jaw. She claimed an interest in the land and other ranch property, which was all in her husband's name. A majority of the Supreme Court held that Mr Murdoch was entitled to keep it all. In a less-often-discussed denouement, Mrs Murdoch was awarded an amount equal to about one third of her former husband's assets in the form of lump sum maintenance: *Murdoch v Murdoch* (1976), 1 AR 378 (QB). See Olive M Stone, "Matrimonial Property Law: The Movement towards Equality – Separation or Community – Canadian (especially Albertan) and English Experience" (1978) 16:3 Alta L Rev 375 at 383–84.

¹¹³ Institute of Law Research and Reform (Alberta), *Matrimonial Property*, Final Report 18 (1975), online: <www.alri.ualberta.ca/wp-content/uploads/2020/03/fr018.pdf>.

¹¹⁴ FR 112, note 9.

legislature implemented those recommendations, amending the legislation and renaming it the *Family Property Act*.

[161] Like the *Dower Act*, one aim of the *Family Property Act* is to recognize that both spouses or both partners contribute to property.¹¹⁵ The *Family Property Act* does so in a tangible way by ensuring that each spouse or partner leaves a relationship owning a share of the property they accumulated together. The two statutes are more complementary than overlapping. Dower rights apply during a marriage and end upon divorce. They apply only to a home. A non-owner's interest is less than full ownership. In contrast, the *Family Property Act* comes into play when a relationship breaks down.¹¹⁶ A former couple may make an agreement or either of them can apply for a court order about property division. An agreement or order may apply to all property owned by either spouse or partner, not just a home. There is a presumption that spouses or partners should share equally in most property acquired during the relationship.¹¹⁷ Once property is divided, each former spouse or partner owns their share.

[162] When a person applies for property division order, they may also file a certificate of lis pendens on title to a home or any other real property.¹¹⁸ The certificate of lis pendens gives notice of the claim to anyone else dealing with the property, like a potential buyer or mortgage lender.

[163] There are different ways to divide a home in a family property agreement or order. Sometimes it is sold and each person keeps a portion of the proceeds. Sometimes one spouse or partner keeps the home and the other receives money or other assets in exchange.¹¹⁹

¹¹⁵ The Alberta Court of Appeal has described the purpose of family property legislation as “to legally recognise marriage as an economic partnership, founded on the presumption that the parties intend to share the fruits of their labour during and as a result of it, on an equal basis.”: *Jensen v Jensen*, 2009 ABCA 272 at para 1.

¹¹⁶ The property division rules in the *Family Property Act* are an example of a model known as deferred sharing. During a marriage or adult interdependent relationship, spouses or partners may hold property in their own names or jointly. If the relationship breaks down, the legislation establishes default rules for dividing property. There is a presumption that spouses or partners should share equally in most property acquired during the relationship.

¹¹⁷ *Family Property Act*, s 7(4)–(5).

¹¹⁸ *Family Property Act*, s 35.

¹¹⁹ It is wise for a spouse keeping a home to obtain a dower release from the other. We heard this step is sometimes overlooked, which can lead to problems obtaining consent later.

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

[164] Along with property division rules, the *Matrimonial Property Act* introduced a way for a spouse to obtain possession of a home. A similar provision, which also applied to adult interdependent partners, was included in the *Family Law Act* when it was enacted in 2003.¹²⁰ Under either statute, a spouse or partner can seek a court order for exclusive possession of the family home.¹²¹ There is a list of factors that a court must consider before granting an exclusive possession order.¹²²

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

¹²⁰ When the *Family Law Act* was enacted, the *Matrimonial Property Act*, RSA 2000, c M-8, applied only to spouses. The *Family Law Act* made it possible for an adult interdependent partner to seek an exclusive possession order. Today, the provisions in the two statutes are nearly identical and probably redundant. The key difference is that an order under the *Family Property Act* is available on its own; under the *Family Law Act*, an order for exclusive possession is only available as part of a support order: *Family Property Act*, ss 19–30; *Family Law Act*, SA 2003, c F-4.5, ss 68–76 [*Family Law Act*]. In cases of family violence, the *Protection Against Family Violence Act* also allows a court to make an order granting exclusive possession of a home to a person in need of protection: *Protection Against Family Violence Act*, RSA 2000, c P-27, ss 2(3)(c), 4(2)(c).

¹²¹ *Family Property Act*, s 19; *Family Law Act*, note 120, s 68. The definition of a family home differs from the definition of a homestead under the *Dower Act* in two important ways. A homestead is a home occupied by the owner but a family home is one that the spouses or partners have occupied together. A homestead is property that one or both spouses own but a family home also includes property that is leased. For example, if a couple are tenants in a rental apartment it would be a family home. The wording in the *Family Property Act* and the *Family Law Act* are nearly identical: see eg *Family Property Act*, s 1(a.1):

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

¹²² *Family Property Act*, s 20; *Family Law Act*, note 120, s 69. The list in the *Family Law Act* is:

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

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

spouse or partner be evicted from the home or restrained from being at the home.

[166] If one or both spouses or partners owns the home, the spouse or partner living in it can prevent a sale, mortgage, or other disposition.¹²³ To benefit from this protection, the spouse or partner must take two steps. First, they must apply to court for an exclusive possession order. If the court grants the order, the spouse or partner can then register the order with the Land Titles Office.¹²⁴

4. INHERITANCE UNDER A WILL OR BY INTESTATE SUCCESSION

a. Inheritance under a will

[167] 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.¹²⁵

[168] 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.¹²⁶

¹²³ *Family Property Act*, s 22(3); *Family Law Act*, note 120, s 71(3).

¹²⁴ *Family Property Act*, s 22; *Family Law Act*, note 120, s 71. There is a similar process under the *Family Property Act* if the home is a mobile home but the order is registered under the Personal Property Registry: *Family Property Act*, ss 23, 27. The *Family Law Act* does not include a provision about registration of an order affecting a mobile home.

¹²⁵ 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>.

¹²⁶ *Dower Act*, s 18.

b. Intestate succession

[169] 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.¹²⁷ 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.¹²⁸ If the deceased person did not have any children, or if all their children were with the surviving spouse or partner, the surviving spouse or partner receives the whole estate.¹²⁹

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

[170] 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 survivor 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.¹³⁰

5. FAMILY MAINTENANCE AND SUPPORT FROM AN ESTATE

[171] 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

¹²⁷ *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).

¹²⁸ *Wills and Succession Act*, s 61(1)(b); *Preferential Share (Intestate Estates) Regulation*, Alta Reg 217/2011, s 1.

¹²⁹ *Wills and Succession Act*, ss 60, 61(1)(a).

¹³⁰ As discussed in Chapter 3, 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 142-43.

describe the rules has evolved over the years: from married women's relief, to family relief, dependents relief, and now family maintenance and support.

[172] 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.¹³¹ Courts interpreted the statute so that the widow's share under intestate succession was also the maximum she could receive in support.¹³² In many cases, the maximum support a widow could receive would be one third of the deceased's estate.

[173] 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 support of the family member."¹³³ It can balance the interests of different family members or beneficiaries and can impose conditions or restrictions.¹³⁴ There is no upper limit on family maintenance and support. In theory a court could award the claimant the entire estate.¹³⁵

6. TEMPORARY POSSESSION OF THE FAMILY HOME AFTER THE OWNER'S DEATH

[174] 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.¹³⁶ This right was a new feature in the *Wills and Succession Act*, which was passed in 2010 and came into force in 2012.

¹³¹ *The Married Women's Relief Act*, SA 1910 (2nd Sess), c 18, s 2.

¹³² *Re Matheson Estate* (1916), 9 WWR 996 (Alta SC); *McBratney v McBratney* (1919), 59 SCR 550.

¹³³ *Wills and Succession Act*, s 88(1).

¹³⁴ *Wills and Succession Act*, ss 88, 93, 96.

¹³⁵ 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.

¹³⁶ *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*, note 120, s 67(1). A family home is one that the spouses or partners have occupied together. It may be owned or leased.

[175] 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,¹³⁷
- those who live in a family home co-owned by someone other than the spouses or partners;¹³⁸ and
- renters.

¹³⁷ Adult interdependent partners do not benefit from dower rights under the *Dower Act*, and therefore would not receive a life estate.

¹³⁸ 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.

CHAPTER 5

Who Is Protected by the *Dower Act*?

A. Who Is Affected?

[176] 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.

[177] Nonetheless, the number of people potentially affected is very large, as a very large number of people in Alberta are homeowners. Nearly 75% 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.¹³⁹

[178] 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 did not uncover official statistics about how couples hold property. It would be difficult to find out how many couples own their home as joint tenants, how many have only one person on title, and how many have some other arrangement.

[179] In the absence of official statistics, we gathered as much information as we could in our consultation. In early consultation, we heard anecdotally from professionals that the vast majority of couples they encounter in their practice are joint tenants. Many estimated that the number is 90% or more.

[180] In the general survey, we asked respondents about their marital status and who owns the home they live in. Of the 586 respondents, 248 said they were married and 60 said they were common-law. Altogether, that is 308 respondents who have a spouse or partner. Of those, 92 rented their homes, lived in a home owned by another member of the household, or did not say. There were 216 who said they lived in a home owned by one or both spouses or partners: 161 said they co-owned their home with their spouse or partner, 26 said that they were the sole owner, and 29 said their spouse or partner was the sole owner.¹⁴⁰ That

¹³⁹ 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].

¹⁴⁰ The survey did not distinguish between joint tenants and tenants in common.

means approximately 75% were co-owners and 25% lived in a home solely owned by one spouse or partner. Approximately 13% were non-owners.¹⁴¹

[181] The anecdotal information and survey results point to the same conclusion. While a majority of couples own their homes together, there is a substantial minority who live in a home owned by one spouse or partner. Even if one in ten homeowner couples are in this minority, it amounts to tens of thousands of couples in Alberta.

[182] 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.¹⁴² If the owner transfers the property into joint ownership, half of the exemption will be lost.¹⁴³ There is therefore an incentive to keep sole ownership of any property that predates the relationship.

¹⁴¹ In our survey, more men than women said they were the sole owner and more women than men said they were the non-owner. Given the small number of respondents in these situations, it is difficult to know if our survey data reflects the population at large.

¹⁴² See *Family Property Act*, s 7(2):

7(2) If the property is

- (a) property acquired by a spouse or adult interdependent partner by gift from a third party,
- (b) property acquired by a spouse or adult interdependent partner by inheritance,
- (c) property acquired by a spouse before the marriage, in the case of spouses who were not in a relationship of interdependence with each other immediately before the marriage,
- (c.1) property acquired by a spouse before the relationship of interdependence began, in the case of spouses who were in a relationship of interdependence with each other immediately before the marriage,
- (c.2) property acquired by an adult interdependent partner before the relationship of interdependence began,

...

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

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

¹⁴³ See *Jackson v Jackson* (1989), 97 AR 153 (CA); *Harrower v Harrower* (1989), 97 AR 141 (CA).

- 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.¹⁴⁴
- 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.
- 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.

[183] 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.

¹⁴⁴ 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).

B. Why Should Legislation Treat Spouses and Adult Interdependent Partners Alike?

[184] ALRI adopted a guiding principle for this project that spouses and adult interdependent partners should be treated alike. This section discusses what we heard about this issue in consultation and explains why we adopted this guiding principle.

1. SPOUSES AND ADULT INTERDEPENDENT PARTNERS

[185] In Alberta legislation, spouse means a person who is legally married.¹⁴⁵

[186] 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*.¹⁴⁶ The legislation includes criteria for determining if two adults live in a relationship of interdependence.¹⁴⁷ Two adults can become adult interdependent partners if they:

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

[187] 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.

2. SUMMARY OF CONSULTATION RESULTS

[188] A large number of exploratory survey respondents said the exclusion of adult interdependent partners was a reason to reform or repeal the *Dower Act*. Very few seemed to be in favour of legislation that applied only to spouses.

¹⁴⁵ *Interpretation Act*, RSA 2000, c I-8, s 28(1)(zz.1).

¹⁴⁶ See *Adult Interdependent Relationships Act*, SA 2002, c A-4.5, ss 1, 3 [*Adult Interdependent Relationships Act*].

¹⁴⁷ *Adult Interdependent Relationships Act*, note 146, s 1(1)(f), 1(2).

[189] The general survey included this question:

The law currently applies only to legally married spouses. It does not apply to common-law partners (couples who live in a marriage-like relationship but are not legally married). Do you agree with this difference?

[190] Of those who answered this question, 55% said the law should apply to legally married spouses and common-law partners. 40% said the law should apply only to legally married spouses and 5% picked the “other” option.

[191] The technical survey asked:

The Dower Act applies only to legally married spouses. It is the only significant legislation in Alberta that applies to spouses but not adult interdependent partners. ALRI proposes that it should apply to spouses and adult interdependent partners.

Do you agree that the Dower Act should apply to spouses and adult interdependent partners?

[192] Responses were nearly evenly divided with 51% of those who answered the question agreeing that the *Dower Act* should apply to spouses and adult interdependent partners and 49% disagreeing. Among that 49% were some – about 5% of all those who answered the question – who explained their answer by saying the *Dower Act* should not apply to anyone.

[193] On both the general and technical surveys, some respondents added comments that the law should only apply to common-law partners if certain conditions were met. Many – more than 30 respondents between the two surveys – said there should be a minimum period of cohabitation. A few said the law should apply if the couple has children together. A few others thought it should only apply if the relationship is “serious” or “committed”. A small number of respondents mentioned other factors, like whether both partners contributed to acquiring or maintaining the home.

[194] The conditions for becoming adult interdependent partners are addressed in the criteria in the *Adult Interdependent Relationships Act*. We used the term “common-law partner” in the general survey because it is more familiar to the general public than adult interdependent partner. Nonetheless, our recommendations refer to adult interdependent partners. It would be outside the scope of this project to consider changes to the *Adult Interdependent Relationships Act* or the criteria for becoming an adult interdependent partner.

3. ARGUMENTS IN FAVOUR OF INCLUDING ADULT INTERDEPENDENT PARTNERS

[195] In our Reports for Discussion we outlined four reasons that spouses and adult interdependent partners should be treated alike. We heard the same reasons in consultation.

[196] 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.¹⁴⁸ This number is approximately 17% of all “persons in a couple” and approximately 10% of the population aged 15 or more. When rights, benefits, or obligations are limited to legally married spouses, it excludes many families.

[197] Respondents also made this point. They said that more couples now choose to live together without being married. Some respondents mentioned reasons that couples might choose to live together without being married. The reasons mentioned most often were not believing in marriage and not being able to afford a wedding.

[198] Many respondents said that they consider common-law relationships to be the same as marriage. This was the most common reason respondents gave for treating spouses and partners alike, with 85 respondents mentioning it. A few described the difference between legal marriage and a common-law relationship as “a piece of paper”.

[199] 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*.¹⁴⁹ 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.¹⁵⁰ This position is consistent with our recent work, particularly our recent project on property division.¹⁵¹ We also recognize the need for equal treatment regardless of

¹⁴⁸ 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.

¹⁴⁹ See *Miron v Trudel*, [1995] 2 SCR 418.

¹⁵⁰ 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.

¹⁵¹ FR 112, note 9 at paras 229–59.

sexual orientation – another analogous ground.¹⁵² The 2016 census found approximately 62% of same-sex couples in Alberta are common-law.¹⁵³ Legislation that excludes unmarried couples has a disproportionate impact on same-sex couples and could be vulnerable to a constitutional challenge.

[200] Respondents mentioned this issue, although they used different words. Only one respondent to the exploratory survey mentioned the *Canadian Charter of Rights and Freedoms* but words like “fair” and “equal” came up repeatedly in all our surveys. Respondents often made comments about fairness, the same rights, or equal treatment in explaining their support for treating spouses and partners alike. They were among the most common reasons for supporting similar treatment. One respondent specifically mentioned same-sex couples, saying they should have the same legal rights as other couples.

[201] 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.¹⁵⁴

[202] This theme also came up in consultation. More than 30 respondents to the general survey mentioned that spouses and partners are treated alike under other laws. Many of the professionals who responded to the exploratory or the technical survey said the *Dower Act* should be consistent with other family law rules. On the exploratory survey, 10 respondents specifically said the rules should be consistent with the *Family Property Act*.

[203] The final reason to treat both kinds of couples alike is that many people support it. Both the general and technical surveys showed a majority of respondents supported change, even if it was not an overwhelming majority. A

¹⁵² See *Egan v Canada*, [1995] 2 SCR 513.

¹⁵³ 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].

¹⁵⁴ 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: Land (Spouse Protection) Act*, RSBC 1996, c 246, s 1 “spouse” [BC Act]; *The Homesteads Act, 1989*, SS 1989-90, c H-5.1, s 2(d)(ii) [Saskatchewan Act]; *The Homesteads Act*, CCSM c H80, s 1 “spouse” [Manitoba Act]; *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 14, s 15(1).

large number of exploratory survey respondents said the exclusion of adult interdependent partners was a reason to reform or repeal the *Dower Act* and very few seemed to be in favour of legislation that applied only to spouses. Other consultations have also shown support for treating spouses and adult interdependent partners alike.¹⁵⁵ Popularity is not the most important reason or the deciding factor but it is a factor.

4. ARGUMENTS AGAINST INCLUDING ADULT INTERDEPENDENT PARTNERS

[204] In our Reports for Discussion, we identified three arguments for maintaining the distinction between spouses and adult interdependent partners. The same arguments came up in consultation.

[205] The first is that adding adult interdependent partners would undermine the simplicity of the *Dower Act*. It is fairly straightforward to determine if a couple is married or not. In contrast, it is sometimes difficult to determine if a couple are adult interdependent partners. The criteria in the *Adult Interdependent Relationship Act* are subjective. If the legislation applied to adult interdependent partners, there would be more uncertainty about whether it applies in particular cases.

[206] This argument was the most common reason respondents gave for having the law apply only to married spouses. It was particularly common among respondents to the technical survey. Approximately 30 respondents to the technical survey said including adult interdependent partners would make the law confusing, uncertain, or difficult to apply. A few were concerned that there would be more disputes or lawsuits. A couple respondents said the difficulty with including adult interdependent partners is a reason that the *Dower Act* should be repealed entirely.

¹⁵⁵ In 2016, ALRI commissioned phone survey research for our Property Division project. There were 1,208 respondents. One of the questions was “Which of the following values is most important in any new law about dividing property between common-law couples when they split up?” The question asked respondents to select from four options. The most popular was “All couples should be treated the same, whether they are married or not”, with 44% 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% of the 181 respondents agreed that property division legislation should apply to adult interdependent partners: see FR 112, note 9 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[?]” 59% agreed: Marcomm Works, *Alberta Family Law Reform Stakeholder Consultation Report* (2002) at 88.

[207] Another argument is that marriage is special and rights, benefits, and obligations should be reserved for this special relationship.

[208] In consultation, we heard several related ideas about how marriage is special. One was that marriage is more serious or a bigger commitment than a common-law relationship. Another was that legal marriage is important and that the law should encourage couples to marry. Some respondents said couples should have to marry to get benefits or protections. A few said that common-law couples are more likely to break up. A small number of respondents said that they do not believe in common-law relationships.

[209] The last argument 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.

[210] This argument came up occasionally in consultation. Some respondents said that some people choose not to marry to avoid the legal consequences of marriage and that they should not have those consequences imposed upon them.

[211] We heard one additional argument from a small number of respondents. They suggested a short term partner or a roommate might take advantage of a homeowner by alleging they were in an adult interdependent relationship.

5. ARE THERE OTHER OPTIONS?

[212] Before making our preliminary recommendation, we considered other approaches to reform. For example, we considered whether rules should apply to other types of relationships. One could argue that any person or any adult who lives in a home deserves protection against losing their home unexpectedly. This approach would protect those who may have a strong interest in remaining in the home, like an adult child who lives with a homeowner or all the members of polyamorous relationship living together. There would also be pitfalls. It would be very difficult to craft a rule that would distinguish between those who have important interests to protect and those who do not. It could mean that consent would be required from several individuals to make a disposition, or that several individuals could claim a life estate. Real estate transactions and estate administration would be more complicated. In our view, it is not feasible to require consent to disposition from those who are not spouses or adult interdependent partners.

[213] In consultation, we heard a few other suggestions. The most common one was that partners should make written agreement about property which might include provisions about consent or the non-owner's interest in the home after the owner's death.

[214] We considered all the suggestions but we are not convinced that any are better than providing the same rights to spouses and adult interdependent partners.

[215] It is a good idea for spouses or partners to make agreements about property. Agreements allow couples to choose rules that suit them and their particular circumstances. But many couples will not make agreements. In our project about property division for common-law couples, we found that any approach that requires a couple to opt in to legal rules will leave many people unprotected.¹⁵⁶ The most vulnerable are the least likely to benefit from an opt-in approach. There are always default rules for those who do not make an agreement. In our view, the default rules should be the same for spouses and adult interdependent partners. It is possible to opt out of most rights, benefits, and obligations, including those under the *Dower Act*. If a non-owner wants to give up their dower rights, they can opt out by making a release or an agreement releasing dower rights.

6. ALRI'S RECOMMENDATION

[216] After considering all the arguments, we have concluded that our guiding principle is a sound one. The reasons for eliminating the distinction between spouses and adult interdependent partners are stronger than the reasons for maintaining the distinction.

[217] The potential for uncertainty is a problem but, in our view, not a reason to deny rights, benefits, or obligations to adult interdependent partners. Chapter 10 discusses ways to mitigate this problem.

RECOMMENDATION 1

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

¹⁵⁶ See FR 112, note 9 at paras 143-68.

CHAPTER 6

Should the Requirement for Consent to Disposition Be Abolished?

A. Introduction

[218] In *Dower Act: Consent to Disposition*, Report for Discussion 36, we discussed arguments in favour of and against abolishing consent to disposition. This chapter reviews those arguments and additional ones we identified in consultation.

B. Summary of Consultation Results

[219] Early consultation showed a majority of respondents were in favour of keeping dower rights, including consent to disposition. On the exploratory survey, 60% of respondents were in favour of reforming the *Dower Act*, 30% were in favour of repealing it, and 10% said neither.

[220] We saw similar results in our general consultation. The general survey included this question:

The law currently says that the sole owner of a couple's home cannot sell, transfer, or mortgage the home unless their spouse consents. The spouse who does not own the home must sign a legal document that proves they consent to the sale, transfer, or mortgage. Do you agree with this rule?

[221] About 66% of respondents who answered this question agreed that a spouse should have to consent. Another 29% said a spouse's consent should not be required. The remaining 5% picked the "other" option.

[222] The technical survey asked:

Do you agree that the spouse of a sole owner should have to consent to a sale, lease, mortgage, or other disposition of the home?

[223] Of those who answered the question, 73% agreed that a spouse should have to consent to a disposition of a home and 27% disagreed.

C. Arguments in Favour of Abolishing Consent to Disposition

[224] We previously discussed five arguments for abolishing consent to disposition in *Dower Act: Consent to Disposition*, Report for Discussion 36. We heard some additional ones in consultation. With the benefit of that input, we have now identified seven arguments. This section presents them.

1. THE DOWER ACT IS OUTDATED

[225] 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.

[226] In both early consultation and general consultation, some respondents said the *Dower Act* is obsolete. All of them were respondents to the technical survey. Some said it may have had merit in the past, but with social changes it is no longer needed. Some respondents see it as objectionable in the modern context. They described the *Dower Act* as outdated, outmoded, patronizing, sexist, and “rooted in patriarchy.”

2. CONSENT TO DISPOSITION IS UNNECESSARY

[227] A related argument is that consent to disposition is no longer needed. It is very common for couples to own property as joint tenants. Even when there is a sole owner, most couples cooperate. Several respondents acknowledged it is a good idea for owners to discuss decisions with their spouse or partner but said it should not be a legal requirement. Some professionals told us they have never seen a situation where a non-owner did not consent. The implication is that consent is purely a formality.

[228] Even if a non-owner disagrees with a disposition, they may give consent anyway. Some non-owners may be unable to exercise their rights because of domestic violence or coercive control. If consent to disposition does not help these individuals, one might ask what good it does.

3. THE HOME SHOULD BELONG TO THE OWNER

[229] A new argument that emerged in general consultation was about the importance of ownership. It was frequently mentioned in the general survey. There were 63 respondents who explained their opposition to consent to

disposition with a comment about the sole owner owning the home. It was the most common reason members of the public gave for opposing consent to disposition.

[230] Respondents explained the importance of ownership in different ways. Some simply said, “because they own it.” Some said that an owner should be able to do what they want with their property. Some respondents seemed to assume that a sole owner had paid for the home by themselves or was solely responsible for paying the mortgage, property taxes, and other costs. A few said that a sole owner is responsible for the home.

[231] One respondent to the technical survey mentioned the Torrens land registration system. They implied that dower rights undermine the principle that all interests should be shown on title.

4. THERE ARE OTHER PROTECTIONS FOR SPOUSES AND PARTNERS

[232] There is an argument that consent to disposition is redundant, as it has been replaced by other protections. It was the most common reason professionals gave for opposing consent to disposition, with 26 respondents to the technical survey mentioning it.

[233] Many respondents mentioned the *Family Property Act* or property division rules. In both early and general consultation, we heard the argument that the *Family Property Act* provides all the protection spouses or adult interdependent partners need.

[234] Some respondents mentioned other ways non-owners could be protected. Some said that spouses and partners should ensure they are both on title or that a non-owner should insist on being added to title. Some said couples should make agreements about property. A few suggested a non-owner could protect their interest by registering something on title, like a caveat or a certificate of lis pendens.

5. THE RIGHT TO WITHHOLD CONSENT COULD BE MISUSED

[235] A few respondents were concerned that an abusive or unreasonable spouse could withhold consent without a good reason. Some said a non-owner could use their rights as a “sword” or a “weapon”. Some said or implied a non-owner might do so out of spite; one said that a non-owner might do so to get money from the owner.

6. CONSENT TO DISPOSITION IS INEFFICIENT AND INCONVENIENT

[236] Consent to disposition adds complexity to real estate transactions. It requires additional forms like the dower affidavit, the dower consent, and the certificate of acknowledgment. It requires the non-owner to meet with a witness to sign the dower consent, sometimes more than once. If the spouses are separated, the owner or their lawyer must go to extra effort to locate the non-owner and obtain their consent or apply for an order dispensing with consent. It requires the Land Titles Office to examine documents to ensure compliance.

[237] Some respondents to the technical survey said obtaining consent to disposition is inefficient and inconvenient. We heard it complicates, impedes, slows down, or “bogs down real estate transactions”. One respondent specifically mentioned that it adds expense to transactions.

[238] Abolishing consent to disposition would streamline real estate transactions for all homeowners and the Land Titles Office. Given that a relatively small number of people are protected by consent to disposition, the costs may outweigh the benefits. As we asked in *Dower Act: Consent to Disposition*, Report for Discussion 36: “Does it make sense to add extra steps to transactions for all homeowners, just in case it helps a few non-owners?”

7. ABOLISHING CONSENT TO DISPOSITION WOULD BE AN EASY ROUTE TO MODERNIZATION

[239] The final argument was rarely mentioned in consultation but is nonetheless worth considering. 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 would be the most direct route to modernization.

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

[241] Abolishing consent to disposition would be a straightforward way to achieve the goal of treating spouses and adult interdependent partners alike. All

couples would be treated the same because no one would require consent to disposition.

D. Arguments Against Abolishing Consent to Disposition

[242] We previously identified six arguments against abolishing consent to disposition. Consultation uncovered some additional ideas. Many respondents who supported consent to disposition gave very general reasons, like “it just seems fair” or “it makes sense”, but we also received more detailed responses. We have grouped some arguments together, so there are now five arguments in this section.

1. A HOME IS A SPECIAL ASSET

[243] Consent to disposition specifically protects a non-owner’s interest in a home.

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

2. RELATIONSHIPS INVOLVE SHARING

[245] There were three related ideas that we heard from many respondents who supported consent to disposition. They were the most common reasons members of the public gave for supporting consent to disposition.

[246] The first is that a home belongs to both spouses or both partners, regardless of legal ownership. Respondents said couples share everything, that a home or all assets belong to them both, that everything should be 50/50, or that each person is entitled to half of the home.

[247] The second is both people in a relationship participate in acquiring or maintaining their home. Some respondents focused on direct financial contributions, saying that non-owners often help pay the mortgage or other expenses. Others said a non-owner may contribute in other ways, such as helping to maintain the home or helping the household in ways that enable the owner to pay for the home.

[248] The third is that couples should make decisions together. The phrase “have a say” came up often, with more than a dozen respondents saying a non-owner should have a say. Others said a non-owner should be informed, consulted, or involved in a decision about the couple’s home. Some said it should be a joint decision or that a couple should agree.

3. CONSENT TO DISPOSITION PROTECTS A NON-OWNER

[249] Many respondents mentioned protection for a non-owner in consultation. It was the most common reason technical survey respondents gave for supporting consent to disposition and was also mentioned by many respondents to the general survey. Respondents said that a disposition could have a big impact on a non-owner who lives in the home. Some mentioned the financial impact on the non-owner. More mentioned the possibility that the non-owner could lose their home, have to move, or become homeless.

[250] The *Dower Act* is the only law that requires an owner to inform and seek consent from a non-owner before selling or mortgaging a home. Without it, an owner could dispose of a home unilaterally. More than 30 respondents expressed concern about this possibility. Some said a non-owner could have a home “sold from under them”, be left “high and dry”, or be “out on the street”. Some mentioned scenarios where it could occur, such as if a relationship is breaking down, if the owner is trying to avoid sharing assets with their spouse, or as a way for the owner to control or abuse a non-owner.

[251] Consent to disposition acts as a safety net when other protections fail. Although other protections overlap, they have not completely replaced the protection consent to disposition provides. There are several reasons that consent to disposition provides particularly effective protection.

a. Consent to disposition provides automatic protection

[252] Consent to disposition protects a non-owner automatically. Unlike other protections, non-owners benefit whether or not they know their rights, whether

or not they have a lawyer, and whether or not they take any steps. The Land Titles Office has procedures to ensure compliance in every disposition.

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

b. Consent to disposition provides protection upon relationship breakdown

[254] Consent to disposition may be a formality while a couple is together but it is often critical around the time a couple separates. We heard that non-owners especially need the automatic protection the *Dower Act* provides at this time. The other ways for a non-owner to protect their interest in a home require taking action, such as making an application for exclusive possession, filing a caveat, or making a claim for property division and filing a certificate of *lis pendens*. A non-owner may not immediately realize they need such protection. They may not anticipate the risk that the owner could dispose of the home. Even if they do, it may not be feasible to act immediately. They need to know their rights and understand the steps they must take. They will often require legal advice and representation. Cost and inconvenience can be barriers. There is often some delay. In the meantime, the owner would have an opportunity to dispose of property unilaterally.

[255] It is impossible to know how often this risk would materialize without the *Dower Act* but consultation suggests it is a real risk. Respondents told us about cases where an owner spouse tried to sell a home before or shortly after separation. We also heard about cases involving unmarried couples where an owner sold the couple's home very suddenly, taking the non-owner by surprise.

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

[256] There are cases where the *Dower Act* has protected an innocent spouse from losing their home because of fraud. A recent case is a good illustration. In *Inland Financial Inc v Guapo*, the Court of Appeal held that a fraudulently obtained mortgage was void because one of the spouses had not consented.¹⁵⁷

¹⁵⁷ *Guapo*, note 47. A similar issue arose in *Bentley v Hooton*, although it was eventually resolved on other grounds: *Bentley v Hooton*, 2018 ABQB 109, *aff'd* on other grounds 2019 ABQB 231. In that case, a husband mortgaged a home that he and his wife owned together. He signed the mortgage documents as himself and also signed on behalf of his wife, relying on a forged power of attorney. The lender sought to enforce the

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

[258] The Court of Appeal relied on the *Dower Act* to resolve the case. Although couples who co-own their home rarely rely on the *Dower Act*, they have dower rights.¹⁵⁸ The mortgage was a disposition that required both spouses to consent. As the father had not consented, the mortgage was invalid.¹⁵⁹ The mortgage was removed from title. If the purpose of the *Dower Act* is to protect a vulnerable spouse from losing their home, it worked as intended in this case.

4. ABOLISHING CONSENT TO DISPOSITION MIGHT SHIFT RISK AND INCONVENIENCE TO THE VULNERABLE

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

[260] Without protection from the *Dower Act*, a non-owner would have to rely on other options to protect their interest in a home. Some family lawyers predicted they would file caveats and certificates of *lis pendens* more often, on more properties, and earlier if consent to disposition were abolished. There might be an increase in litigation, as more people sought exclusive possession orders or other remedies.¹⁶⁰

mortgage. A Master of the Court of Queen's Bench directed that the mortgage be removed from title, relying in part on the *Dower Act*. The Justice decided that the mortgage was a nullity because it was obtained by fraud. It was therefore not necessary to consider the *Dower Act*.

¹⁵⁸ The Court of Appeal confirmed that "[d]ower rights underlie a joint tenancy between married spouses": *Guapo* note 47 at para 24. See also *McNeil v Martin* (1982), 41 AR 473 (CA); *Pawluk*, note 111 at para 53; *Nicholson v Nicholson* (1994), 153 AR 200 at para 24 (QB); *Karafiat v Webb*, 2012 ABCA 115 at paras 20–22.

¹⁵⁹ *Guapo*, note 47 at paras 23–26.

¹⁶⁰ For example, *Family Property Act*, s 10 allows a court to grant a remedy if a spouse or partner has transferred family property to defeat the other spouse's claim. At least one respondent noted that the remedy is available but "easier said than done in practice."

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

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

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

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

5. CONSISTENCY WITH OTHER JURISDICTIONS

[265] Every Canadian jurisdiction has legislation that is comparable to the requirement for consent to disposition under the *Dower Act*.¹⁶¹ British Columbia’s legislation is unique, because it applies only if a spouse or partner registers their interest with the land titles office.¹⁶² In all other jurisdictions, consent is required automatically, so a spouse or partner does not need to take any action to benefit from it. While consistency with other jurisdictions is not the most important guiding principle, it is desirable. The fact that consent to disposition is required in all Canadian jurisdictions suggests a widespread view that there is value in the requirement.

¹⁶¹ BC Act, s 3; Saskatchewan Act, s 5(1)(a); Manitoba Act, s 4; *Family Law Act*, RSO 1990, c F.3, s 21(1)(a) [Ontario Act]; arts 404–405 CCQ; *Marital Property Act*, RSNB 2012, c 107, s 19(1) [New Brunswick Act]; *Matrimonial Property Act*, RSNS 1989, c 275, s 8(1)(a) [Nova Scotia Act]; *Family Law Act*, RSPEI 1988, c F-2.1, s 22(1)(a) [PEI Act]; *Family Law Act*, RSNL 1990, c F-2, s 10(a) [Newfoundland Act]; *Family Property and Support Act*, RSY 2002, c 83, s 23(1)(a) [Yukon Act]; NWT Act, note 154, s 53(1)(a); Nunavut Act, note 154, s 53(1)(a); *Family Homes on Reserves Act*, note 14, s 15(1).

¹⁶² BC Act, s 2.

E. Are There Other Options?

[266] A few respondents had other ideas. They seemed to think consent to disposition has a purpose but suggested other ways of accomplishing the purpose.

[267] Some respondents said consent to disposition should be required only in certain situations. Some focused on direct financial contributions, saying consent to disposition should only be required if the non-owner helped to pay the mortgage or other expenses. Some thought it mattered whether the home was acquired before the relationship began or during the relationship. They said consent to disposition should not be required if the owner acquired the home before the relationship began but could be required for a home acquired during the relationship. A few others thought it should depend on the length of the relationship, whether the couple has children, or whether the relationship involves domestic violence.

[268] Some respondents said that couples should plan ahead, either by having both of them on title or making an agreement about how to deal with a home. Most of these comments came from respondents to the technical survey. One respondent to the technical survey said that a non-owner should have to take a positive step to have a say in disposition. They suggested a non-owner should register a caveat to have benefits like those in the *Dower Act*.

[269] One respondent to the technical survey proposed that an owner should have to give a non-owner notice that they intend to sell the home. If the non-owner objected, they could take legal action to prevent the sale.

[270] We considered these suggestions and other options for replacing consent to disposition. We are not convinced any of them would be better than abolition or reform.

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

F. ALRI's Recommendation

[272] After weighing all the arguments and consultation results, ALRI concludes that consent to disposition should remain a requirement.

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

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

RECOMMENDATION 2

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

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

CHAPTER 7

Should the Life Estate Be Abolished?

A. Introduction

[275] In *Dower Act: Life Estate*, Report for Discussion 37, we discussed arguments in favour of and against abolishing the automatic life estate to a surviving non-owner. This chapter reviews those arguments and additional ones we identified in consultation.

B. Summary of Consultation Results

[276] In our early consultation, we asked whether the *Dower Act* should be reformed or repealed. Overall, 60% of respondents were in favour of reforming the *Dower Act*, 30% were in favour of repealing it, and 10% said neither. Many of the comments on the exploratory survey focused on consent to disposition but some respondents mentioned the life estate.

[277] In general consultation, our surveys asked specifically about the life estate. The general survey included this question:

The law currently says that if the sole owner dies, the surviving spouse can keep the home for the rest of their life. Do you agree with this rule?

[278] Of the respondents who answered the question, 71% agreed, 26% disagreed, and 3% picked the “other” option.

[279] The technical survey included this question:

Do you agree that the surviving spouse of the sole owner of a home should automatically receive a life estate in the home?

[280] Support for the automatic life estate was not as strong among respondents to the technical survey as it was among the general public. Of those who answered this question on technical survey, 61% agreed and 39% disagreed.

C. Arguments in Favour of Abolishing the Life Estate

[281] In *Dower Act: Life Estate*, Report for Discussion 37, we identified four arguments for abolishing the life estate. Consultation revealed several others.

1. THE OWNER'S WISHES SHOULD PREVAIL

[282] The most common reason that respondents gave for opposing the life estate was that the owner should decide who inherits the home when they die. More than 50 respondents to the general survey and 14 respondents to the technical survey said that it should be the owner's decision or that the owner's will should be followed.

2. FEW PEOPLE RELY ON THE LIFE ESTATE

[283] There is an argument that the *Dower Act* is outdated. When the *Dower Act* was enacted more than 100 years ago, many married women relied on its protection to stay in their home after their husband's death.

[284] Today, 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.

[285] 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.

[286] 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.

[287] Some argue that all these other protections have made the *Dower Act* unnecessary. Nearly 30 respondents to the technical survey mentioned other ways to protect the interests of non-owners. It was the most common type of comment among those respondents to the technical survey who were in favour of abolishing the life estate. Various ideas for protecting non-owners came up. Those mentioned most often were:

- both spouses or partners should be on title to the home;
- the owner should leave the home to the non-owner in their will;
- a couple should make an agreement, like a marriage agreement or a cohabitation agreement, about the home or property generally;

- a non-owner who does not inherit the home and wishes to keep it should make an application for family maintenance and support.

3. AN AUTOMATIC LIFE ESTATE IS NOT TAILORED TO ACTUAL NEEDS

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

[289] 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.¹⁶³ It is very difficult, if not impossible, to raise cash if a life estate is a person's only asset.

[290] 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.

4. A LIFE ESTATE GIVES A SPOUSE'S INTEREST PRIORITY OVER OTHERS

[291] 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.

[292] In consultation, we heard concerns that an automatic life estate may be unfair to other heirs. Approximately 20 respondents mentioned the interests of the owner's children. Some were specifically concerned about minor children. A few mentioned other interested parties, like other family members, co-owners, or lenders.

[293] 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.

¹⁶³ See eg *Ebeling-Argue (Estate of) v Hutchinson*, 2008 ABQB 299; *Re Fliczuk Estate*, 2019 ABQB 946.

5. ABOLISHING THE LIFE ESTATE WOULD BE CONSISTENT WITH MOST OTHER CANADIAN JURISDICTIONS

[294] 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.¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶

[295] 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 a share of the estate, although different jurisdictions have different formulas.¹⁶⁷ In every jurisdiction, a spouse who does not inherit enough to meet their needs may apply to court for additional support from an estate.¹⁶⁸ Some jurisdictions extend the same right to partners.¹⁶⁹ Generally speaking, courts have broad discretion to award support

¹⁶⁴ Manitoba Act, s 21.

¹⁶⁵ BC Act, ss 2, 4(1).

¹⁶⁶ Newfoundland Act, ss 5–6, 8.

¹⁶⁷ 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).

¹⁶⁸ *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 S.26, 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.

¹⁶⁹ 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 “dependant”; *Dependants Relief Act*, RSY

that is appropriate in the circumstances, which might include a life estate or full ownership of a home.¹⁷⁰ 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.¹⁷¹

[296] It could be argued that abolishing the *Dower Act* would improve harmonization between jurisdictions. Alberta is one of only two jurisdictions that provide an automatic life estate to a surviving spouse. Without it, Alberta law would be closer to the majority of Canadian jurisdictions in one way. There would still be significant differences between jurisdictions.

6. ABOLISHING THE LIFE ESTATE WOULD BE AN EASY ROUTE TO MODERNIZATION

[297] As discussed in Chapter 6, repealing the *Dower Act* would be an easy way to address the problems with it, including the exclusion of adult interdependent partners. If the life estate were abolished, all couples would be treated the same because no one would receive an automatic life estate.

D. Arguments Against Abolishing the Life Estate

[298] We previously identified three arguments against abolishing the life estate. In consultation, many respondents gave very general reasons for keeping the automatic life estate, like “it’s only right” or “they are entitled to it”. Others gave more explanation. Nearly all related to one of the arguments we had already identified, sometimes adding new details or perspectives. The three arguments in this section are enriched with the input from consultation.

1. IMPORTANCE OF A HOME

[299] As discussed in Chapter 6, a home is a special asset. Many people value their home for reasons that cannot be measured in money. Moving is disruptive, especially when a surviving spouse or partner is grieving. The disruption would

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”.

¹⁷⁰ *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.

¹⁷¹ See eg Ontario Act, ss 5-6; arts 414-416 CCQ.

also affect any children who live in the home. Losing a home may be distressing and money cannot always compensate for the loss.

[300] Many comments reflected the importance of a home. Several themes emerged.

a. A non-owner should not lose their home

[301] The most common reason respondents gave for supporting an automatic life estate is that a surviving non-owner should be able to remain in their home. More than 60 respondents to the general survey and about 10 on the technical survey mentioned staying in the home.

b. A couple's home belongs or should belong to the non-owner

[302] Another theme that came up often is that the home belongs or should belong to the non-owner, even if they are not the legal owner. We heard three related ideas. The first is simply that the home belongs to those who live in it. Many comments said something like "it's their home." The second is that a spouse or partner contributed to the home. The contributions might be financial or non-financial. The third is that a spouse or partner is or should be entitled to a share of property. Respondents said a home is a shared asset, marital property, or owned jointly. Some said that each spouse or partner has equal rights or is entitled to a share.

c. Reflecting the owner's wishes

[303] Some respondents said or implied that an owner would generally want the non-owner to keep the home. Two mentioned the possibility that an owner's will may not be up to date.

2. A LIFE ESTATE PROVIDES SUPPORT FOR A SURVIVING NON-OWNER

[304] A life estate provides a form of support for a surviving non-owner. This point came up on both the general and the technical survey. Respondents said a non-owner may need support and spouses or partners should provide for each other after death. Some respondents were specifically concerned about a non-owner becoming homeless. More than 20 respondents said that a surviving non-owner should have a place to live or protection against being left homeless.

[305] In many cases, a life estate provides in-kind support. It gives a surviving non-owner a place to live. If the non-owner does not need or want to remain in

the home, it is sometimes possible to convert the life estate into another kind 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.

3. AN AUTOMATIC LIFE ESTATE OFFERS PROTECTION WITHOUT LITIGATION

[306] 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.¹⁷²

[307] 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 leave the home 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.

[308] Some professionals said that a surviving non-owner should not have to litigate to stay in their home. We heard this point in early consultation and again in the technical survey. One respondent said that many elderly people are not able to afford legal representation to make an application for support.

E. Are There Other Options?

[309] It would be possible to replace the life estate with a different kind of interest or right. A few respondents suggested alternatives to the life estate.

¹⁷² 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*.

[310] Some thought a surviving spouse or partner should automatically receive title to the home. If this proposal were adopted, its effect would be similar to Newfoundland and Labrador's statutory joint tenancy.¹⁷³

[311] Others thought the non-owner should be able to stay in the home for a limited time. All these suggestions came from respondents to the technical survey. None of these respondents mentioned the existing right to possess a family home for 90 days after the owner's death. Respondents had different ideas about how long a non-owner should be able to stay in the home. It is noteworthy that they all thought it should be longer than 90 days. At least one respondent said the non-owner should be able to live in the home as long as they were willing and able to live there. If they moved to another home or into a care facility, their interest would end. A few respondents suggested the non-owner should be able to stay in the home for a specific time. Some suggested six months. Others suggested one year. A couple respondents suggested a formula based on the time the non-owner had lived in the home or had lived with the owner. For example, one of the suggestions was that the non-owner could keep the home for half the time they had lived there. If they had lived in the home for ten years, they could keep it for five years after the owner's death.

[312] There are other possible approaches that did not come up in consultation. One would be to require that a home be held in trust for a surviving non-owner, as in British Columbia.¹⁷⁴ In an earlier project, ALRI proposed that the life estate should be replaced with a right of occupancy.¹⁷⁵

[313] ALRI considered all these options. While the proposals are interesting, we are not convinced any are clearly better than an automatic life estate. 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.¹⁷⁶ 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.

¹⁷³ Newfoundland Act, ss 5-6, 8.

¹⁷⁴ BC Act, s 4.

¹⁷⁵ RFD 14 at 58-60 (Recommendation 7).

¹⁷⁶ Alberta, Ministry of Service Alberta, *Land Titles Procedure Manual*, Procedure LIF-1 (Edmonton: Ministry of Service Alberta, 2021), online: *Service Alberta* <www.servicealberta.ca/pdf/ltmanual/LIF-1.pdf> [perma.cc/AGL4-D3FQ].

[314] Consultation turned up concerns about the 90 day period of temporary possession. Some respondents said or implied that 90 days is not long enough. We also heard about a mismatch between the period of temporary possession and the time to make an application for family maintenance and support from an estate. It can cause problems if a non-owner has to leave the home before their claim for maintenance and support is resolved.

[315] Issues about the 90 day period of temporary possession deserve review but are outside the scope of this project.

F. ALRI's Recommendation

[316] After weighing all the arguments, we have concluded that the life estate should remain.

[317] Again, 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.

[318] ALRI recommends that the automatic life estate should remain part of the law of Alberta. The problems with the life estate are best addressed by reform, not repeal. Later in this report, we propose reforms to improve some of the problems discussed in Chapter 3.

RECOMMENDATION 3

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

CHAPTER 8

Why Is New Legislation Needed?

A. The Need for Reform

[319] While the key features of the *Dower Act* still serve an important purpose, the legislation is overdue for reform. The *Dower Act* has not been fully reviewed since 1948. Many other things have changed in the meantime, but the *Dower Act* has been left behind. The legislation should be brought up to date with clear, modern, plain language drafting. In short, the *Dower Act* should be replaced.

[320] Some issues with the *Dower Act* affect both consent to disposition and the life estate. This part recommends reforms that should apply to both key features. This chapter discusses comments we received about the current form of the *Dower Act* and the need to replace it. Chapter 9 recommends changes to the homes affected. Chapter 10 discusses some practical issues about treating spouses and adult interdependent partners alike and explains how our other recommendations would address those issues.

B. Issues Raised in Consultation

[321] In both early and general consultation we heard support for modernizing the legislation. Respondents said the *Dower Act* should be reviewed, that it needs updating, that it should be modernized, and that it is time for change.

[322] Some respondents pointed out specific problems with the current form of the *Dower Act*.

1. OUTDATED LANGUAGE

[323] The language of the *Dower Act* is outdated. Outdated language can make it difficult for the public – and sometimes lawyers – to find and understand the law.

[324] In both early and general consultation, respondents specifically mentioned problems with the words “dower” and “homestead.”

[325] Dower is an archaic word and very few people, other than Alberta lawyers, are familiar with it. It is no longer used in other Canadian jurisdictions. Lawyers from outside Alberta may confuse it with its obsolete common law dower, if they recognize the term at all. It is easily confused with “dowry”.

Dower and dowry both have gendered connotations, referring to customs where property interests are affected by a woman's marriage.

[326] Homestead is also likely to be confusing. In everyday language, it usually refers to the historical practice where governments granted land to settlers at very low cost if they met certain conditions. It has a connotation of rural land. A person who lives in a condominium unit in a city, for example, is unlikely to say that they have a homestead.

2. INCONSISTENCY WITH OTHER ALBERTA LEGISLATION

[327] A few respondents said that the *Dower Act* is inconsistent with other Alberta legislation. Most often, the comments were about how the *Dower Act* applies to spouses but not adult interdependent partners. Other Alberta family law legislation treats spouses and adult interdependent partners alike.

[328] There were a few general comments that the *Dower Act* does not fit well with other legislation. We heard about a disconnect or gaps between the *Dower Act* and other family and estate legislation. The *Dower Act* predates the *Family Property Act* and the *Wills and Succession Act*. Both are much more modern than the *Dower Act*. Our research identified some specific problems, which we discuss in later chapters.

3. RULES COULD BE IN OTHER LEGISLATION

[329] In both early consultation and general consultation, we heard suggestions that rules currently in the *Dower Act* should be moved into other legislation. We heard this suggestion from some respondents who said the *Dower Act* should be abolished or repealed, suggesting that they support the policy behind the *Dower Act* but not its current form.

[330] Respondents mentioned moving rules to the *Family Property Act* or the *Wills and Succession Act*. Rules about consent to disposition could be added to the *Family Property Act* and provisions about the life estate could be added to the *Wills and Succession Act*.

[331] One respondent said that bringing related rules together would make it easier for members of the public to access and understand the law.

4. THE NEED FOR CLEAR LEGISLATION

[332] One of ALRI's general principles is that legislation should be clear. It should be easy for everyone to find and interpret the law.

[333] We heard support for this principle in consultation. There was a theme in many comments that legislation should be clear and the rules should be easy to apply. We heard it from respondents who were in favour of keeping the key features of the *Dower Act* and from those who thought it should be abolished.

C. ALRI's Recommendation

[334] The *Dower Act* has an important purpose but it has not kept up with social and legal changes. It does not function well in its current form.

[335] One of ALRI's guiding principles is that all provisions in legislation should serve the purpose of the legislation. Many provisions of the *Dower Act* do not serve its purpose well. Some are too narrow, such as rules that apply to spouses but exclude adult interdependent partners. Some are too broad, such as the definition of homestead.

[336] The changes we recommend in this report are fundamental ones. They go beyond reforming existing legislation. It is time for a fresh start, with new legislation.

[337] The recommendations in this report are about policy. ALRI is not making specific recommendations about how new legislation should be drafted. Some respondents raised drafting issues but we do not take any position on them.

[338] One of ALRI's guiding principles for all projects is that legislation should be clear. The *Dower Act* should be replaced with clear, modern legislation. Beyond that general principle, the form and wording of legislation is best left to legislative drafters. ALRI has no position on whether replacement legislation should be a stand-alone statute or added to existing statutes.

RECOMMENDATION 4

The *Dower Act* should be replaced with new legislation.

CHAPTER 9

How Could Redefining the Property Affected Resolve Problems?

A. Redefining the Property Affected

[339] The current definition of homestead contributes to many of the practical problems discussed in Chapters 2 and 3. Changing the definition could eliminate some of the issues.

[340] In this chapter, we recommend a new definition of the property to be affected by consent to disposition and the life estate. While changing the definition, the word “homestead” itself should be replaced. As discussed in Chapter 8, it has historical and rural connotations that could cause confusion. A modern, plain-language replacement would make the legislation easier to understand. We are not recommending a specific term to replace homestead. The wording is best left to legislative drafters.

B. The Definition of Homestead

[341] The *Dower Act* defines a homestead as:¹⁷⁷

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.

¹⁷⁷ *Dower Act*, s 1(d).

[342] 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.¹⁷⁸

[343] 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.”¹⁷⁹

[344] 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.¹⁸⁰ It does not matter if the owner or non-owner has moved out.

C. Summary of Consultation Results

[345] Early consultation revealed issues with the definition of homestead. Those issues are discussed in Chapters 2 and 3. We did not seek or get input on specific proposals for reform in early consultation. We considered the issues when developing the preliminary recommendations for our Reports for Discussion.

[346] There was one question on the general survey about which homes should be affected. After questions describing the rules currently in the *Dower Act*, the survey asked:

Which kinds of homes should these rules apply to?

[347] The possible answers were:

¹⁷⁸ 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]; *Pawluk*, note 111 at paras 58–76.

¹⁷⁹ *Forms Regulation*, note 3, Form B [emphasis added]. In 1975, ALRI recommended correcting the discrepancy: Institute of Law Research and Reform (Alberta), *Small Projects*, Final Report 17 (1975) at 4-5, online: <www.alri.ualberta.ca/wp-content/uploads/2020/05/fr017.pdf>. 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*).

¹⁸⁰ *Dower Act*, s 3. The last requirement is probably superfluous. The action for damages is only available if the owner 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 could not obtain a judgment for damages unless the property had been transferred and therefore ceased to be a homestead.

A home on a lot or acreage (detached or semi-detached home, townhouse, row house, etc.)

A home on a farm or ranch

A condominium unit

A mobile home

Other (please explain)

[348] Respondents could select more than one answer. Of the 586 respondents, 374 (64%) chose all the options. The most popular answer was a home on a lot or acreage, with 489 (83%) of respondents selecting it. In descending order, 428 (73%) selected a home on a farm or ranch, 415 (71%) selected a condominium unit, and 407 (69%) selected a mobile home. More than 70 respondents added comments to the effect of “a home is a home”.

[349] The technical survey included more details about ALRI’s recommendations. It included some examples to illustrate the effect of the proposed reforms. The description and question read:

The *Dower Act* applies to a “homestead”, which is a parcel of land or condominium unit where the owner lives or has lived. Under the *Dower Act*, a homestead remains a homestead until it is transferred or sold, until the couple is divorced, or until the spouse gives up their rights in the homestead. ALRI’s preliminary view is that the definition of homestead is broader than necessary.

For example:

- Yuki and Sam are separated but not divorced. After their separation, Sam bought a home. Yuki has never lived in the home.
- Kelly and Nika are married but in a long-distance relationship. Kelly lives in another country and has never come to Alberta. Nika owns and lives in a home in Alberta.
- Lou and Devin used to live in a condominium unit that Lou owned. Ten years ago they moved into a new home that they own together. Lou still owns the condominium unit and rents it to tenants.

Under the *Dower Act*, all these homes are homesteads. ALRI proposes changes that would reduce the number of homes affected so that none of these homes would be homesteads. ALRI proposes that the *Dower Act* should apply only to a home where the owner and their spouse or adult interdependent partner live or have lived

together, and that it should apply only while the couple lives in the home and for a transition period after a move or separation.

Do you agree that the definition of homestead should be changed as ALRI proposes?

[350] Of those who answered this question, 75% agreed and 25% disagreed.

[351] There was another question on the technical survey specifically about mobile homes. It asked:

Do you agree that the *Dower Act* should apply to mobile homes?

[352] Of the respondents who answered this question, 76% agreed and 24% disagreed.

D. What Property Should Be Included?

[353] Consent to disposition and the life estate protect non-owners from losing their home unexpectedly due to the actions of their spouse or partner. This purpose is an important one, but the definition of homestead does not serve this purpose well.

1. OCCUPANCY

a. Background

[354] Non-owners should be protected against losing their 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.

[355] 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.¹⁸¹

[356] Either the third or fourth option would serve the purpose better. If the purpose of dower rights is to protect a non-owner from losing their home, it does

¹⁸¹ Compare *Dower Act*, s 1(d); *Forms Regulation*, note 3, Form B.

not make sense to have them apply to a place where the non-owner may have never lived. The third or fourth option would protect places where they actually lived.

[357] 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.¹⁸²

[358] 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.

[359] 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”.¹⁸³ The version in the *Family Property Act* is representative:

1(a.2) “family home” means property

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

¹⁸² 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.

¹⁸³ *Family Law Act*, note 120, s 67(1); *Family Property Act*, s 1(a.2); *Wills and Succession Act*, s 72(a).

[360] Every other Canadian jurisdiction uses the fourth option in legislation requiring consent to disposition. Consent is required only for a home where the spouses or partners lived together.¹⁸⁴

b. Consultation results

[361] In our Reports for Discussion we proposed using the fourth option. Consent to disposition and the life estate would apply to a home only if the owner and their spouse or adult interdependent partner live or have lived in the home.

[362] The results of the technical survey indicate there is strong support for this change, with 75% agreement that the definition of homestead should be changed as ALRI proposed. Some added comments that having the *Dower Act* apply to a home where the non-owner has never lived is overreach or not required to protect a non-owner.

[363] Although we did not ask specifically about this proposal on the general survey, there were comments suggesting many respondents would approve of it. More than 25 respondents added comments saying that consent to disposition or the life estate should apply only if the couple had lived in the home together.

c. ALRI's recommendation

[364] Consultation has reinforced our view that consent to disposition and the life estate should apply only to a home where the spouses or partners live or have lived together.

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

¹⁸⁴ BC Act, s 1; Saskatchewan Act, s 2(c); Manitoba Act, s 1; Ontario Act, s 18(1); art 395 CCQ; New Brunswick Act, note 161, s 16(1); Nova Scotia Act, note 161, s 3(1); PEI Act, note 161, s 19(1); Newfoundland Act, s 6(1); Yukon Act, note 161, s 21(1); NWT Act, note 154, s 50(1); Nunavut Act, note 154, s 50(1); *Family Homes on Reserves Act*, note 14, s 2(1).

RECOMMENDATION 5

Consent to disposition and the life estate should apply only to a home where both spouses or both adult interdependent partners live or lived together.

2. PAST OCCUPANCY AND THE EFFECT OF MOVING OUT OR SEPARATION

[366] Under the *Dower Act*, land remains a homestead indefinitely, even after the couple has moved out or separated. Sometimes a couple will move but keep their former home as a rental or investment property. Upon separation, one or both spouses may move out. In either case, the land remains a homestead until the owner sells or transfers it, the non-owner makes a release of dower rights, or the couple divorces.

[367] This rule goes farther than necessary to protect a non-owner from losing their home. We propose time limits to provide protection only when needed. There are different considerations for consent to disposition and the life estate. Although this issue relates to the definition of homestead, we have one recommendation for consent to disposition and a different one for the life estate. It makes sense to discuss them with other reforms specific to each key feature. In Chapter 11, we recommend a time limit for consent to disposition measured from the time the couple or one of them moves out. In Chapter 15, we recommend a time limit for the life estate measured from the time the couple separates.

3. MULTIPLE HOMES

a. Background

[368] A person can have more than one homestead. It can occur if a couple moves from one home to another, as discussed above. It can also occur if a couple divides their time between two homes they own, like a primary home and a vacation home. There is no limit on the number of homesteads an owner may have.

[369] While the owner is alive, consent to disposition is required any time the owner makes a disposition of any homestead.

[370] Upon the owner's death, 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.¹⁸⁵

[371] This rule is not unique to Alberta. Other Canadian jurisdictions recognize that a couple may have more than one home.¹⁸⁶ Some jurisdictions have systems for designating a property as a home or requiring consent to change a designation.¹⁸⁷

b. Consultation results

[372] Our preliminary recommendations were to retain the current rules as modified by our other recommendations about occupancy and time limits. We proposed that consent to disposition should be required for any home where the spouses or adult interdependent partners had lived within the last three years. We proposed that a surviving spouse or adult interdependent partner should be entitled to a life estate in only one home. If a homeowner died owning more than one home, the surviving spouse or partner should have to choose one for their life estate from among those where the spouses or partners lived together.

[373] We received a handful of comments about these preliminary recommendations. Two respondents to the general survey said rules should apply only to the primary residence of a couple. A few respondents to the technical survey said the rules should apply only to a home where the couple currently lives, to their primary residence, or to one home at a time. Two others made the opposite argument, mentioning reasons to include multiple homes. One said that a home where the couple used to live may be the more valuable one. The respondent gave an example of a couple who owns more than one home and chooses to live in the less valuable one in retirement. Another said that an owner might take advantage of a rule limiting the number of homesteads "to cheat the other out of a home."

¹⁸⁵ *Dower Act*, s 19.

¹⁸⁶ Some jurisdictions have legislation explicitly stating that a couple may have more than one home: see New Brunswick Act, note 161, s 16(2); Nova Scotia Act, note 161, s 3(4); Newfoundland Act, s 6(6); Yukon Act, note 161, s 21(3). In other jurisdictions, it is implicit: see eg Ontario Act, s 18(1). In Manitoba, a person may have only one homestead: Manitoba Act, s 2.

¹⁸⁷ Manitoba Act, ss 7, 9; Ontario Act, s 20.

c. ALRI's recommendations

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

[375] We considered whether to recommend a system for designating a property as a home while the owner is alive. While there is merit in letting individuals choose the property that they consider to be their home, we doubt that the benefits outweigh the administrative burden.

[376] Our final recommendations are the same as our preliminary recommendations.

[377] There is no need to limit the number of homes requiring consent to disposition while the owner is alive. It is not unreasonable to require consent to disposition for more than one property. The time limit we recommend in Chapter 11 will narrow the properties potentially affected so consent will only be required for homes where the couple lives or have lived within the last three years.

[378] After the owner's death, a surviving non-owner should be entitled to a life estate for one home. The purpose of the life estate is to prevent a non-owner from becoming homeless. Only one home is necessary for this purpose. We considered whether there is any need for a rule limiting the number of homes that a non-owner may choose from but concluded that there is not. It is appropriate to allow the non-owner to choose from among the places they lived with their spouse or partner. They should have the opportunity to choose the one that they consider to be their home, whatever their reasons are.

RECOMMENDATION 6

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

RECOMMENDATION 7

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

RECOMMENDATION 8

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.

4. AMOUNT OF LAND

a. Background

[379] 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:¹⁸⁸

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.

[380] Like Alberta, Saskatchewan and Manitoba define the amount of land that may be subject to consent to disposition, although the details are slightly different. In Saskatchewan the maximum size of a homestead is 65 hectares – equivalent to a quarter section – with no distinction between urban and rural homesteads.¹⁸⁹ In Manitoba, a homestead in a city, town, or village may be up to six lots, one block, or one acre. A rural homestead may be up to a half section and must include the quarter section or lot where the house is located.¹⁹⁰ Most other Canadian jurisdictions do not have a specific limit on the size of parcel.¹⁹¹

¹⁸⁸ *Dower Act*, s 1(d).

¹⁸⁹ Saskatchewan Act, s 2(c).

¹⁹⁰ Manitoba Act, s 1 “homestead”.

¹⁹¹ 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, s 18(3):

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

[382] 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?

[383] 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?¹⁹²

b. Consultation results

[384] In our Reports for Discussion, we proposed a new rule that would clarify the amount of land affected. Our preliminary recommendation was to define the land affected as “all the land included on the certificate of title for the land where the home is located.” Usually it would be one lot, one condominium unit, or one quarter section.

[385] We received a handful of comments about this proposal on the technical survey. Two respondents agreed with the preliminary recommendation. Three said that the amount of land is not relevant. One said that shops, barns, and outbuildings should also be considered.

c. ALRI’s recommendations

[386] Our final recommendation is the same as our preliminary recommendation. The land affected should usually be all the land included on one certificate of title. In urban areas, it would usually be one lot. For a condominium, it would usually be one unit. In rural or unsubdivided areas, it

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

See also New Brunswick Act, note 161, s 16(1); Nova Scotia Act, note 161, s 3(2); PEI Act, note 161, s 19(3); Newfoundland Act, s 6(2); Yukon Act, note 161, s 21(5); NWT Act, note 154, s 50(1); Nunavut Act, note 154, s 50(3). In two provinces, the number of dwellings on the land is relevant: see arts 404–405 CCQ; Newfoundland Act, s 6(4).

¹⁹² A question about a subdivision arose in *Schwormstede v Green Drop Ltd* (1994), 155 AR 302, 1994 ABCA 259 (CanLII). A married couple lived on a quarter section. The husband owned the quarter section. The husband proposed to sell a portion of the quarter section to Green Drop. The wife objected and filed a caveat against the whole quarter section. The husband subdivided the land to make two lots: one of about 151 acres (including the couple’s home) and another of about 9 acres. He sold the 9-acre lot to Green Drop. The Court of Appeal held that the disposition was in violation of the *Dower Act*, implying that both lots remained homesteads.

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.¹⁹³

[387] The definition would include the whole lot, condominium unit, quarter section or other area of land if any part of it is the couple's home. For example, consent would be required to dispose of a lot even if part of it was used for business purposes, like a building with business premises on the ground floor and the couple's residence above. Consent would also be required if the couple lives on a lot with more than one suite, ranging from a home with a basement suite to an apartment building. Similarly, a surviving non-owner would be entitled to a life estate for all the land on the certificate of title even if only part of it was the couple's home.

[388] If a home is built on more than one lot, the definition would apply to both. Consent would be required to dispose of either or both.¹⁹⁴ This approach does not change the existing rule. Under the *Dower Act* a person may have more than one homestead. If a couple lived on two or more lots, consent to disposition would be required for either or both.¹⁹⁵

[389] There will also be situations where outbuildings or other improvements are located on land that has a separate title. In a rural area, for example, the house could be on one lot or quarter section with a shop or barn on another.

¹⁹³ *Land Titles Act*, note 57, s 26(1):

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

(a) more than one section of land;

...

¹⁹⁴ 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. A court has a similar power under the *Family Property Act*, s 19(2), which allows a court to "give a spouse or adult interdependent partner possession of as much of the property surrounding the family home as is necessary, in the opinion of the Court, for the use and enjoyment of the family home." It appears this provision is rarely applied. Our research did not turn up any reported cases where an exclusive possession order applied to a portion of a lot or parcel of land.

¹⁹⁵ 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; ...

Wells, septic systems, garages, sheds, driveways, pools, gardens, and fences are all examples of improvements that could be located on an adjacent lot.

[390] We considered whether legislation should address whether and when improvements on adjacent land are part of the home. We decided not to make any recommendations. It is doubtful that these situations arise often enough to require legislated rules. Each situation will be unique and it is impossible to foresee all the possibilities. There are other ways to resolve ambiguous situations. For consent to disposition, the easiest solution will usually be to ask the non-owner for consent. If the non-owner does not consent or if there is a dispute about a life estate, a court could resolve the issue on a case-by-case basis.

[391] If a lot or quarter section is subdivided, consent to disposition should be required for any of the new lots – at least for a time. The time limit we propose in Chapter 11 would apply after a subdivision. If the couple’s home is on one of the newly created lots, the time limit would start to run for the other lots, just as it would if the couple had moved. This rule would address situations like *Schwormstede v Green Drop Ltd.*¹⁹⁶ It would prevent an owner from using subdivision to circumvent the requirement for consent to disposition without tying up property indefinitely.

RECOMMENDATION 9

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

RECOMMENDATION 10

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.

5. INTERESTS IN LAND

a. Background

[392] 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,

¹⁹⁶ *Schwormstede v Green Drop Ltd* (1994), 155 AR 302, 1994 ABCA 259 (CanLII).

at law or in equity, in possession, in futurity or expectancy".¹⁹⁷ This definition is a very broad one, as there are many different kinds of estates or interests in land.

[393] Most other Canadian jurisdictions have similarly imprecise language, stating that consent to disposition is required if one spouse (or in some jurisdictions, partner) is the owner of land¹⁹⁸ or has an interest in land.¹⁹⁹ 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.²⁰⁰ British Columbia's legislation includes a helpful clarification that the interest must be one that entitles the owner to possession.²⁰¹

[394] Some other Alberta legislation is more precise but not completely consistent. The *Family Property Act* and the *Family Law Act* have provisions allowing an exclusive possession order to be registered with the Land Titles Office. Both statutes lists the interests in land that qualify: ownership, a lease for more than three years, or a life estate.²⁰² Other statutes have definitions of owner. They nearly always include the registered owner of a fee simple estate but the other interests listed vary.²⁰³

[395] Case law clarifies that the *Dower Act* applies only if the owner's interest is one for which a certificate of title could be issued.²⁰⁴ Those interests are a fee

¹⁹⁷ *Land Titles Act*, note 57, s 1(r).

¹⁹⁸ BC Act, s 1; Saskatchewan Act, ss 2(c),(e); Manitoba Act, s 1; arts 404–405 CCQ; Newfoundland Act, s 6(1)(b).

¹⁹⁹ BC Act, s 1; Ontario Act, s 18(1); Nova Scotia Act, note 161, s 3(1); PEI Act, note 161, s 19(1); Yukon Act, note 161, s 21(1); NWT Act, note 154, s 50(1); Nunavut Act, note 154, s 50(1).

²⁰⁰ See eg BC Act, s 1: "'homestead' means land or any interest in it entitling the owner to possession of it that is registered in the records of the land title office in the name of the spouse ..."; Saskatchewan Act, s 2(e): "owning spouse" means a spouse who is a "registered owner of an interest in land."

²⁰¹ BC Act, s 1.

²⁰² See *Family Property Act*, s 22(1):

22(1) If an order is made under section 19 with respect to a family home and the family home or part of it is real property that

(a) is owned by one or both of the spouses or adult interdependent partners,

(b) is leased by one or both of the spouses or adult interdependent partners for a term of more than 3 years, or

(c) is the subject of a life estate in favour of one or both of the spouses or adult interdependent partners, the order may be registered with the Registrar of Land Titles.

Family Law Act, note 120, s 71(1) is nearly identical.

²⁰³ See eg *City Transportation Act*, RSA 2000, c C-14, s 1(c); *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s 1(ss); *Highways Development and Protection Act*, SA 2004, s H-8.5, s 1(q); *Public Highway Development Act*, RSA 2000, c P-38, s 1(m); *Seniors' Home Adaptation and Repair Act*, SA 2016, c S-7.1, s 2(1); *Seniors' Home Adaptation and Repair Regulation*, Alta Reg 107/2016, s 11.

²⁰⁴ *Pawluk*, note 111 at paras 74-76.

simple estate, a leasehold estate for a term of more than three years, or a life estate.²⁰⁵

[396] The *Dower Act* also applies 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.²⁰⁶

b. Consultation results

[397] Our preliminary recommendation was to retain the current rule with one exception. We proposed that consent to disposition should not be required if the owner's interest is a life estate.

[398] There were very few comments on this proposal. Only two respondents to the technical survey mentioned it. Both were in favour of ALRI's preliminary recommendations.

c. ALRI's recommendations

[399] Our final recommendations are the same as our preliminary recommendations.

[400] The existing rules are generally appropriate. Consent to disposition should be required if the owner's interest is a fee simple estate or a leasehold estate for more than three years. As long as it is consistent with Metis Settlements General Council policy, consent to disposition would also be required if the owner's interest is Metis title, provisional Metis title, or an allotment.

[401] Similarly, a surviving spouse or adult interdependent partner should receive a life estate if the owner's interest is a fee simple estate. If the owner's interest is a leasehold estate for more than three years, the surviving spouse or partner should be able to keep the property but the surviving non-owner's interest cannot be greater than the owner's interest. The surviving non-owner's interest would end when the lease ends by its terms or the surviving non-owner dies, whichever occurs first.

[402] The same principle would apply to land on Metis Settlements as long as Metis Settlements General Council policy permits. A surviving spouse or partner would receive a life estate if the owner had Metis title. If the owner's interest was

²⁰⁵ See *Land Titles Act*, note 57, s 32.

²⁰⁶ *Metis Settlements Land Registry Regulation*, Alta Reg 361/1991, s 79.

provisional Metis title or an allotment, the surviving non-owner could keep the property until the interest ends by its terms or the surviving non-owner dies.

[403] The exception is a life estate. Consent to disposition should not be required if the owner's interest is a life estate. It is doubtful that consent to disposition would offer much protection to the spouse or partner of a life tenant. A life tenant's interest is limited and will end upon their death. Few people will be affected as few life estates are registered.²⁰⁷ Life estates are not readily sold or transferred. If a life tenant makes a disposition of their life estate, it will often be a sale or transfer to the owner of the remainder interest. Requiring consent to disposition would impose a burden without much benefit to the non-owner.

[404] If the owner's interest is a life estate, a surviving spouse or partner cannot receive any interest upon the owner's death. A life estate ends when the life tenant dies. There would be no interest left for a surviving non-owner.

RECOMMENDATION 11

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

If consistent with Metis Settlements General Council policy, consent to disposition should be required for the following interests in land that can be registered: Metis title, provisional Metis title, or an allotment.

RECOMMENDATION 12

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

RECOMMENDATION 13

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

If consistent with Metis Settlements General Council policy, a surviving spouse or adult interdependent partner should have a life estate if the homeowner had Metis title.

A surviving spouse or adult interdependent partner should have the homeowner's interest for the remaining term if the homeowner had

²⁰⁷ According to the Land Titles Office, there were 2781 life estates registered as of 23 March 2021: email from Land Titles Office to ALRI counsel (23 March 2021).

a leasehold estate for more than three years. If consistent with Metis Settlements General Council policy, a surviving spouse or adult interdependent partner should have the homeowner's interest for the remaining term if the homeowner had provisional Metis title or an allotment.

6. MOBILE HOMES

a. Background

[405] The *Dower Act* does not protect all homeowners in Alberta. It applies only if the owner has an interest in land. Many people who own mobile homes do not have an interest in the land where the mobile home is located and therefore consent to disposition is not required under the *Dower Act*.²⁰⁸

[406] A significant number of people in Alberta live in mobile homes. The 2016 Census found 48,155 mobile homes in Alberta.²⁰⁹ The median owner-estimated value was \$125,239; the average was \$178,992.²¹⁰

[407] Some individuals own both a mobile home and the land where it is located. In this scenario, there is some protection for a non-owner. If the mobile home is a couple's home, the non-owner would have to consent to a disposition of the land. In theory, the mobile home might be considered part of the land if it is a fixture.²¹¹ In practice, a real estate purchase contract will usually state whether the mobile home is included or not included in the sale.²¹² Consent to disposition would not be required, however, if the owner removed the mobile home from the land and sold it separately.

²⁰⁸ In consultation, some respondents suggested using "manufactured home" or "manufactured housing" instead of mobile home. We appreciate that many people prefer the term manufactured home but our research suggests mobile home is in common use, including by industry stakeholders. Mobile home is also the term used in relevant Alberta legislation, including the *Mobile Home Sites Tenancies Act*, RSA 2000, c M-20; *Family Property Act*, ss 1(a.2), 23; *Family Law Act*, note 120, ss 67, 74.

²⁰⁹ 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].

²¹⁰ Statistics Canada, *Data Tables, 2016 Census: Value (owner-estimated) of Dwelling, Structural Type of Dwelling, Age of Primary Household Maintainer, Presence of Mortgage Payments and Number of Bedrooms (6) for Owner Households in Non-farm, Non-reserve Private Dwellings of Canada*, Catalogue No 98-400-X2016233 (Ottawa: Statistics Canada, 2017), online: [perma.cc/7DCY-Q9WP].

²¹¹ ALRI raised this question in RFD 14 at 158-59.

²¹² The standard form Residential Purchase Contract that real estate agents use includes a description of items included or not included in a sale. There is also a standard form Manufactured Home Schedule that can be included in a contract to describe a mobile home included in a sale.

[408] 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.²¹³ In most urban municipalities, mobile homes are invariably on rented sites because zoning requirements limit them to mobile home parks.

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

b. Consultation results

[410] ALRI's preliminary recommendations were that mobile homes should be treated like other homes. Consent should be required for a disposition of a mobile home. 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.²¹⁴

[411] Our surveys showed strong support for the idea that consent to disposition and the life estate should apply to all kinds of homes.

[412] On the general survey, we asked which kinds of homes should be affected. Of the 586 respondents, 407 (69%) said rules about consent to disposition and the life estate should apply to a mobile home. There were 18 respondents who said they lived in a mobile home. All but one of them said that the rules should apply to a mobile home.

[413] On the technical survey, 195 respondents answered a question about whether the *Dower Act* should apply to mobile homes. Of those, 76% agreed that the *Dower Act* should apply to mobile homes. There were 45 who added comments in favour of including mobile homes. Most said that mobile homes are homes, that they have value like other homes, or that non-owners who live in mobile homes deserve the same protection as other non-owners.

²¹³ *Mobile Home Sites Tenancies Act*, RSA 2000, c M-20.

²¹⁴ These preliminary recommendations were consistent with the one ALRI made in an earlier project: RFD 14 at 158-61 (Recommendation 28).

[414] Among those who disagreed with including mobile homes, the most common reason was that mobile homes are different from other homes because they are chattels. A few compared mobile homes to other kinds of personal property, suggesting including them would also require applying the *Dower Act* to things like recreational vehicles, cars, or boats. A small number of respondents said it would be difficult to apply the rules to mobile homes because there is no registry for mobile home ownership. Two pointed out that mobile homes are usually worth less than other homes and depreciate faster, suggesting the rights would not be worth much to a non-owner. One thought there would be additional issues with mobile homes, like responsibility for paying rent for the site during a life estate.

c. ALRI's recommendations

[415] Consultation has confirmed our view that non-owners who live in mobile homes should benefit from the same protection as those living in other types of homes.

[416] We recognize that there will be some practical issues. The Land Titles Office plays an important role in ensuring the *Dower Act* works as intended. The protections will not work as well for mobile homes because there is no registry that records ownership and registers dispositions.

[417] Without a registry for mobile homes, there is no independent entity to check whether a non-owner's consent is required and provided in the proper form. Consent to disposition automatically protects a non-owner's interest in land because the Land Titles Office checks for compliance. It would be outside the scope of this project to recommend establishing an entirely new registration system for mobile homes. Responsibility for ensuring compliance will fall to real estate agents and lawyers, if they are involved in a transaction. There is no doubt that there will be gaps in protection. Non-owners will not get the same level of automatic protection that the Land Titles Office provides. Consent to disposition may be overlooked or ignored, especially when there are no professionals involved.

[418] It is hard to prove ownership of a mobile home and a life estate may add to the difficulty. 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. When one spouse or partner dies, it may be unclear whether the survivor has full ownership or a life estate. When both spouses or

partners have died there may be no one who remembers who originally owned the mobile home, making it difficult to know who should inherit it.

[419] Although these practical issues are serious, in our view they are not reasons 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".²¹⁵ They should be included for consent to disposition and the life estate too.

RECOMMENDATION 14

Consent to disposition should be required for a mobile home.

RECOMMENDATION 15

A surviving spouse or adult interdependent partner should have the right to keep a mobile home for the rest of their life.

7. PROPERTY OWNED BY SOMEONE OTHER THAN AN INDIVIDUAL

[420] The *Dower Act* applies only to property owned by an individual. Land is not a homestead if a third party is a co-owner.²¹⁶ Similarly, land is not a homestead if it is owned by a corporation.

[421] Our recommendations would change the rules for consent to disposition but not the life estate. It makes sense to discuss this issue in the context of each key feature. In Chapter 11, we recommend changes affecting consent to disposition. In Chapter 15, we recommend that the current approach continue for the life estate.

²¹⁵ *Family Law Act*, note 120, s 67(1); *Family Property Act*, s 1(a.2); *Wills and Succession Act*, s 72(a).

²¹⁶ *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.

E. What Property Should Be Excluded?

1. PROPERTY OTHER THAN A HOME

[422] In both early consultation and general consultation, a few respondents questioned whether consent to disposition should be required for all family property or all real property. Some thought such a requirement would protect against an owner dissipating assets before property is divided at the end of a relationship. Others suggested it would be fair for a spouse or partner to have a say when they contribute to property. For example, one respondent thought it was unfair that a non-owner spouse who has contributed to the success of a farm can prevent disposition of the home quarter but not the rest of the farmland. Others said the rules should apply to animals, equipment, or undeveloped land. One respondent said that they have seen situations where an abusive or controlling spouse or partner sells the couple's assets to prevent the other from having them. They may dissipate assets, sell them for less than they are worth, or hide the proceeds.

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

[424] Similarly, adding requirements about ownership of property after death would have a major impact on testamentary freedom. A spouse's or partner's right to make a disposition of property in their own name includes making a disposition by will. There are already other protections for a surviving spouse or partner, including the right to make a claim for family maintenance and support.²¹⁷

²¹⁷ Some other Canadian jurisdictions have rules allowing a surviving spouse or partner to seek division of family property when the other dies: see eg Ontario Act, ss 5, 6; *The Family Property Act*, SS 1997, c F-6.3, s 30. ALRI considered this issue in a previous project: see Alberta Law Reform Institute, *Division of Matrimonial Property on Death*, Final Report 83 (2000), online: <www.alri.ualberta.ca/wp-content/uploads/2020/05/fr083.pdf>. It is outside the scope of this project.

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

2. RESIDENTIAL TENANCIES

[426] Of the approximately 1.5 million dwellings in Alberta, over 400,000 are occupied by renters.²¹⁸ An individual who rents a house, condominium, or 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*.²¹⁹ Most residential tenancy agreements are for a relatively short term. A residential tenancy agreement does not give a renter an interest in land. Although residential tenancy agreements are commonly called leases, they do not give a renter a leasehold estate. A residential tenancy agreement cannot be registered with the Land Titles Office or any other registry.

[427] We do not propose any change 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. The spouse or partner of a renter should have a say in decisions about the tenancy.²²⁰ Nonetheless, consent to disposition and the life estate are not the right ways to protect those who live in rented homes. A tenant's rights are limited. The tenant may occupy the property for the term of the residential tenancy agreement but has no lasting or long-term interest.

[428] It would not be practical to require a spouse or partner's consent to an assignment of a residential tenancy agreement. There would be little benefit to the spouse or partner of a tenant because the right to occupy the property would be short-lived. There would be no system to check for compliance. It would add

²¹⁸ 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].

²¹⁹ *Residential Tenancies Act*, SA 2004, c R-17.1.

²²⁰ There are specific issues that may deserve review in another context. For example, some scholars have identified gaps in legislation that make it difficult for survivors of domestic violence to stay in rental accommodations: see Professor Lois Gander & Rochelle Johannson, *The Hidden Homeless: Residential Tenancies Issues of Victims of Domestic Violence* (Edmonton: Centre for Public Legal Education & University of Alberta, 2014) at 24-26, online: <www.cplea.ca/wp-content/uploads/2015/01/FINAL-Report-The-Hidden-Homeless.2014Jun05.pdf> [perma.cc/A5KY-R2MC]; Jonnette Watson Hamilton, "Reforming Residential Tenancy Law for Victims of Domestic Violence" (2019) 8 Annual Review of Interdisciplinary Justice Research 245 at 260-62; Jennifer Koshan, "Mapping Domestic Violence Law and Policy in Alberta: Intersections and Access to Justice" (2021) 58:3 Alta L Rev 521 at 540.

complexity to the law and could increase administrative burdens. The drawbacks outweigh any possible benefits.

[429] The *Wills and Succession Act* already allows a surviving spouse or partner to possess a rented home for up to 90 days.²²¹ 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

[430] As mentioned above, the *Dower Act* does not apply to homes or land on reserves. Either the laws enacted by a First Nation or the provisional rules in the *Family Homes on Reserves Act* would apply.²²²

F. Summary

[431] The recommendations in this chapter would mean new legislation would apply to:

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

if at least one of the residents:

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

and that resident and their spouse or adult interdependent partner live or have lived there together.

²²¹ *Wills and Succession Act*, s 75.

²²² *Family Homes on Reserves Act*, note 14, ss 7, 12.

CHAPTER 10

Are Any Adjustments Required to Treat Spouses and Adult Interdependent Partners Alike?

A. Introduction

[432] There are two practical concerns about treating spouses and adult interdependent partners alike. The problems cannot be completely solved but can be mitigated.

B. Proving an Adult Interdependent Relationship

[433] As many respondents identified, there can be uncertainty about whether a couple are adult interdependent partners. Sometimes it may be difficult to determine if consent to disposition is required or if there is a person entitled to a life estate.

[434] 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.²²³ 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.²²⁴ Sometimes partners have different perceptions, so they may not agree about whether their relationship meets the criteria.

[435] We heard concerns that the difficulty of proving an adult interdependent relationship would make the law confusing, uncertain, or difficult to apply. Some people who are entitled to protection under the law might not receive it. Others might make false or questionable claims, alleging they are the adult interdependent partner of an owner.

²²³ 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.

²²⁴ See *Adult Interdependent Relationships Act*, note 146, s 1. For a full discussion of the criteria, see FR 112, note 9.

[436] The concern is a legitimate one but we are not convinced it should stand in the way of reform. Spouses and adult interdependent partners are already treated alike under most other legislation. There are already ways to determine whether a couple are adult interdependent partners. Different contexts may call for different approaches. Some of these existing approaches can be used or adapted for consent to disposition and the life estate.

1. CONSENT TO DISPOSITION

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

[438] Self-reporting is used in other contexts for spouses and adult interdependent partners. Other legislation or government programs depend on individuals self-reporting common-law or adult interdependent relationships. For example, individuals have to report whether they are in a common-law relationship when filing taxes. They have to report whether they are in an adult interdependent relationship for health care coverage, other government benefits, employment benefits, and pension plans, among other things.

[439] Other Canadian jurisdictions, including the ones that require consent from common-law partners, also rely on self-reporting to prove that consent to disposition is or is not required. Like Alberta, other jurisdictions rely on affidavit evidence to prove the owner's marital status.²²⁵

[440] There is a risk that an owner in an adult interdependent relationship would make an incorrect affidavit. Some might mistakenly believe their relationship is not an adult interdependent relationship. Some might lie, knowing it will be difficult to disprove their statement.

²²⁵ See eg *The Homesteads Forms Regulations*, RRS c H-5.1, Reg 1, Form D; Teranet Manitoba, *Land Titles Forms*, Transfer Form 5P, online: <www.teranetmanitoba.ca/wp-content/uploads/2019/11/transfer_5pe-1.pdf> [perma.cc/N4FF-GHY5].

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

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

[443] At least one family lawyer said uncertainty is not as much of a problem as it may seem:

Real estate lawyers might complain about the ambiguity of the definition but 99% of the time it's obvious whether they are or not [adult interdependent partners] after a couple of questions ...

[444] In some borderline cases, it may be difficult to determine if consent to disposition is required. A couple professionals had a solution: if in doubt, ask the non-owner for consent. In most cases the extra step will be no more than a minor inconvenience. We heard from many respondents who regularly assist with disposition that they have never or rarely seen a situation where a non-owner does not consent. Asking for consent is not a significant burden, especially considering that the alternative risks a partner losing their home unexpectedly.

2. LIFE ESTATE

[445] Spouses and adult interdependent partners are already treated alike in legislation about succession and inheritance.²²⁶ These rules have been in place for many years. Sometimes after a person's death there is a dispute about whether they were in adult interdependent relationship. These disputes may be about intestate succession, family maintenance and support, or other issues such as

²²⁶ See *Wills and Succession Act*, ss 60-62, 72-108; see also *Estate Administration Act*, SA 2014, c E-12.5, ss 10-11, 13.

who is entitled to administer an estate. There is now a body of case law that clarifies when a relationship meets the criteria.²²⁷

[446] There will probably be similar disputes about a life estate. When necessary, courts can determine whether a deceased person was in an adult interdependent relationship with a claimant and whether the claimant is entitled to a life estate.

C. Overlapping Rights

[447] 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.²²⁸

[448] Only one other Canadian jurisdiction has legislation that anticipates the possibility of overlapping rights.²²⁹ In Manitoba, only one spouse or partner can have homestead rights – which include consent to disposition and an automatic 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.²³⁰

[449] We considered whether there is a need for a legislated rule about overlapping rights. For consent to disposition, there are two possible approaches. One would be to require consent from only one spouse or partner, as in Manitoba. This approach would require a priority rule to determine which spouse or partner must consent.²³¹ The other option would be to require consent

²²⁷ In the context of intestate succession, see eg *Re Fricker Estate*, 2005 ABQB 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.

²²⁸ See *Adult Interdependent Relationships Act*, note 146, s 5(2).

²²⁹ Overlapping rights can only arise in the six jurisdictions that require consent to disposition from both spouses and common-law partners.

²³⁰ Manitoba Act, s 2.2:

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

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

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

²³¹ For example, consent might be required only from the spouse or partner in the earlier relationship, or from the spouse or partner who lived in the home most recently.

from both the spouse and the partner. For the life estate, it would be impractical to provide a life estate to two individuals. The most likely approach would be to provide a life estate to only one spouse or partner.

[450] There are other ways to address this issue. Elsewhere in this report we propose reforms that would significantly reduce the likelihood of overlapping rights. One is to limit the homes affected so a non-owner would only have rights in the home where they lived together with the owner. Another is to introduce a time limit, so a non-owner's rights would expire some time after the couple last lived together in the home or after separation. If these reforms were implemented, very few people would be affected by overlapping rights.

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

CHAPTER 11

Which Homes Should be Affected by Consent to Disposition?

A. Introduction

[452] This part discusses reforms specific to consent to disposition. This chapter recommends rules about defining the homes affected by consent to disposition. Chapter 12 makes recommendations to improve the process of obtaining consent to disposition. Chapter 13 is about the consequences for a disposition without consent. Chapter 14 is about specific issues that arise in the context of civil enforcement and bankruptcy.

B. Time Limits

1. BACKGROUND

[453] Under the *Dower Act*, land remains a homestead indefinitely. Consent to disposition is required until the owner sells or transfers it, the non-owner releases their dower rights, or the couple divorces.

[454] In Chapter 2, we described how problems tend to arise with separated couples. Some couples divide property informally and do not complete dower releases. Sometimes, even when there is an agreement or order about property division, a dower release is overlooked. We heard that real estate agents often require the non-owner to provide consent even if there is a dower release on title. It can be difficult to obtain a non-owner's consent years after separation, especially if they have moved far away or the spouses have lost contact.

[455] Sometimes a couple will move but keep their former home as a rental or investment property. Under the current rules a non-owner would have to consent to any disposition of the former home, no matter how long it has been since they moved out.

[456] The current rules go farther than necessary to protect a non-owner from losing their home. A non-owner who has lived elsewhere for many years will not

become homeless if the owner sells a home years after separation.²³² A non-owner will not become homeless if the owner sells a rental or investment property that used to be the couple's home. The focus should be on a home where a couple lives at the time of disposition.

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

2. CONSULTATION RESULTS

[458] In *Dower Act: Consent to Disposition*, Report for Discussion 36, we proposed that consent to disposition should be required while a couple lives together in a home and for a period of time afterwards. In other words, there would be a time limit. We suggested three years would be an appropriate time limit, measured from the time the spouses or partners last lived in the home together. Effectively, the requirement for consent to disposition would expire three years after a move or separation.

[459] The technical survey included a question about ALRI's proposals to redefine the property affected, including adding a time limit. The question included examples to illustrate the effect of the proposed reforms. The question mentioned a transition period but did not include all the details about our preliminary recommendation. The last part of the question read:

ALRI proposes changes that would reduce the number of homes affected so that none of these homes would be homesteads. ALRI proposes that the *Dower Act* should apply only to a home where the owner and their spouse or adult interdependent partner live or have lived together, and that it should apply only while the couple lives in the home and for a transition period after a move or separation.

²³² If the home is family property, a non-owner may have a claim to a share of the proceeds. That claim could be resolved under the *Family Property Act*.

Do you agree that the definition of homestead should be changed as ALRI proposes?

[460] Of those who answered this question, 75% agreed and 25% disagreed.

[461] Some respondents added comments about the time limit. We heard a variety of views about how long the transition period should be. Five respondents thought there should be no transition period. They said that consent to disposition should be required only while the couple is living together in a home or that it should not be required after separation. Eight respondents had the opposite view. They said consent to disposition should be required as long as a couple is legally married, even if one or both of them no longer live in the home. Some of them said that the home would be family property, suggesting consent to disposition is necessary to protect the non-owner's interest until property is divided. Others were concerned that an owner might use a transition period to get an unfair advantage, waiting out the transition period and then selling the home without the non-owner's consent.

[462] There were a handful of comments suggesting how long the transition period should be. We heard suggestions that it should be one, two, or five years after separation. One respondent said to be effective it would have to be "quite long". Another said that three years would not be long enough and asked why there should be any time limit.

[463] A few respondents mentioned problems with the current rules. In both early and general consultation, we heard anecdotes about trying to find non-owners who had been separated from the owner for many years. One respondent to the technical survey said requiring consent to disposition in these circumstances is "just ridiculous". Another said that requiring consent to disposition for a home where the non-owner has not lived for many years means extra cost and hassle for a client. They thought it would tend to reduce most people's regard for the justice system.

[464] We heard that real estate agents often require a non-owner to consent even when the non-owner has already signed and registered a dower release. One respondent said it was "ridiculous and cumbersome" to require consent in addition to a dower release.

[465] Some comments expressed general support for ALRI's proposals.

3. ALRI'S RECOMMENDATION

[466] Our final recommendation is the same as our preliminary recommendation. Consent to disposition should be required while a couple lives together in a home and for three years afterwards. The time limit would start to run when one or both of them move out.

[467] We have concluded a three year transition period is appropriate, even if some would prefer a longer or shorter one. On the one hand, a time limit should give a non-owner enough time to learn about their rights and decide whether to take action to protect their interest in the home. It should allow some time for negotiation, so couples are not pushed towards litigation. A year may not be enough. On the other hand, a time limit should be short enough to encourage parties to resolve their claims. A non-owner should not be able to prevent disposition indefinitely. Consent to disposition should bridge a gap from relationship breakdown to seeking a long-term remedy. Three years would give a non-owner enough time to decide whether to make an application for exclusive possession or make claim for property division and file a certificate of lis pendens. It is not feasible to make the time limits identical to those for making a property division claim under the *Family Property Act* but a time limit of three years would be close in most cases.²³³ A time limit of three years also corresponds to the time required in most cases for a couple to become adult interdependent partners by living together.²³⁴ Using a three year time limit would avoid overlapping claims.

[468] The time limit should be the same for spouses and adult interdependent partners. It should not be cut short even if the couple divorces or becomes former adult interdependent partners.²³⁵

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

²³³ *Family Property Act*, ss 6–6.1. One reason that it is not feasible to use the same time limits is that spouses can restart the time limit under the *Family Property Act* by applying for divorce.

²³⁴ *Adult Interdependent Relationships Act*, note 146, s 3(1)(a)(i).

²³⁵ Compared to a marriage, an adult interdependent relationship can end very quickly. Spouses remain legally married until a divorce is finalized. In most cases, spouses must be separated for a year before they can obtain a divorce and it often takes longer to finalize the divorce. Adult interdependent relationships usually end after a year of separation and can end more suddenly. For example, a relationship ends immediately if one of the partners marries a third party: *Adult Interdependent Relationships Act*, note 146, s 10(1).

RECOMMENDATION 16

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.

C. Property Owned By Someone Other Than an Individual

[470] Under the current rules, consent to disposition is only required if the home is owned by an individual. Land is not a homestead and consent to disposition is not required if a third party is a joint tenant or tenant in common.²³⁶ Similarly, land is not a homestead if it is owned by a corporation so consent to disposition is not required.²³⁷

1. CO-OWNERS

a. Background

[471] In both early and general consultation, we heard about scenarios where one spouse or partner co-owns property with a third person. There are various reasons. Some examples are a parent who owns a home adding their child as a joint tenant as part of an estate planning arrangement, relatives or friends pooling their money to buy a home together, or former spouses or partners remaining co-owners of a home while a family property claim is resolved. Sometimes we heard suggestions that the co-ownership can be part of a plan to keep the non-owner from having rights in the property. For example, we heard about parents contributing money to buy a house for a child and the child's spouse, with a condition that the parents are put on title with their child. Some respondents suspected that parents might insist on this arrangement to discourage a family property claim or to prevent the spouse from exercising dower rights.

[472] The exclusion of co-owned property seems to be unique to Alberta. Many other Canadian jurisdictions have fairly broad language that does not exclude co-

²³⁶ *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.

²³⁷ 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 57, s 27(1).

owned property. For example, in Ontario consent to disposition is required for “[e]very property in which a person has an interest ...” and where the spouses lived together.²³⁸

b. Consultation results

[473] In *Dower Act: Consent to Disposition*, Report for Discussion 36, we proposed requiring consent to disposition if a spouse or partner disposes of their interest in the couple’s home, even a third party is a co-owner. The preliminary recommendation was:

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

[474] The technical survey invited comments about this issue along with several others. The question read:

ALRI is seeking feedback on some specific issues before making proposals for reform. Those issues include:

- How could forms or procedures be improved?
- Should the *Dower Act* apply to a home that one spouse or partner co-owns with a third party?
- Should the *Dower Act* apply if a couple lives in a home owned by a closely held corporation?
- Would it be helpful to have legislation about registering and discharging caveats based on dower rights?
- Should legislation include guidance on how to value a life estate?

ALRI’s two Reports for Discussion, *Dower Act: Consent to Disposition*, Report for Discussion 36; *Dower Act: Life Estate*, Report for Discussion 37 have more details about these issues.

Do you have any comments about these issues?

²³⁸ Ontario Act, s 18(1). See also Ontario Act, s 21(1):

21(1) No spouse shall dispose of or encumber an interest in a matrimonial home unless,
(a) The other spouse joins in or consent to the transaction;

...

[emphasis added]

See also New Brunswick Act, note 161, s 19(1); Nova Scotia Act, note 161, ss 3(1), 8(1); PEI Act, note 161, ss 19(1), 22(1); Yukon Act, note 161, ss 21(1), 23(1); NWT Act, note 154, ss 50(1), 53(1); Nunavut Act, note 154, ss 50(1), 53(1).

[475] There were 29 comments about co-owners. Of those, 9 were in favour of having the *Dower Act* apply to a home that one spouse or partner co-owns with a third party, 16 were opposed, and the remaining comments were ambivalent or hard to interpret.

[476] Only a few respondents gave reasons for their answer. One respondent in favour of ALRI's proposal said parents or family members of one spouse or partner are often co-owners to protect property against claims by the other spouse or partner. Some of those opposed said the change would add to the administrative burden or it would be unfair to third party co-owners.

c. ALRI's recommendation

[477] We have concluded that consent to disposition should be required whenever a spouse or partner disposes of their interest in the couple's home, even if a third party is a co-owner. We considered all the comments we received. There are good arguments on both sides. In our view, this recommendation strikes a balance. It closes a gap in protection, so non-owners cannot easily be shut out of decisions about their home. It is consistent with our guiding principle that the law should protect non-owners from losing their homes unexpectedly due to the actions of their spouse or partner. At the same time, this approach would have minimal effect on third parties and should not interfere with legitimate planning.

[478] It is worth mentioning that many respondents who handle real estate transactions told us couples generally agree about dispositions. We heard it is very rare for a non-owner to refuse consent. We do not expect this change will block or delay many transactions. It is reasonable to assume that non-owners will usually consent. It should not be a significant additional burden to have the non-owner sign the consent in front of a witness.

[479] This rule would apply if the spouse or partner and the other co-owners were joint tenants or tenants in common. To clarify, consent would be required if all the co-owners made a disposition of the home, like mortgaging it or selling it to someone else. Consent would be required if the spouse or partner disposed of their interest, like selling their share to the other co-owners. If the third party co-owner only disposed of their interest consent would not be required. For example, if the co-owners were tenants in common the third party could sell their share to someone else without the non-owner's consent. It should be remembered our other recommendations would mean that a non-owner's

consent would only be required if the couple live or had lived in the property together.

[480] This preliminary recommendation would not affect the right of survivorship for joint tenants. If a spouse or partner were a joint tenant with a third party, and the spouse or partner died, the surviving joint tenant would become the sole owner of the property. The change in ownership would occur automatically by operation of law. It is not a disposition as defined in the *Dower Act* or our recommendations for new legislation.²³⁹

RECOMMENDATION 17

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

2. PROPERTY OWNED BY A CORPORATION

a. Background

[481] Some couples live in homes owned by closely held corporations.²⁴⁰ In both early and general consultation we heard that this arrangement is common among farmers or ranchers. It may occasionally occur in urban areas. Consent to disposition is not required if a corporation owns a home. If one spouse or partner controls the corporation that owns the couple's home, they could cause the corporation to sell the home, mortgage it, or make any other disposition unilaterally.

[482] Eight Canadian jurisdictions have legislation that requires consent to disposition if a couple's home is owned by a corporation.²⁴¹ The provision in Ontario's *Family Law Act* is a representative example. Under that legislation, a matrimonial home is one "in which a person has an interest" and where that

²³⁹ *Dower Act*, s 1(b).

²⁴⁰ This discussion is specifically about corporations because, as a legal person, a corporation can be the registered owner of land. The *Land Titles Act* lists the types of corporations that may be the registered owner of land: *Land Titles Act*, note 57, s 27(1). The Land Titles Office checks to ensure that any corporation acquiring or claiming an interest in land is one of the listed types and that it is registered in Alberta: Alberta, Ministry of Service Alberta, *Land Titles Procedures Manual*, Procedure COR-1 (Edmonton: Ministry of Service Alberta, 2021), online: <www.servicealberta.ca/pdf/ltmanual/COR-1.pdf> [perma.cc/6S2F-2Y2X]. Other entities, like partnerships or trusts, cannot be the registered owner of land.

²⁴¹ Ontario Act, s 18(2); New Brunswick Act, note 161, s 17; Nova Scotia Act, note 161, s 3(3); PEI Act, note 163, s 19(2); Newfoundland Act, s 6(3); Yukon Act, note 161, s 21(4); NWT Act, note 154, s 50(2); Nunavut Act, note 154, s 50(2).

person lived together with their spouse.²⁴² The next section says a matrimonial home may include one owned by a corporation:²⁴³

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

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

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

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

[486] The only practical way to check whether a property owned by a corporation is a couple's home would be to have the corporate representative make a statement. As with any system that relies on self-reporting, it would be possible to circumvent the requirement by making an incorrect statement.

[487] Consent to disposition would not provide complete protection for a spouse or partner who lives in a home owned by a corporation. A shareholder in the corporation could sell or transfer the shares. It would be difficult to implement a rule requiring consent to disposition of shares. It would be impossible for the Land Titles Office to check for compliance, as ownership of shares is not reflected on a certificate of title. It would require establishing an entirely new system to ensure compliance, which is not desirable or feasible.

²⁴² Ontario Act, s 18(1).

²⁴³ Ontario Act, s 18(2). This provision may have been intended to apply to properties with several homes built on unsubdivided land. There are examples of such properties where a corporation owns the land and homeowners own shares of the corporation. For some examples from British Columbia, see Jason Proctor, "Billionaire's association with luxury B.C. mansion highlights property tax loophole", CBC News (12 May 2022), online: <www.cbc.ca/news/canada/british-columbia/property-tax-billionaire-ownership-loopholes-1.6435925> [perma.cc/T5YV-9F8T].

b. Consultation results

[488] ALRI did not make a preliminary recommendation on whether consent to disposition should be required for a home owned by a closely held corporation.

[489] The technical survey invited comments about this issue along with several others.²⁴⁴

[490] There were 31 comments on this issue. They were nearly evenly split, with 14 in favour of having the *Dower Act* apply to a home owned by a closely held corporation and 13 opposed. The remaining comments were unclear.

[491] Only a few respondents gave reasons. Those in favour were most likely to mention protection for spouses or partners living in the home. One respondent specifically raised protection for a spouse or partner living on a farm, saying many farmers own land through a corporation. A detailed comment from a family lawyer pointed out that other remedies, like certificates of *lis pendens* and preservation orders, are not available or are ineffective when a couple lives in a home owned by a corporation. The lawyer said requiring consent to disposition would be a minimally intrusive compromise to protect the non-owner. Those opposed said it would add to the administrative burden and it would be undesirable to affect the rights of a separate legal person.

c. ALRI's recommendation

[492] We considered all comments. There are good arguments on both sides of this issue but ultimately our guiding principle tips the balance. The law should protect non-owners from losing their homes unexpectedly due to the actions of their spouse or partner. It should not matter whether the spouse or partner owns the home as an individual or through a closely held corporation.

[493] We are not making recommendations about defining a closely held corporation in new legislation. There are examples of other legislation that applies when a person controls a corporation, which show some possible approaches.²⁴⁵ The rules should focus on corporations controlled by an individual primarily for their own benefit. The rules should not be so broad that they would affect a director or officer of an entity like a housing cooperative. The exact wording would be a drafting decision.

²⁴⁴ See paragraph [474] for a reproduction of the full question.

²⁴⁵ See eg *Conflicts of Interest Act*, RSA 2000, c C-23, s 1(5); *Federal Child Support Guidelines*, SOR 97-175, ss 18, 21(1)(f).

[494] This change would also require changes to forms. When making a disposition, a corporate representative would have to make a statement about whether the property was or was not a couple's home. In the next chapter we suggest some improvements to forms.

[495] Our recommendation would only affect dispositions of interests in land. It would not affect sales, transfers, or other dispositions of shares in a corporation. It would not affect a person disposing of a share in a housing cooperative, for example.

RECOMMENDATION 18

If spouses or adult interdependent partners live together in a home owned by a closely held corporation controlled by one of the spouses or partners, consent to disposition should be required for any disposition of the corporation's interest in the home.

CHAPTER 12

How Can Procedures for Obtaining Consent to Disposition Be Improved?

A. Introduction

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

B. Which Dispositions Should Require Consent?

1. BACKGROUND

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

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

[498] The purpose of consent to disposition is to protect non-owners from losing their homes unexpectedly due to the actions of their spouse or partner. This list is generally appropriate for that purpose. It includes all the kinds of transactions that might deprive a spouse or partner of their home.

[499] There is one thing that is out of place. A devise or disposition made by will is not an act inter vivos and, in any case, the life estate would defer any disposition by will.

[500] British Columbia, Saskatchewan, and Manitoba have comparable definitions of disposition, although the details vary.²⁴⁶

2. CONSULTATION RESULTS

[501] *Dower Act: Consent to Disposition*, Report for Discussion 36 briefly reviewed the definition. We determined that the list was generally appropriate, with the exception of a devise or disposition by will. The surveys did not specifically mention the definition or seek input on it.

[502] The definition of disposition came up once in consultation, at a meeting with a stakeholder organization. The discussion was about whether there would be ways to reduce the burden of consent to disposition by requiring consent for fewer transactions. One idea was to narrow the definition of disposition.

3. ALRI'S RECOMMENDATIONS

[503] We have concluded that narrowing the definition of disposition would undermine protection for the non-owner. Some dispositions, like sales or transfers, mean the non-owner will lose their home immediately. Others, like mortgages or encumbrances, can result in the non-owner losing their home in the future. In either case, the non-owner deserves an opportunity to consent or withhold consent.

[504] ALRI recommends that the definition remain much the same as it is now, although it should not include a disposition by will.

RECOMMENDATION 19

Consent to disposition should be required for any disposition that could result in the spouse or adult interdependent partner of the homeowner losing their home.

²⁴⁶ BC Act, s 1 “disposition”; Saskatchewan Act, s 2(b); Manitoba Act, s 1 “disposition”.

RECOMMENDATION 20

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

C. What Information or Advice Should Non-owners Receive When Providing Consent or Making a Release of Dower Rights?

1. BACKGROUND

[505] In early consultation we heard concerns that non-owners may sign dower consents without understanding their rights. A non-owner must meet separately with a witness to sign the consent and make the acknowledgment but the witness does not need to be a lawyer or independent.²⁴⁷ In fact, the witness is often someone acting for another party in the transaction. The non-owner may not receive any information beyond the basic information in the certificate of acknowledgment. A witness who is neither a lawyer nor independent cannot provide independent legal advice.

[506] There is a discrepancy between the requirements for a disposition and those for a release of dower rights. To consent to a disposition, a non-owner must meet with a witness. To make a release of dower rights, they must meet with an independent lawyer.²⁴⁸ Yet both a disposition and a release can extinguish a non-owner's dower rights. If the disposition is a transfer, the effect is permanent. In contrast, a release can be revoked.²⁴⁹

[507] There are similar requirements for other agreements where a spouse or partner agrees to give up property. For example, an agreement about family property is only enforceable if each spouse or partner has met separately with an independent lawyer.²⁵⁰

²⁴⁷ The witness must be "a person authorized to take proof of the execution of instruments under the *Land Titles Act*": *Dower Act*, s 5(2). The *Land Titles Act* includes rules about who may witness an instrument and who may commission an affidavit: see *Land Titles Act*, note 57, ss 155-59.

²⁴⁸ *Dower Act*, s 7(3).

²⁴⁹ *Dower Act*, ss 3(2), 8.

²⁵⁰ *Family Property Act*, s 38. The person must acknowledge:

38(1) ...

(a) that the party is aware of the nature and the effect of the agreement,

(b) that the party is aware of the possible future claims to property the party may have under this Act and that the party intends to give up these claims to the extent necessary to give effect to the agreement, and

Continued

[508] There was a previous move to change the requirements. In 2013 the Legislature passed amendments to the *Dower Act* that would have required a non-owner to make the acknowledgment before a lawyer other than the lawyer acting for the owner.²⁵¹ The amendments were not proclaimed into force.

2. CONSULTATION RESULTS

[509] One of ALRI's preliminary recommendations was that a non-owner should have to meet separately with an independent lawyer when signing either a consent or a release of dower rights. Preliminary recommendation 14 in *Dower Act: Consent to Disposition*, Report for Discussion 36 was:

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

[510] The technical survey included a question about this preliminary recommendation. It asked:

Do you agree that a spouse or adult interdependent partner should have to meet with an independent lawyer to consent to a disposition or to make a release of dower rights?

[511] Feedback was mixed. Of the 258 respondents to the technical survey, 191 answered this question and 67 skipped it. Among those who answered the question, a slight majority – 56% – agreed that a spouse or partner should have to meet with an independent lawyer. The remaining 44% disagreed.

[512] Many respondents provided comments on this issue. Several themes emerged.

a. Difficulty giving or getting appropriate advice

[513] It was clear that many respondents believe non-owners deserve to understand the nature of a transaction and their rights before giving consent. As one respondent wrote, "If the spouse doesn't know their rights it's a very dangerous thing to have them sign them away so easily." It is likely that most

(c) that the party is executing the agreement freely and voluntarily without any compulsion on the part of the other party.

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

²⁵¹ *Statutes Amendment Act, 2013 (No 2)*, SA 2013, c 23, s 5.

non-owners will need information or advice. Some respondents to the technical survey said that non-owners rarely know or understand their rights under the *Dower Act*. There was some evidence for this point in the general survey, where a couple respondents said they learned about dower rights from taking the survey.

[514] Both the public and professionals were concerned about a lack of appropriate information or advice for non-owners.

[515] A few members of the public said they received inadequate information about the nature of a disposition or about their rights. Some suggested that a witness acting for another party in the transaction may be more interested in concluding the transaction than in ensuring that the non-owner is fully informed. In that situation, non-owners may be rushed or pressured to give consent.

[516] Some real estate agents and brokers said that they are not equipped to provide appropriate information or advice. Several said real estate professionals should not act as witness. They would prefer to have a lawyer involved.

b. Screening for abuse or coercion

[517] Another theme was about abuse and coercion. Some respondents to the technical survey mentioned the possibility that a non-owner could be pressured to consent to a disposition. About a dozen thought that a separate meeting with an independent lawyer would help ensure that consent was not given under duress.

[518] We also heard that an independent lawyer may have a role in assisting individuals experiencing domestic violence or coercive control. If a non-owner says they are giving consent under duress or the lawyer recognizes signs of domestic violence, the lawyer can help connect the non-owner to appropriate supports. We heard that a “warm handoff” can be particularly effective. A warm handoff is where a lawyer or other service provider directly introduces their client to a new service provider.

c. Inconvenience and cost

[519] Some respondents to the technical survey said a meeting with an independent lawyer would be an additional burden, would be inconvenient, and would slow down real estate transactions. Some were concerned about delay because it would take time to arrange a meeting with a lawyer.

[520] Cost came up in many comments. Nearly 20 respondents to the technical survey mentioned additional cost as a reason not to require a meeting with an independent lawyer.

[521] We also heard a concern about access to lawyers, especially in small communities or rural areas. This proposal would require three lawyers for some real estate transactions: one acting for the seller, a second acting for the buyer, and a third to meet with the non-owner. Many communities do not have three independent lawyers. At least one party would have to find a lawyer somewhere else. Videoconferencing may make it easier to meet remotely but it is not perfect. One respondent was concerned that it could be harder for a lawyer to detect coercion when meeting remotely with a non-owner. It can be harder to read body language on a screen. Also, a lawyer cannot always confirm that the meeting is completely private. The owner might be nearby even if they are not visible on screen.

[522] Many of the respondents who mentioned these drawbacks also thought that a meeting with an independent lawyer was unnecessary. Several respondents said that, in their experience, the vast majority of couples agree on dispositions. We heard concerns that the additional hassle and costs would outweigh any potential benefits.

3. ARE THERE OTHER OPTIONS?

[523] We considered whether there was another way to offer a non-owner appropriate information and advice without a disproportionate burden.

a. Release of dower rights

[524] Having a non-owner sign more than one consent related to a sale is clearly burdensome. It would be preferable if a non-owner could receive advice and then consent once to all the dispositions involved in a sale.

[525] In theory, a release of dower rights could be used this way. Under the *Dower Act*, a non-owner must meet with an independent lawyer to make a release of dower rights. Once the release is registered at the Land Titles Office, the land is no longer a homestead. The owner could complete all the other steps in the transaction unilaterally: entering a listing agreement, entering an agreement to sell the home, and completing the closing documents.

[526] We learned in consultation that releases of dower rights are not as useful as they should be. Real estate agents usually require a non-owner to consent to a

listing agreement or sale even if the non-owner has already made a release. A couple respondents to the technical survey expressed frustration that releases are unhelpful.

[527] We heard that real estate agents follow this practice because a non-owner may revoke a release at any time. The problem might be avoided if releases were irrevocable, either permanently or for a period of time, but that would cause other problems. A non-owner might have good reasons for revoking a release. For example, they might make a release to facilitate a specific transaction. Once that transaction is complete or has fallen through, they would want to reclaim their ability to withhold consent to future transactions. A non-owner might also want to revoke a release if they felt coerced to make it, if after making a release they suspect an owner is dissipating family property, or because their circumstances have changed.

[528] As long as real estate agents require consent whether or not there is a release on title, releases are not a practical way to reduce the burden. This practice already exceeds the requirements of the *Dower Act*. It is unlikely that new legislation would make a difference.

b. Other ideas

[529] Another way to reduce the burden would be to require consent for fewer transactions, perhaps by narrowing the definition of disposition. We heard something similar from a respondent to the technical survey, who suggested that a meeting with an independent lawyer should be required for a transfer but not for a mortgage. The difficulty with this approach is that it would undermine protection for the non-owner. The dispositions requiring consent are those that can result in a non-owner losing their home, whether immediately or in the future. Whenever there is a risk of losing their home, the non-owner would benefit from appropriate information and advice.

[530] We also considered whether it would be possible to reduce the number of times a non-owner must meet with an independent lawyer. For example, would it be possible to introduce a system requiring a non-owner to meet with an independent lawyer only once, no matter how many dispositions may follow? We determined this idea was not feasible. A non-owner should have information about the specific disposition they are being asked to consent to. It would not be practical or cost-effective for a lawyer to advise them about other dispositions that could occur in the future.

4. ALRI'S RECOMMENDATION

[531] We have reconsidered our preliminary recommendation. Despite the support for a meeting with an independent lawyer, we have concluded the costs outweigh the benefits.

[532] Our final recommendation is to retain the current rule: a non-owner should have to meet separately with a witness when giving consent to disposition. The witness does not need to be a lawyer. It is a good idea for a non-owner to meet with a lawyer if possible, but it should not be mandatory.

[533] Our main concern is the cost and inconvenience. One separate meeting with an independent lawyer may be reasonable, but the burden would increase when there are multiple dispositions. A typical real estate transaction involves two dispositions, with the non-owner required to consent to the listing agreement and the transfer of land. There are other dispositions requiring consent, like mortgages, other encumbrances, or long-term leases. Some owners will mortgage or encumber a home multiple times.²⁵² Some, especially in rural areas, may grant surface leases or long-term leases of agricultural land. The more dispositions an owner makes, the greater the burden.

[534] We are not convinced that a meeting with a lawyer is the only or best way to protect against duress. Ideally, a lawyer would recognize the signs of coercion and know how to help. Unfortunately, not all lawyers have appropriate training or resources to do so. Training and resources are available but tend to be designed for lawyers who practice family law.

[535] A separate meeting with a witness is not perfect but it offers some protection to a non-owner with minimal inconvenience.

[536] We recognize that some non-owners need advice. We also recognize that witnesses are concerned about being asked to provide information or advice that is outside their expertise. A witness can recommend that a non-owner seek legal advice. Below, we suggest some changes to forms and procedures that might help non-owners and witnesses recognize when to seek legal advice.

²⁵² See eg *VirtualLEDGER Inc v Neilson*, 2021 ABQB 458, where the owner had several mortgages and encumbrances registered against a homestead.

RECOMMENDATION 21

A spouse or adult interdependent partner should have to meet separately with a witness when giving consent to disposition.

5. REQUIREMENTS FOR MAKING RELEASE OF DOWER RIGHTS

[537] While releases of dower rights are not as useful as they should be, it makes sense to have a way for a non-owner to opt-out. A release of dower rights can complement a separation agreement or order dividing family property. If one former spouse or partner keeps the family home, it can be useful to have a way to declare that the land is no longer a homestead. We recommend that there should be a way for a non-owner to give up their dower rights in a property and have the release registered on title.

[538] Under the current rules, it is more onerous to make a release of dower rights than it is to give consent to a disposition. To make a release of dower rights, a non-owner must meet separately with an independent lawyer to sign the release. There will usually be some cost and inconvenience.

[539] It does not make sense that it is harder to make a release of dower rights than to give consent, especially because a dower release can be revoked.

[540] ALRI recommends that the requirements for making a dower release should be the same as those for giving consent to disposition: a non-owner should have to meet separately with a witness.

RECOMMENDATION 22

A spouse or adult interdependent partner should have to meet separately with a witness when making a release of dower rights.

D. Caveats

1. BACKGROUND

[541] A non-owner spouse may register a caveat on title to a property, giving notice that they claim dower rights.²⁵³ Once registered with the Land Titles

²⁵³ Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure CAV-1 (Edmonton: Ministry of Service Alberta, 2021), online: <www.servicealberta.ca/pdf/ltmanual/CAV-1.pdf> [perma.cc/JL3D-CQJS]; see also *Schwormstede v Green Drop Ltd* (1994), 155 AR 302, 1994 ABCA 259 (CanLII).

Office, a caveat has priority over any disposition or claim registered afterwards. Although this option is available, it seems it is rarely used in Alberta.

[542] Many other Canadian jurisdictions have some form of optional registration.²⁵⁴ Once registered with the land titles office, the title will show that the land is a homestead or matrimonial home. It is difficult to know how often spouses or partners register their interest but it is likely that only a small minority do so.²⁵⁵

[543] An optional registration system can be useful. It can help a non-owner protect their home. If a non-owner registers their interest, it may prevent an owner from circumventing the requirement for consent. The registration would refute an incorrect affidavit.

[544] A registration system should have clear procedures for registering an interest and for removing interests that should not have been filed or that have become outdated. For example, there should be a straightforward way for an owner to have a caveat removed after a relationship has ended and the time limit has expired. Alberta has procedures for registering and removing caveats but they are not specific to the *Dower Act*.²⁵⁶ In contrast, the statutes in Saskatchewan and Manitoba both describe how a non-owner may register their interest with the land titles office and how registrations may be removed.²⁵⁷

2. CONSULTATION RESULTS

[545] ALRI did not make any preliminary recommendations about caveats. In *Dower Act: Consent to Disposition*, Report for Discussion 36, we asked if reform was needed.

²⁵⁴ See eg Saskatchewan Act, s 14; Manitoba Act, s 19; Ontario Act, s 20. In British Columbia, consent to disposition is required only if a spouse or partner registers their interest with the land titles office: BC Act, ss 1 “homestead”, 2-3.

²⁵⁵ Teranet Manitoba, which administers Manitoba’s land titles office, provided us with some statistics about registration of homestead notices in Manitoba. There were 239 notices registered in a three-year period: email from Senior District Registrar, Teranet Manitoba to ALRI student (10 May 2021).

²⁵⁶ See Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure CAV-1 (Edmonton: Ministry of Service Alberta, 2021), online: <www.servicealberta.ca/pdf/ltmanual/CAV-1.pdf> [perma.cc/JL3D-CQJS]; Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure CAV-2 (Edmonton: Ministry of Service Alberta, 2021), online: <www.servicealberta.ca/pdf/ltmanual/CAV-2.pdf> [perma.cc/RH63-GG5C].

²⁵⁷ Saskatchewan Act, ss 14-17; Manitoba Act, ss 19-20.

[546] On the technical survey, we invited comments on several issues. One was whether it would be helpful to have legislation about registering and discharging caveats based on dower rights. That part of the question read:²⁵⁸

Would it be helpful to have legislation about registering and discharging caveats based on dower rights?

[547] We received only a few comments about caveats. Most said it would be helpful to have legislation about registering and discharging caveats. Of 14 comments, 9 were in favour. A few were ambivalent or proposed something different. Two respondents seemed to be in favour of a system where dower rights would apply only if the spouse or partner registered their interest on title. One said dower rights should apply only if the couple had an agreement and the agreement should state whether the non-owner could register a caveat.

[548] A few respondents mentioned a related issue, about the difficulty of finding out whether an owner has a spouse or partner whose consent would be required. Some said it would be easier if a spouse or partner's interest were always registered on title.

3. ALRI'S RECOMMENDATIONS

[549] Whenever possible, it would be helpful to have a caveat or notice on title showing that land is a couple's home and that there is a non-owner who must consent to any disposition. It would improve protection for a non-owner. Professionals involved in dispositions often check the title. If the non-owner had registered their interest on title, professionals would know to seek consent. It would prevent an owner from making a disposition without consent by falsely stating that the land is not a homestead.

[550] Nonetheless, registration should be optional. Only one Canadian jurisdiction requires a spouse or partner to register their interest to benefit from protection.²⁵⁹ In our view, a non-owner's rights should not depend on registration. One of ALRI's guiding principles for this project is that the law should protect the most vulnerable. Registration is most likely to benefit those who are sophisticated and have access to legal advice or legal services. A system that required registration would probably fail to protect those most in need of protection.

²⁵⁸ The whole question is reproduced at paragraph [474].

²⁵⁹ BC Act, ss 1-3.

[551] It would be helpful to have a statement in legislation that a non-owner may register a caveat. The *Dower Act* mentions caveats only as a way to revoke a release of dower rights. One has to look closely in the Land Titles Procedure Manual to find out about registering a caveat claiming dower rights.²⁶⁰

[552] It would also be helpful to have clear procedures about discharging or vacating caveats.

[553] A person who registered a caveat can voluntarily withdraw it. It would also be helpful to have a procedure for removing a caveat if the non-owner makes a release of dower rights.

[554] There should be a straightforward way to remove a caveat that is no longer appropriate. If a non-owner dies, or once the time limit expires after a move or separation, an owner should be able to have the caveat removed without undue difficulty. Manitoba's *Homesteads Act* has some useful examples. In Manitoba, a non-owner may register a homestead notice on title.²⁶¹ The notice can be removed "on the filing of proof, satisfactory to the district registrar" that the non-owner has died or the couple is divorced.²⁶² There should be a similar

²⁶⁰ Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure CAV-1 (Edmonton: Ministry of Service Alberta, 2021), online: <www.servicealberta.ca/pdf/ltmanual/CAV-1.pdf> [perma.cc/JL3D-CQJS].

²⁶¹ Manitoba Act, s 19.

²⁶² Manitoba Act, s 20(2)(d), (f). For ease of reference, section 20 reads:

20(1) A homestead notice may be discharged by the registration in the appropriate land titles office of a discharge in the form approved under The Real Property Act.

20(2) A homestead notice shall be vacated by the district registrar

- (a) on the registration of a consent by the owner's spouse or common-law partner to a disposition that disposes of all of the owner's interest in the entire homestead;
- (b) on the registration of a consent by the spouse or common-law partner to a change of the homestead;
- (c) on the registration of a release by the spouse or common-law partner, in favour of the owner, of the spouse's or common-law partner's rights in respect of the homestead;
- (d) on the filing of proof, satisfactory to the district registrar, of the death of the spouse or common-law partner;
- (e) on the filing of an order of the court under section 10 dispensing with the consent of the spouse or common-law partner to a disposition of the homestead;
- (e.1) on the filing of an order of the court under subsection 10(1.1) terminating the homestead rights of the common-law partner;
- (f) on the filing of proof, satisfactory to the district registrar, that the spouses are divorced;
- (f.1) on the filing of proof, satisfactory to the district registrar, that a dissolution of the common-law relationship has been registered under section 13.2 of The Vital Statistics Act; or
- (g) on registration of a transfer or conveyance to complete a sale of the homestead by a disposition to which the spouse or common-law partner has consented.

20(3) Notwithstanding that a homestead notice has been registered, if

- (a) the owner's spouse or common-law partner has consented to a disposition of the homestead that does not dispose of all of the owner's interest in the entire homestead; or
- (b) the court has made an order under section 10 dispensing with the consent of the spouse or common-law partner to a disposition of the homestead that does not dispose of all of the owner's interest in the entire homestead;

Continued

process in Alberta, whether it is described in a statute, regulations, or the land titles procedure manual.

[555] There should also be procedures for removing caveats when someone else becomes the owner of the home. For example, a caveat should be removed when the home is sold or transferred with the non-owner's consent or if the owner was a joint tenant with a third party who becomes the owner by right of survivorship when the owner dies.

[556] On occasion, a non-owner or a person claiming to be a non-owner might register an untrue or questionable caveat. A person could claim to be an adult interdependent partner or to have lived in a home. These claims can be difficult to prove or disprove. They cannot be confirmed with documents alone. It would not be feasible for the Land Titles Office to investigate the truth of such claims before registering a caveat so it is inevitable that some caveats will be registered wrongfully. There are already ways to deal with this problem. An owner will receive a notice of any caveat registered on their title and can take action to have it lapsed or discharged.²⁶³ A person who wrongfully registers a caveat may be required to compensate the owner for any damage.²⁶⁴ If an owner intends to make a disposition, they might instead apply for an order dispensing with consent.

RECOMMENDATION 23

Legislation should state that a spouse or adult interdependent partner of a homeowner may register a caveat stating their interest in a home.

RECOMMENDATION 24

There should be clear procedures for removing a caveat registered by the spouse or adult interdependent partner of a homeowner.

the district registrar may complete registration of the disposition free of the homestead notice, but the notice is not thereby vacated or made ineffective in respect of any legal or equitable title or interest of the owner in the homestead that is not affected by the disposition.

See also BC Act, s 11; *The Land Titles Regulations*, 2001, RRS c L-5.1, Reg 1, s 49.

²⁶³ *Land Titles Act*, note 57, ss 134, 138, 141; Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure CAV-2 (Edmonton: Ministry of Service Alberta, 2021), online: <www.servicealberta.ca/pdf/ltmanual/CAV-2.pdf> [perma.cc/RH63-GG5C]. One option is to serve the caveator with notice to take proceedings. If the caveator does not begin court proceedings to prove their claim within 60 days, the caveat lapses. The other option is to make an application to discharge the caveat.

²⁶⁴ *Land Titles Act*, note 57, s 144.

E. How Else Could Reform Reduce Inefficiencies and Improve Protections?

1. TRANSFERS BETWEEN SPOUSES OR PARTNERS

a. Background

[557] Sometimes a non-owner is asked to consent to a disposition that is for their benefit, such as becoming a joint tenant with the owner. Consent to disposition is not required in these circumstances but it is easy to overlook the exception.²⁶⁵

[558] There is no reason why a non-owner should have to consent to a transfer to themselves. Such a requirement would not protect anyone.

[559] This issue is a relatively simple one to correct, by clearly stating an exception to the statute and forms. There are models in other Canadian jurisdictions. For example, Saskatchewan's *The Homesteads Act, 1989* requires consent for a disposition "to a person other than the non-owning spouse" and the required form of dower affidavit has an option for the owner to state "My spouse ... is the transferee ... named in this disposition."²⁶⁶ If the owner makes this statement, the spouse or partner does not need to consent to the transaction.

b. Consultation results

[560] In *Dower Act: Consent to Disposition*, Report for Discussion 36, ALRI recommended clearly stating the exception. Consent to disposition should not be required when a homeowner makes a disposition in favour of their spouse or adult interdependent partner.

[561] We received very few comments about this proposal. Two respondents opposed it although their reasons were not clear. One was in favour. One lawyer said they do not ask the non-owner for consent in this circumstance. They submit an affidavit to show that the transfer is for the non-owner's benefit to the Land Titles Office instead of submitting consent and certificate of acknowledgment.

²⁶⁵ See *Scott v Cresswell* (1975), 56 DLR (3d) 268 (Alta CA) at 296. The Land Titles Procedures Manual mentions this exception but the standard forms do not reflect it: see Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure DOW-1 (Edmonton: Ministry of Service Alberta, 2021), online: <www.servicealberta.ca/pdf/ltmanual/DOW-1.pdf> [perma.cc/42XJ-2AJZ]

²⁶⁶ Saskatchewan Act, s 5(1); *The Homesteads Forms Regulations*, RRS c H-5.1, Reg 1, Form D.

c. ALRI's recommendation

[562] Our final recommendation is the same as our preliminary recommendation. Legislation and forms should clearly state that a non-owner does not need to consent to a disposition for their benefit.

RECOMMENDATION 25

Legislation should state that consent to disposition is not required when a homeowner makes a disposition in favour of their spouse or adult interdependent partner.

2. CAPACITY

a. Background

[563] If a non-owner does not have capacity to consent to a disposition, the owner must make an application to dispense with consent.²⁶⁷ In early consultation, some respondents told us this requirement was unnecessarily burdensome. They thought an attorney under an enduring power of attorney should be able to consent, even if the attorney is the owner.

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

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

²⁶⁷ *Dower Act*, s 10(1)(f). In some cases, a substitute decision maker may be able to consent on behalf of the spouse who lacks capacity but the conditions are narrow. A trustee under the *Adult Guardianship and Trusteeship Act* may consent to the disposition of the homestead but only if the trusteeship order specifically grants the trustee authority to do so: *Adult Guardianship and Trusteeship Regulation*, Alta Reg 219/2009, s 13(2). If the Public Trustee acts as trustee, it appears that they may consent on behalf of the non-owner spouse: see *Dower Act*, s 10(1)(f)(ii); *Public Trustee Act*, SA 2004, c P-44.1, s 25(1):

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

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

[566] Saskatchewan and Manitoba both have legislation addressing this issue. In Saskatchewan, an attorney may not give consent on behalf of a spouse or partner.²⁶⁸ In Manitoba, an attorney may give consent in certain narrow conditions. Among others, the power of attorney must specifically authorize the attorney to consent to a disposition of the homestead and the owner cannot be the attorney.²⁶⁹

[567] The Law Reform Commission of Saskatchewan recently considered this rule.²⁷⁰ It concluded that an attorney should be able to consent to a disposition, even if the owner is the attorney. It suggested only one limit: an owner should only be able to consent on behalf of the non-owner if the non-owner does not have capacity to consent. It recommended that an owner should have to make an affidavit stating the non-owner lacks capacity. These recommendations have not been implemented.

b. Consultation results

[568] Our preliminary recommendations were to follow the recommendations of the Law Reform Commission of the Saskatchewan.

[569] We received fewer than 10 comments on this issue. They were all in favour, although one respondent said it should depend on conditions. One respondent said the attorney giving consent should have to document the reason for giving consent and why it is in the interest of the non-owner.

c. ALRI's recommendations

[570] ALRI's final recommendations are the same as our preliminary recommendations.

²⁶⁸ Saskatchewan Act, s 6(4).

²⁶⁹ Manitoba Act, s 23.

²⁷⁰ Law Reform Commission of Saskatchewan, *Reform of The Homesteads Act, 1989*, Final Report (2017) at 9-16, online: <www.lawreformcommission.sk.ca/Final-Report-on-the-Homesteads-Act.pdf> [perma.cc/X3YF-5SEK].

RECOMMENDATION 26

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

RECOMMENDATION 27

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

3. ORDERS DISPENSING WITH CONSENT

a. Background

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

- 10(1) A married person who wishes to make a disposition of the married person's homestead and who cannot obtain the consent of the married person's spouse
- (a) when the married person and the married person's spouse are living apart,
 - (b) when the spouse has not since the marriage lived in Alberta,
 - (c) when the whereabouts of the spouse is unknown,
 - (d) when the married person has 2 or more homesteads,
 - (e) when the spouse has executed an agreement in writing and for valuable consideration to release the claim of the spouse to dower pursuant to section 9, or
 - (f) when the spouse is a mentally incompetent person or a person of unsound mind for whom
 - (i) a trustee under the *Adult Guardianship and Trusteeship Act* does not have authority to make a disposition of the homestead, and
 - (ii) a certificate of incapacity is not in effect under the *Public Trustee Act*,

[572] A court may impose conditions.²⁷¹ It seems this power is rarely used but it may be useful. For example, a court might dispense with the requirement for consent but require that proceeds be kept in trust until a claim for property division is resolved.

b. Consultation results

[573] ALRI did not make any preliminary recommendations about orders dispensing with consent. In *Dower Act: Consent to Disposition*, Report for Discussion 36, we asked if there was a need for reform about orders dispensing with consent.

[574] In both early consultation and general consultation we heard very few concerns about the process for obtaining an order dispensing with consent. There were some general concerns that it adds an extra step to a transaction but it seems that orders are routinely granted when one or more of the listed grounds are present.

[575] Although the listed grounds are likely to be present in most situations where a couple disagrees about a disposition, we heard at least one anecdote about a case where they were not. The owner could not get consent and would not have been able to apply for an order dispensing with consent.

c. ALRI's recommendations

[576] We have concluded there is no need to limit the situations where an owner may apply for an order dispensing with consent. If a couple cannot agree on a disposition there should be a way to resolve the dispute. The owner should be able to apply and the court can decide whether it is appropriate to grant the order.

RECOMMENDATION 28

A court should be able to grant an order dispensing with consent to disposition if a homeowner cannot obtain the consent of their spouse or adult interdependent partner for any reason.

²⁷¹ *Dower Act*, s 10(6).

RECOMMENDATION 29

A court should have discretion to grant an order dispensing with consent if in the opinion of the court it is fair and reasonable to do so in the circumstances.

RECOMMENDATION 30

A court should be able to include any terms and conditions the court considers appropriate in an order dispensing with consent.

F. Other Improvements to Forms or Procedures

[577] Some of the practical problems we heard about could be addressed in forms or procedures.

[578] The recommendations in this report are about policy. ALRI is not making specific recommendations about how forms should be drafted or specific procedures that professionals should follow. Nonetheless, we are mentioning some observations we made in our research and consultation that may be helpful in preparing new forms or procedures.

[579] Some of the hassle and administrative burden associated with consent to disposition is because there are different forms for different situations. If land is owned by a corporation or there are two or more individuals on title, no forms are required. If there is one individual on title but the land is not a homestead, they must make an affidavit. If there is one individual on title and the land is a homestead, consent and a certificate of acknowledgment are required. It would be possible to streamline by having fewer forms, covering more possibilities. There are examples in other jurisdictions that may be useful. In Ontario, for example, a person making a transfer must select a statement about consent to disposition from a list.²⁷² One option on the list is that their spouse consents. The other options are the reasons that consent is not required. Every individual making a transfer selects from the same list.

²⁷² Ontario, Ministry of Government and Consumer Services, *Electronic Registration Procedures Guide* (Ontario: Queen's Printer for Ontario, 2017) at 35, online: <teraview.ca/wp-content/uploads/2018/02/ERPG-V12-2017-Final-English-AODA-.pdf> [perma.cc/AN88-DXHH].

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

[580] Another way to streamline would be to have the same forms whether the owner is an individual, two or more individuals, or a corporation. This change would help implement our recommendations that consent to disposition should be required for the owner's interest in a home co-owned with a third party or for a home owned by a closely held corporation. An individual owner or a corporate representative could be required to make a statement about whether or not a property has been a couple's home within the last three years.

[581] It would be helpful to have standard forms providing general information in plain language. The certificate of acknowledgment already includes some basic information about a non-owner's dower rights but it could be clearer. Some non-owners will need information or advice. When the witness is not a lawyer, they may not be equipped to provide all the information or advice the non-owner needs. A form can help. It might be appropriate, for example, if consent forms said clearly that a disposition could result in the non-owner losing their home and that a non-owner can seek legal advice before giving consent.²⁷³

[582] Similarly, it would be helpful if forms included general information about the criteria for an adult interdependent relationship, the potential consequences for making a disposition without consent, or the potential consequences of making a false affidavit.

[583] The wording of the certificate of acknowledgment can create a dilemma for witnesses. It requires a witness to state that the non-owner "is executing the document freely and voluntarily without any compulsion on the part of the married person." If the non-owner discloses compulsion, the witness must either refuse to complete the certificate or make a false statement. One option might endanger the non-owner; the other would be an ethical breach. It might be enough to have a witness state that the non-owner appeared to understand the consent.²⁷⁴

[584] Some other burdens come from procedures that exceed the requirements in the *Dower Act* or because homeowners are asked to encumber land as security

²⁷³ For an example of a form that advises parties to seek legal advice, see eg *Adult Interdependent Partner Agreement Regulation*, Alta Reg 66/2011, Schedule, Note 5:

If an Adult Interdependent Partner Agreement is part of or attached to another agreement between the parties that contains one or more provisions relating to the property of one or both of the parties, the parties are advised to seek legal advice as to their rights and obligations in respect of that property.

²⁷⁴ Like the *Dower Act*, the *Family Property Act*, s 38 requires a lawyer to provide a certificate stating, among other things, that the person who executed an agreement did so "freely and voluntarily without any compulsion on the part of the other party." In contrast, the *Guarantees Acknowledgment Act*, RSA 2000, c G-11, s 4(1.1) requires only that a lawyer satisfy themselves that the person making the guarantee "is aware of the contents of the guarantee and understands it".

for other obligations. Legislation cannot reduce these burdens. It would be worthwhile for professionals or people involved in transactions to review their practices, looking for opportunities to reduce administrative burdens.

CHAPTER 13

What Should Be the Consequences of Disposition without Consent?

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

1. BACKGROUND

[585] A previous version of the *Dower Act* stated that a disposition without consent was “null and void for all purposes”.²⁷⁵ This provision undermined the certainty of the land titles system and so was removed in the 1948 reforms.²⁷⁶

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

[587] If the transfer is not completed, or if the disposition is less than a transfer of the property – like a mortgage, encumbrance, or lease – it is unclear whether it can be set aside. Professor Wilbur Bowker clearly stated the issue just a few years after the 1948 reforms:²⁷⁷

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

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

[589] Many other Canadian jurisdictions have a rule that a disposition cannot be set aside if the person acquiring the interest was innocent. Ontario’s provision is representative:²⁷⁸

²⁷⁵ *Dower Act*, RSA 1942, c 206, s 3.

²⁷⁶ Bowker, note 103 at 504–505.

²⁷⁷ Bowker, note 103 at 505.

²⁷⁸ Ontario Act, s 21(2); see also New Brunswick Act, note 161, s 19(2); Nova Scotia Act, note 161, s 8(2); PEI Act, note 161, s 22(2); Yukon Act, note 161, s 23(3); NWT Act, note 154, s 53(2); Nunavut Act, note 154, s 53(2). Compare Saskatchewan Act, s 12; Manitoba Act, s 6.

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

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

a. Real estate purchase contracts before registration

[591] There is an unresolved issue about whether a real estate purchase contract is void or voidable before a non-owner signs the prescribed form of consent.²⁷⁹

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

[593] Problems sometimes arise when a party has agreed to buy or sell property but does not want to close. In several cases parties who wanted to withdraw from a deal before closing argued that a residential purchase contract was not binding because it was not accompanied by a dower consent in the prescribed form.²⁸⁰ If a contract without proper dower consent is void, neither party could enforce the residential purchase contract. If it is voidable, the transaction can still be saved by providing the proper consent.

[594] Alberta trial courts face conflicting binding authority about whether a contract is binding without a proper dower consent. In *Meduk v Soja*, the Supreme Court held that the purchase contract was void.²⁸¹ In *Schwormstede v Green Drop Ltd.*, the Alberta Court of Appeal did not consider *Meduk* but said that “the better view is that the transaction is voidable”.²⁸² In *Charanek v Khosla*, a Master of the Court of Queen’s Bench concluded that summary judgment was not available because “the consequence of non-compliance with the consent

²⁷⁹ See Jonnette Watson Hamilton, “No Dower Act Consent? Is the Transaction Void or Voidable?” (27 May 2010), ABlawg (blog), online: <www.ablawg.ca/2010/05/27/no-dower-act-consent-is-the-transaction-void-or-voidable/> [perma.cc/485E-E4D2].

²⁸⁰ *Meduk v Soja*, [1958] SCR 167; *Senstad v Makus*, [1978] 2 SCR 44; *Charanek v Khosla*, 2010 ABQB 202.

²⁸¹ *Meduk v Soja*, [1958] SCR 167.

²⁸² *Schwormstede v Green Drop Ltd* (1994), 155 AR 302 at para 39, 1994 ABCA 259 (CanLII).

requirements of the *Dower Act* remains an open question.”²⁸³ At this point, there is little chance the issue can be resolved by litigation.²⁸⁴

b. Dispositions that do not result in a transfer of title

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

[596] In several reported cases, lenders or creditors have found that their mortgage or encumbrance was void because the non-owner did not consent.²⁸⁵ Often, they did not realize anything was wrong until long after they provided funds and registered their interest on title. They only discovered the lack of compliance after the owner defaulted and they attempted to enforce their mortgage or encumbrance.

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

[598] Nonetheless, these cases raise questions about who should bear a loss. For example, consider *Inland Financial Inc v Guapo*.²⁸⁶ In that case, a man posed as his father to mortgage the home that his parents owned as joint tenants. Eventually the mortgage went into foreclosure. The Court of Appeal held the mortgage was a disposition that required both spouses to consent. As the father had not consented, the mortgage was invalid and was removed from title. Assuming that the purpose of the *Dower Act* is to protect a vulnerable spouse from losing their home, it worked as intended in this case. Meanwhile, the mortgage lender – also

²⁸³ *Charanek v Khosla*, 2010 ABQB 202 at para 61.

²⁸⁴ As Professor Watson Hamilton points out, the conflict could be fully resolved by the Supreme Court but it is highly unlikely that it would grant leave to appeal on the issue: Jonnette Watson Hamilton, “No Dower Act Consent? Is the Transaction Void or Voidable?” (27 May 2010), ABlawg (blog), online: <www.ablawg.ca/2010/05/27/no-dower-act-consent-is-the-transaction-void-or-voidable/> [perma.cc/485E-E4D2].

²⁸⁵ *British American Oil Co. v Kos* (1963), [1964] SCR 167; *Nicholson v Nicholson* (1994), 153 AR 200 (QB); *Karafiat v Webb*, 2012 ABCA 115; *Guapo*, note 47. There are also reported cases where a lease or similar interest was void for lack of dower consent, although they are not recent: *Reynolds v Ackerman*, [1953] 32 WWR 289 (Alta SC TD); *Champagne v Aljean Construction Ltd* (1979), 11 Alta LR (2d) 1 (QB).

²⁸⁶ *Guapo*, note 47.

a victim of the fraud – lost the \$245,000 it had advanced. It is not clear if the lender had any way to recover the loss.²⁸⁷

2. ALRI'S RECOMMENDATION

[599] ALRI's preliminary recommendation was that a disposition should be unenforceable until a non-owner consents or until consent to disposition is no longer required. This issue is a technical one that does not affect many people so we did not ask about it in our surveys.

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

[601] A rule that a disposition without consent is void goes farther than necessary to achieve this purpose. Sometimes, it may even be used to the detriment of the non-owner. In *Charanek v Khosla*, for example, the owner and non-owner spouse both wanted to sell their home. It was the purchasers who attempted to rely on non-compliance with the *Dower Act* to escape a real estate purchase contract.²⁸⁸

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

²⁸⁷ In theory, the son was liable. He was a defendant in the case and judgment was granted against him. But the judgment would be a hollow victory if the son had no assets. The Assurance Fund was also a defendant but it is questionable whether compensation would be available in this situation. None of the reported judgments considered the claim against the Assurance Fund. The relevant parts of the *Land Titles Act* are difficult to interpret and it is not obvious that they apply. There are other complicating factors. One is that one of the owners cooperated with the fraud. Another is that the Assurance Fund is a payor of last resort: see *Land Titles Act*, note 57, ss 168, 172; see also Curtis D Woollard, "Land Titles Assurance vs Title Insurance: What's Covered and What Isn't" (Paper prepared for the Legal Education Society of Alberta, delivered at the 45th Annual Refresher Course on Real Estate, Lake Louise, 6–8 May 2012).

²⁸⁸ *Charanek v Khosla*, 2010 ABQB 202.

RECOMMENDATION 31

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

B. Should Making a Disposition Without Consent Be an Offence?

1. BACKGROUND

[603] As discussed in Chapter 2, it is an offence to dispose of a homestead without consent. No other Canadian jurisdiction has a similar offence. ALRI previously made a preliminary recommendation to abolish the offence.²⁸⁹

[604] Completing a disposition without consent would usually require submitting false documents to the Land Titles Office. In some cases, it may be an honest mistake. If a person deliberately makes or submits false documents, criminal law could apply. Depending on the details, knowingly making or submitting a false document could be perjury, forgery, fraud, or another offence.²⁹⁰

2. CONSULTATION RESULTS

[605] ALRI's preliminary recommendation was that this offence should be abolished.

[606] The technical survey mentioned the proposal to abolish the offence along with several other proposed changes. It invited respondents to provide comments about any of the proposed changes.

[607] Most of those who left comments expressed general support for the proposed changes. There were very few comments specifically about abolishing the offence. Two were supportive. Three respondents were opposed to abolishing the offence. Two of them suggested that damages may not be a sufficient deterrent. One said that having an offence in legislation communicates that the act is wrongful, even if the offence is rarely prosecuted.

²⁸⁹ RFD 14 at 117-18 (Recommendation 17).

²⁹⁰ For example, swearing a false affidavit may be perjury, which is punishable by up to fourteen years' imprisonment: *Criminal Code*, RSC 1985, c C-46, ss 131-132. See also RFD 14 at 117-18.

3. ALRI'S RECOMMENDATION

[608] After considering all the comments, we have concluded that it is appropriate to abolish the offence. It is doubtful that the offence is an effective deterrent, especially if it is rarely or never enforced. The possibility of criminal liability for perjury, forgery, fraud, or another offence should be sufficient.

RECOMMENDATION 32

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

C. How Should the Action for Damages Be Reformed?

1. BACKGROUND

[609] Unlike the offence, there are reported cases where a non-owner spouse has successfully claimed damages.²⁹¹ In early consultation, we heard anecdotally that others have at least considered making this kind of claim.

[610] This consequence is only useful in certain situations. It requires that a non-owner know of their right to prevent a disposition, know that the disposition occurred, and initiate an action against the owner. They might do so if the relationship has already broken down but there would be little point in suing if the relationship is intact. Damages would only transfer money from one spouse or partner to the other. With legal fees, the couple would suffer a net loss.

[611] Saskatchewan, Manitoba, and Newfoundland and Labrador have similar provisions giving a non-owner a right of action for damages in the case of disposition without consent.²⁹² There is very little case law applying these provisions.²⁹³

²⁹¹ *Joncas v Joncas*, 2017 ABCA 50; *Graham v Graham*, 2021 ABCA 340.

²⁹² Saskatchewan Act, s 12.1; Manitoba Act, s 16(1); Newfoundland Act, s 14(1)(e). The legislation in Newfoundland and Labrador describes the remedy as a substitute for the matrimonial home:

14(1)(e) where a false affidavit is made under section 10 or where a matrimonial home or an interest in it is disposed of contrary to section 10, [the court may] direct

...

to substitute other real property for the matrimonial home or to set aside money or security to stand in place of the matrimonial home, subject to the terms and conditions that the court considers desirable.

²⁹³ We found only one reported case where a court outside Alberta awarded damages for disposition without consent: *Dowse v Dowse*, 2003 MBQB 8.

a. Availability

[612] Damages are only available if title has actually been transferred to another person.²⁹⁴ If the disposition is a mortgage or other encumbrance, the non-owner would not receive damages unless the encumbrance resulted in a transfer of title.

[613] A transfer of title has the most potential to harm a non-owner. A transfer to a bona fide purchaser for value cannot be set aside. If an owner succeeds in transferring a couple's home without the non-owner's consent, the non-owner would lose their home permanently. Damages are the only possible remedy.

[614] Other types of dispositions are unlikely to cause permanent harm, especially given our recommendation above that they should be unenforceable until a non-owner provides consent.

[615] Nonetheless, there may be situations where a disposition other than a transfer harms a non-owner. In other Canadian jurisdictions that provide a right of action to a non-owner, a non-owner may seek damages for any wrongful disposition.²⁹⁵

[616] ALRI previously made a preliminary recommendation that "[a]n action for damages should be available for a wrongful disposition of any kind."²⁹⁶

b. Reported cases

[617] The two reported cases about damages illustrate some of the issues. It is helpful to briefly summarize the facts.

[618] In *Joncas v Joncas*, the husband was the sole owner of a home, which the Court called the "Edgedale Property".²⁹⁷ He owned the home before the couple married. After they married, they lived together in the Edgedale Property for several years. They moved to a new home in 1998. Apparently the husband

²⁹⁴ *Dower Act*, s 11(1):

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

In *Guapo*, note 47 at para 14, the Court of Appeal confirmed that this remedy (a non-owner spouse's right of action for damages) is "limited to improper transfers of title"; it is unavailable where there has merely been an improper registration of a mortgage or other encumbrance.

²⁹⁵ Saskatchewan Act, s 12.1; Manitoba Act, s 16(1); Newfoundland Act, s 14(1)(e).

²⁹⁶ RFD 14 at 115 (Preliminary Recommendation 15(1)).

²⁹⁷ *Joncas v Joncas*, 2017 ABCA 50.

mortgaged the Edgedale property twice during the marriage without his wife's consent. His evidence was that he was not aware he needed consent and no one told him. The couple separated in 2013 and the husband sold the Edgedale Property for \$325,000 shortly afterwards. He was able to sell it without consent because he swore a false affidavit, in which he said that neither he nor his spouse had lived in the house during their marriage. After paying a line of credit registered against the property and some other amounts, the owner's net proceeds were \$121,019. Under the formula in the *Dower Act*, the wife was awarded \$162,500 in damages. The Court of Appeal declined to make a decision about how the damages would affect a claim for property division.

[619] The couple in *Graham v Graham* separated in 1997 but not did not divorce.²⁹⁸ They were still legally married when the appeal was heard in 2021. In 2006 the husband acquired a new home. He mortgaged it several times. In 2014, he sold it for \$325,000. His net proceeds were \$122,910.58. The husband made all the dispositions without the wife's consent. Each time, he swore a false affidavit stating he was not married. The trial court awarded the wife \$3,000 in damages.²⁹⁹ On appeal, the Court of Appeal corrected the remedy, awarding the wife half the consideration for the sale: \$162,500.³⁰⁰ The award of damages was not the end of the matter because the court decided the damages were family property that had to be distributed. It decided it would be just and equitable to divide the \$162,500 unequally, with 75% to the wife and 25% to the husband. In the end, the wife's share was \$121,875.

[620] It is worth noting that neither home would be a homestead if ALRI's other recommendations were implemented, so consent would not have been required. In *Joncas*, the couple had moved out 15 years before the owner sold it. If ALRI's recommendation about time limits were implemented, consent would only be required for three years after the couple last lived in the home together. In *Graham*, the couple had never lived in the home together. ALRI's recommendation is that consent to disposition should be required only for a home where both spouses or both adult interdependent partners live together.

²⁹⁸ *Graham v Graham*, 2021 ABCA 340.

²⁹⁹ The trial judge seems to have referred to the maximum fine under *Dower Act*, s 2(3) instead of the formula for damages under *Dower Act*, s 11(2). The maximum fine under *Dower Act*, s 2(3) would be \$1,000 for each wrongful disposition.

³⁰⁰ The wife only received damages for one wrongful disposition. Under the *Dower Act*, s 11(1) damages are only available for a disposition "that results in the registration of the title in the name of any other person". She received damages for the sale but there was no remedy for the wrongful mortgages because they did not result in a transfer of title.

c. Assessing damages

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

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

[622] As courts cannot vary this formula, a damages award resulting from a prohibited disposition can exceed the amount that the owner actually receives from the sale. In both *Joncas v Joncas* and *Graham v Graham*, the damages were more than the net proceeds.

[623] Professor Jonnette Watson Hamilton briefly reviewed arguments for and against fixed damages in one of her blog posts.³⁰¹ She noted that the fixed damages will almost always be punitive but that some might argue punishment is appropriate.

[624] While the formula may punish the owner, it does not necessarily make a non-owner whole. As one respondent pointed out in early consultation, half the value of the homestead is not enough to buy a comparable home.

[625] None of the other jurisdictions with an action for damages have provisions prescribing the amount of damages. Manitoba's legislation explicitly states that the court has discretion to assess the damages:³⁰²

16(5) The court may, in its discretion, determine the amount of a spouse's or common-law partner's damages under this section, subject to such terms and conditions as the court considers appropriate

[626] Both ALRI and the Manitoba Law Reform Commission have considered the assessment of damages. In *The Matrimonial Home*, Report for Discussion 14,

³⁰¹ Jonnette Watson Hamilton, "The Harsh Consequences of Ignoring the *Dower Act*" (14 March 2017), ABlawg (blog), online: <www.ablawg.ca/2017/03/14/the-harsh-consequences-of-ignoring-the-dower-act/> [perma.cc/2Z6T-NM7A].

³⁰² Manitoba Act, s 16(5).

ALRI proposed that a court should have discretion.³⁰³ The Manitoba Law Reform Commission came to a similar conclusion in its 2010 *Review of Compensation for the Loss of Homestead Rights*. It acknowledged that it is difficult to value the loss but that a fixed formula would “create unnecessary complications and could unduly restrict a court’s discretion.”³⁰⁴

d. Factors to consider

[627] Replacing the formula for damages with court discretion would increase flexibility. It would also mean uncertainty about how damages will be assessed, especially until there is a body of case law about damages.³⁰⁵ Courts might award substantial damages, making a non-owner whole and punishing an owner. Or they might award nominal damages which could make the action for damages irrelevant.

[628] It may be useful to provide a list of factors that a court should consider. In *The Matrimonial Home*, Report for Discussion 14, ALRI proposed the list should include “the costs of relocation and comparable accommodation, and any inconvenience caused to a spouse or the children of the marriage.”³⁰⁶ It might also be appropriate to include whether the non-owner lived in the home at the time of disposition, the value of the home, the consideration for the transaction, the net proceeds, and specific or general deterrence.

e. Payment from the General Revenue Fund

[629] The *Dower Act* guarantees payment of damages to a non-owner. If a non-owner is awarded damages but cannot enforce the judgment against the owner, the non-owner can apply to have the damages paid from the General Revenue

³⁰³ RFD 14 at 115. Preliminary Recommendation 15(2) was:

The quantum of damages to be awarded should be left to the discretion of the court. In assessing damages, a court should take into account all of the circumstances of the case, including the costs of relocation and comparable accommodation, and any inconvenience caused to a spouse or the children of the marriage. In the case of a wrongful mortgage, a court can assess damages at the level of the monies advanced, together with any incidental affects associated with the mortgage.

³⁰⁴ Manitoba Law Reform Commission, *Review of Compensation for the Loss of Homestead Rights*, Informal Report 25 (2010) at 7, online: <www.manitobalawreform.ca/pubs/pdf/additional/informal_report_homestead.pdf> [perma.cc/8KL7-5NH4].

³⁰⁵ In the only reported case we found from outside Alberta, *Dowse v Dowse*, 2003 MBQB 8, the Manitoba Court of Queen’s Bench awarded \$8,955, which included damages for the loss of the non-owner’s life interest, loss of a tactical advantage in family litigation, and punitive damages.

³⁰⁶ RFD 14 at 115 (Recommendation 15(2)).

Fund. The non-owner must take all possible proceedings to collect from the owner first.³⁰⁷

[630] This feature is only found in Alberta and Saskatchewan.³⁰⁸

[631] ALRI previously recommended that this feature be retained, with some adjustments.³⁰⁹

f. Effect of the end of the relationship

[632] In a 1965 case, *Clark v Clark*, a majority of the Court of Appeal held that the right to damages ends upon divorce.³¹⁰

[633] ALRI previously made a preliminary recommendation that the claim “should no longer be extinguished by divorce.”³¹¹

[634] In early consultation, we heard anecdotally of spouses postponing their divorce until the action for damages was resolved. It seems undesirable that the law would require a separated spouse to decide to either remain married through years of litigation or to abandon their claim.

[635] For adult interdependent partners, this rule would have even more severe effects. It is likely that an adult interdependent partner could never receive damages. An adult interdependent relationship usually ends after the partners have been separated for one year.³¹² It may end sooner, if they make a separation agreement or if one marries or enters an adult interdependent partner agreement with a third party.³¹³ It would be nearly impossible to complete litigation within a year or less, especially since the defendant would have an incentive to delay.

³⁰⁷ *Dower Act*, ss 13–15.

³⁰⁸ *Dower Act*, s 13(1); *Saskatchewan Act*, s 13.

³⁰⁹ RFD 14 at 116–17 (Recommendation 16).

³¹⁰ *Clark v Clark* (1965), 55 DLR (2d) 218 (Alta SC AD). A married couple separated and shortly afterwards the husband transferred his interest in all his land to his father. The wife did not consent to the disposition. She commenced divorce proceedings and an action for damages. The divorce was finalized before the trial of the action for damages. Justice Johnson’s reasons expressed the majority’s decision: *Clark v Clark* (1965), 55 DLR (2d) 218 at 227 (Alta SC AD), Johnson JA:

[W]hile the appellant’s dower rights existed when the action was commenced, the plaintiff, because of the intervening divorce, was unable at trial to prove any damages since her dower rights which were the subject matter of the action, had ceased to exist because of the divorce.

³¹¹ RFD 14 at 112–13, 115 (Recommendation 15(1)).

³¹² *Adult Interdependent Relationships Act*, note 146, s 10(1)(b).

³¹³ *Adult Interdependent Relationships Act*, note 146, ss 10(1)(a), (c)–(d).

2. CONSULTATION RESULTS

[636] ALRI made several preliminary recommendations about the action for damages. We proposed that the action for damages should be available for any wrongful disposition, that a court should have discretion to assess damages, and that the General Revenue Fund should remain a payor of last resort. We asked whether legislation should include a list of factors for a court to consider when assessing damages but did not make a preliminary recommendation.

[637] The technical survey mentioned the proposal to give a court discretion to assess damages and invited respondents to provide comments.

[638] Most of those who left comments expressed general support for the proposed changes. There were only two comments specifically about damages. One respondent suggested a court should be able to assess damages but there should be default amount. Another was opposed to payment of damages from the General Revenue Fund.

3. ALRI'S RECOMMENDATION

[639] After considering all the comments we received, we have added one new recommendation.

[640] If the offence were abolished, the action for damages would be the main deterrent against a disposition without consent. An action for damages should be available for any wrongful disposition. Given our recommendation that a court should have discretion to assess damages, a court would be able to award damages that are proportionate to the actual harm.

RECOMMENDATION 33

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

[641] We considered the suggestion that there should be default damages. Replacing the formula with court discretion would mean uncertainty about how damages will be assessed, especially until there is a body of case law about damages. Default damages or a default minimum would improve certainty. It could streamline litigation because the non-owner would not have to prove their damages, or would only have to prove damages if they were seeking damages

above the default minimum. It could also make the remedy more effective. If courts awarded only nominal damages, the action for damages would not be an effective deterrent. A non-owner would be unlikely to make a claim if they expected to spend more in legal fees than they would receive in damages.

[642] Nonetheless, we have concluded that courts should have flexibility to determine damages appropriate to the circumstances. A default amount or a formula may not produce fair results in all cases.

[643] A list of factors to consider would be more helpful than a minimum or formula. A list of factors would help identify the relevant considerations while giving a court flexibility about how to weigh them. It would also help non-owners and their lawyers assess their claim and might help parties settle claims out of court.

[644] We are concerned that it undermines the purpose of damages to have a presumption that they are family property to be divided equally under section 7(4) of the *Family Property Act*. It might be appropriate if such damages were exempt property under section 7(2) of the *Family Property Act* but it is outside the scope of this project to recommend amendments to other legislation.

[645] Under the *Family Property Act*, most property is to be divided equally between the former spouses or partners unless a court decides “that it would not be just and equitable to do so.” There are various factors that a court may consider.³¹⁴ In *Graham v Graham*, the court considered the fact that the damages were a penalty for the husband’s breach of the *Dower Act* among the other factors when deciding to divide the damages unequally in favour of the wife. As long as damages are not exempt property, this approach seems the best one. We have included the effect of division of family property in the list of factors to be considered.

[646] We propose the following factors:

- Whether the non-owner lived in home at the time of the disposition,
- Whether the disposition resulted in a transfer of title,
- Whether the non-owner had to leave the home as a result of the disposition,
- The costs of relocation and comparable accommodation,

³¹⁴ *Family Property Act*, s 8.

- Any inconvenience caused to the non-owner or other family members,
- The value of the home,
- The consideration for the transaction,
- The amount the owner received,
- The effect on a division of family property,
- Specific or general deterrence.

RECOMMENDATION 34

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

RECOMMENDATION 35

Legislation should include a list of factors for a court to consider in awarding damages.

[647] The General Revenue Fund should remain a payor of last resort. This feature provides important protection for a non-owner and should be retained.

[648] We recommend a limit to its responsibility, however. If a court awards punitive damages, the General Revenue Fund should not be required to pay them. The purpose of punitive damages is to punish a wrongdoer. They are not compensation for the wronged person and it would be inappropriate to use public funds to pay them.

RECOMMENDATION 36

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

[649] ALRI recommends that legislation should reverse the rule in *Clark v Clark*.³¹⁵ A claim for damages should survive divorce or the end of an adult interdependent relationship.

³¹⁵ *Clark v Clark* (1965), 55 DLR (2d) 218 (Alta SC AD).

[650] To be clear, damages would be available only if the disposition was wrongful at the time it was made. If the owner disposed of property without consent while the couple lived in the home or within three years after they last lived in the home together, a court could award damages. It would not matter if the relationship ended before the action was resolved. This recommendation would not affect the time limit discussed above or the limitation period for making a claim.

RECOMMENDATION 37

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

CHAPTER 14

How Should Debt Affect Consent to Disposition?

A. Background

[651] Alberta's *Dower Act* was inspired by American homestead legislation. Homestead legislation generally protected a spouse in three ways: by requiring the spouse's consent to disposition, by giving the spouse rights to the home after the owner's death, and by protecting the home from creditors.³¹⁶

[652] In Alberta, protection against creditors is not an explicit feature of the *Dower Act* but there are various ways that the *Dower Act* can affect the rights of debtors and creditors.

1. CIVIL ENFORCEMENT AND BANKRUPTCY

[653] Although civil enforcement and bankruptcy are entirely different processes, there are similar issues about the interaction with the *Dower Act*. This section deals with the two together.

[654] A judgment creditor can force the sale of a debtor's land, including land that is the debtor's homestead, to pay a judgment. There are several steps that must occur before a creditor can force the sale of land.³¹⁷ First, they must obtain a judgment from court, requiring the debtor to pay money. If the debtor does not pay voluntarily, the creditor may obtain and register a writ of enforcement. The creditor must register the writ with the Personal Property Registry and against title at the Land Titles Office before instructing a civil enforcement agency to sell a particular parcel of land.

[655] If a person becomes bankrupt, all their property vests in the trustee. The trustee can deal with the property, including selling or otherwise disposing of land.

³¹⁶ See Bowker, note 103.

³¹⁷ See generally *Civil Enforcement Act*, note 73, ss 25.1-42, 67-76.

2. EXEMPTION FOR A PRINCIPAL RESIDENCE

[656] Certain kinds of property are exempt from writ proceedings, including a debtor's principal residence.³¹⁸ The *Bankruptcy and Insolvency Act* adopts provincial exemptions so the same property is exempt in bankruptcy.³¹⁹

[657] There are two kinds of exemptions. Some kinds of property are completely exempt and cannot be seized or sold. Other kinds of property are exempt up to a prescribed amount. They can only be sold if the net proceeds will exceed the prescribed amount. In that case, the debtor is entitled to keep the prescribed amount from the proceeds.³²⁰

[658] A principal residence on a farm may be completely exempt if several conditions are met. The debtor must be a farmer and the principal residence must be on their farm. If so, the home quarter (up to 160 acres) including the residence will be completely exempt no matter how valuable the land and residence may be.

[659] All other principal residences are exempt up to a prescribed amount. The prescribed amount is a maximum of \$40,000.³²¹ Although it would be only a fraction of the amount required to buy another home in most Alberta communities, Alberta's exemption for a principal residence is among the most generous in Canada.

[660] ALRI noted the difference in *Enforcement of Money Judgments*, Final Report 61 which was published in 1991.³²² It did not recommend any changes to the exemption. It would be beyond the scope of this project to recommend changes to the kinds or amounts of exemptions.

³¹⁸ *Civil Enforcement Act*, note 73, ss 88–89.

³¹⁹ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 67(1)(b).

³²⁰ There are some nuances and exceptions but it is not necessary to delve into them for the purpose of this discussion.

³²¹ *Civil Enforcement Act*, note 73, s 88(g); *Civil Enforcement Regulation*, Alta Reg 276/1995, s 37(1)(e). If the debtor co-owns the residence with someone else, the exemption is reduced to the amount proportionate to the debtor's interest. For example, if the debtor co-owns the property with one other person and they have equal shares (ie each owns half), the debtor's exemption would be \$20,000 (half of \$40,000).

³²² Alberta Law Reform Institute, *Enforcement of Money Judgments*, Final Report 61, Volume 1 (1991) at 177, online: <www.alri.ualberta.ca/wp-content/uploads/1991/03/fr061-v1.pdf>.

B. Protection for a Non-owner

1. BACKGROUND

[661] The *Dower Act* does not protect a non-owner from losing their home to an owner's creditors. In *McNeil v Martin*, a 1982 decision, a majority of the Alberta Court of Appeal held that a homestead can be sold in writ proceedings without a non-owner's consent.³²³ One of the reasons the majority gave was that if consent to disposition were required, the non-owner could always prevent the sale. In effect, it would make the homestead completely exempt.

[662] In our view, this rule undermines the purpose of consent to disposition. An owner cannot mortgage a home without a non-owner's consent but can run up other debts without the non-owner's knowledge or consent. If the owner cannot pay their debts, creditors can force the sale of the couple's home. In most cases, the exemption will be insufficient to replace the home. The couple will be left without a home or the means to buy another one.

[663] We are also troubled by the different level of protection for farming couples compared to all others. If a couple lives on a farm, the non-owner has comprehensive protection against losing their home unexpectedly. Either they will have the opportunity to withhold consent or the exemption will apply.³²⁴ Those living elsewhere would have the opportunity to withhold consent to a mortgage but have minimal protection against losing their home to other creditors.

³²³ *McNeil v Martin* (1982), 41 AR 473 (CA). The case was decided before the enactment of the *Civil Enforcement Act*, note 73, but the principle has not changed. The majority's decision added a curious wrinkle: although a non-owner cannot prevent disposition of the homestead, their life estate is not affected by the disposition. The homestead may be sold but the purchaser's interest is subject to the non-owner's contingent life estate. Justice Belzil, who dissented, pointed out the practical problems with a contingent life estate (*McNeil v Martin* (1982), 41 AR 473 at para 47 (CA), Belzil JA, dissenting):

In my view, and with all due respect, an interpretation of the Act which would authorize the sheriff to sell the homestead property of the husband subject to the contingent life estate of the wife leads to such an absurdity. The concept lacks realism and would be termed absurd in the marketplace at least in this jurisdiction. Upon sale, the wife is ejected from her home to await her husband's death, when she may then reoccupy it. A purchaser of such an interest entitled to the possession of it during the husband's life, be it a month or 50 years, becomes a trespasser upon his death and must surrender possession of it to the widow for the rest of her life be that a month or 50 years. Who will buy this pig in a poke? It is inconceivable that the legislators ever intended to foist such a mischievous arrangement upon surviving spouses as part of the scheme for preservation of the family home.

It is very unlikely a non-owner would ever take possession of a property relying on a contingent life estate but we heard it is sometimes useful as a bargaining chip.

³²⁴ A homestead and a principal residence are not exactly the same but the definitions are similar. Both apply to a home quarter.

[664] There is a different approach in Saskatchewan legislation. *The Homesteads Act, 1989* includes a provision stating that a non-owner does not lose their rights when the owner has a trustee in bankruptcy:³²⁵

18(1) Where a trustee in bankruptcy of the property of an owning spouse is appointed, for the purposes of any dealing with the Land Titles Registry, this Act applies, with any necessary modification, as if the trustee in bankruptcy was the owning spouse and the non-owning spouse was his or her spouse.

[665] A trustee in bankruptcy may apply to dispense with a non-owner's consent.³²⁶

2. CONSULTATION RESULTS

[666] ALRI's preliminary recommendation was to adopt a rule based on the approach in Saskatchewan but applying to both civil enforcement and bankruptcy.

[667] The technical survey mentioned this proposal along with several other proposed changes. It invited respondents to provide comments about any of them.

[668] There were only a few comments on this issue and they were mixed. Four were generally in favour of improved protection for a non-owner. Two suggested the non-owner's knowledge should be a factor. One said it would be unfair for the non-owner to lose their home if the owner had incurred debts without the non-owner's knowledge. Two were clearly opposed to ALRI's proposal. One said the *Dower Act* should not be an obstacle to creditors collecting money they are owed; the other did not provide reasons.

[669] We also received detailed written comments from one respondent. The respondent was generally in favour of ALRI's proposal but pointed out some technical issues to consider.

3. ALRI'S RECOMMENDATION

[670] After considering all the comments, we have slightly revised our final recommendation.

³²⁵ Saskatchewan Act, s 18(1).

³²⁶ Saskatchewan Act, s 18(2).

[671] A non-owner should have the same protection against the actions of a civil enforcement agency or a trustee in bankruptcy that they would have against the owner. A civil enforcement agency or a trustee in bankruptcy would step into the shoes of the owner. The non-owner could withhold consent, just as they could if the owner were making a disposition. If they do so, the civil enforcement agency or trustee in bankruptcy could apply for an order dispensing with the non-owner's consent. In our view, this proposal would balance the interests of creditors with the purpose of protecting a non-owner from losing their home unexpectedly.

RECOMMENDATION 38

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

C. Attaching a Non-owner's Rights

1. BACKGROUND

[672] There are a few reported cases where a non-owner was the debtor and a creditor attempted to attach their dower rights while the owner was still alive.³²⁷ In both *Kuehn v Otis Engineering* and *Phan v Lee*, courts decided that a creditor cannot do so.

[673] While the owner is alive, the non-owner has the right to prevent a disposition by withholding consent. If a non-owner's creditors could acquire or sell this right, it would put pressure on the owner to pay. As Justice Kent put it:³²⁸

[T]he creditor who purchases the dower interest has the upper hand because the property cannot be disposed of without the creditor's consent who will presumably attempt to hold out for maximum value.

³²⁷ *Kuehn v Otis Engineering* (1996), 179 AR 225 (QB); *Phan v Lee*, 2005 ABCA 142. A trustee in bankruptcy attempted something similar in a Manitoba case, with a different result: *Chartier v Chartier Estate (Trustee of)*, 2013 MBCA 41, rev'g 2012 MBQB 176, leave to appeal to SCC refused, 35483 (23 January 2014).

³²⁸ *Kuehn v Otis Engineering* (1996), 179 AR 225 at para 9 (QB).

That is not protecting one spouse's dower interest; it is punishing the other spouse.

[674] Even registration of a writ would put pressure on the owner to pay if the owner wants to sell or make any disposition of the home. It would be difficult to sell or mortgage the home while there is a writ on title.

[675] In *Phan v Lee*, the Court of Appeal expressed doubt that the right to prevent disposition by withholding consent could be considered property.³²⁹ If it is not property, a judgment creditor could not instruct a civil enforcement agency to sell it. The court also considered the purpose of the *Dower Act* and the interaction between the *Dower Act* and the *Civil Enforcement Act*. It concluded that creditors cannot attach a non-owner's dower rights while the owner is alive.³³⁰

[676] During the owner's life, a non-owner also has a contingent life estate. That is, they may receive a life estate in the future but only if the owner dies first, the owner still owns the home when they die, and the couple is married when the owner dies. In *Phan v Lee*, the Court of Appeal suggested that the contingent life estate cannot be divided from the right to prevent a disposition by withholding consent.

2. CONSULTATION RESULTS

[677] In *Dower Act: Consent to Disposition*, Report for Discussion 36, ALRI's preliminary recommendation was that there should be a clear statement in legislation that a creditor cannot attach a non-owner's dower rights.

[678] One respondent provided detailed written comments on technical issues related to this proposal. We drew upon those comments in revising our discussion of this issue.

3. ALRI'S RECOMMENDATION

[679] Although case law makes it clear that a creditor cannot attach a non-owner's rights while the owner is alive, it would be helpful to have a clear statement to that effect in legislation.

[680] While the owner is alive, the non-owner has the right to consent or withhold consent and a contingent life estate. Creditors of the non-owner should

³²⁹ *Phan v Lee*, 2005 ABCA 142 at paras 35-38.

³³⁰ *Phan v Lee*, 2005 ABCA 142 at paras 41-46.

not be able to attach these rights, register a writ of enforcement against them, or have them sold in judgment enforcement proceedings. If the non-owner becomes bankrupt, the trustee in bankruptcy should not be able to exercise or sell their rights.

RECOMMENDATION 39

Only a spouse or adult interdependent partner of a homeowner, or their attorney appointed under a power of attorney, should have the right to consent to a disposition of a home or prevent a disposition of a home by withholding consent.

[681] It should be noted that these recommendations apply only while the owner is alive. If the non-owner receives a life estate in the home after the owner's death, the situation would change. A life estate is an estate in land, which is unquestionably property. If a non-owner receives a life estate under the *Dower Act*, it would be available to satisfy the non-owner's debts. A judgment creditor could, at least in theory, instruct a civil enforcement agency to sell the life estate. If the non-owner became bankrupt, the life estate would vest in the trustee in bankruptcy who could sell or dispose of it. It would probably be very difficult, if not impossible, to find a buyer for a life estate on the open market but someone close to the life tenant or the owner of the remainder interest might buy it.

CHAPTER 15

Which Homes Should Be Affected by the Life Estate?

A. Introduction

[682] This part discusses reforms specific to the life estate. This chapter makes recommendations about which homes should be subject to a life estate. Chapter 16 recommends other reforms to improve the life estate. Chapter 17 is about the life estate in personal property.

B. Time Limits

[683] Under the *Dower Act*, land remains a homestead indefinitely, even after the couple has moved out or separated. If a couple is legally married when the owner dies, the non-owner receives a life estate in the homestead. If the owner had more than one homestead, the non-owner may choose one of them.

[684] In Chapter 11, we recommended a time limit for consent to disposition. We recommended 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. We recommend this limit because consent to disposition protects a non-owner in case of relationship breakdown. Consent to disposition bridges a gap, providing automatic protection until a non-owner seeks a longer lasting remedy.

[685] There are different considerations for the life estate. One consideration is the purpose of a life estate. While consent to disposition preserves a non-owner's ability to make a claim, the life estate provides a non-owner with a home. Another consideration is consistency with other Alberta legislation. In our view, consistency requires time limits for the life estate that are different than the time limits we recommend for consent to disposition.

1. PAST OCCUPANCY AND THE EFFECT OF MOVING

[686] Sometimes one spouse or partner owns a property that used to be the couple's home. Often the couple has moved to a new home and the former home is a rental or investment property but there could be other reasons why they no

longer live there together. One example would be a couple who retire to another community while keeping their former home. Another example is a non-owner who lives alone in a home because the owner lives in a care facility.

[687] A time limit measured from the time the spouses or partners last lived in the home together would leave some non-owners unprotected. If a move could affect a non-owner's right to a life estate, there would be a risk of some becoming homeless.

[688] Our other recommendations would mean a non-owner could only receive a life estate for one home. If the owner died owning two or more homes, and all were ones where the spouses or partners had lived together, the non-owner would have to choose one of them.

2. EFFECT OF SEPARATION

[689] 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.

[690] This rule could mean that a non-owner could receive a life estate even if the couple had been separated for many years. Some couples divide property informally and the non-owner does not make a release of dower rights. Sometimes, even when there is an agreement or order about property division, a release is overlooked. Meanwhile, at least one of the spouses will usually have moved elsewhere. This rule goes farther than necessary to protect a non-owner. If the non-owner has moved to a new home, they will not become homeless if they do not receive a life estate.

[691] 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."³³¹ In the case of adult interdependent partners, the survivor will not inherit if the couple had become former adult interdependent

³³¹ *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.

partners before the time of death.³³² 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.”³³³ That means a partner will not inherit if the couple had been separated for more than one year.

[692] One other Canadian jurisdiction has a rule to prevent non-owner from keeping the home after the owner’s death if the couple had separated, at least in some circumstances. In British Columbia, a non-owner’s rights under the *Land (Spouse Protection) Act* end when the couple has separated and has an agreement or order about ownership or division of the home.³³⁴

3. CONSULTATION RESULTS

[693] ALRI’s preliminary recommendations were that a life estate should be available if both spouses or adult interdependent partners lived together in a home at any time, but only if the couple were together or had recently separated when the owner died. There would be time limits that would start to run if a couple separated. We proposed time limits consistent with those for intestate succession in the *Wills and Succession Act*.

[694] The technical survey included a question about ALRI’s proposals to redefine the property affected, including adding a time limit. It mentioned a transition period but did not include all the details about our preliminary recommendation. The last part of the question read:

ALRI proposes changes that would reduce the number of homes affected so that none of these homes would be homesteads. ALRI proposes that the *Dower Act* should apply only to a home where the owner and their spouse or adult interdependent partner live or have lived together, and that it should apply only while the couple lives in the home and for a transition period after a move or separation.

Do you agree that the definition of homestead should be changed as ALRI proposes?

[695] Of those who answered this question, 75% agreed and 25% disagreed.

³³² See *Wills and Succession Act*, ss 1(1)(a), 60–62; *Adult Interdependent Relationships Act*, note 146, ss 1(1)(a), 1(1)(d), 10.

³³³ *Adult Interdependent Relationships Act*, note 146, s 10(1)(b).

³³⁴ BC Act, s 6.

[696] Only a few comments directly addressed whether a non-owner should receive a life estate after a move or separation. There were some comments that were generally supportive of a time limit or a rule that would prevent a non-owner from receiving a life estate after separation. We heard some different views about when dower rights should end. Some respondents thought dower rights should apply only to a home where a couple is currently living together, some thought they should apply until a couple resolves issues about property or makes a separation agreement, and some thought dower rights should continue as long as a couple is legally married, even if they are separated.

[697] We received one written comment with an anecdote relevant to this issue. The respondent knew a couple who were separated for decades but did not divorce for religious reasons. When one of the spouses died, the other sought a life estate. The respondent did not think the survivor should have received a life estate.

4. ALRI'S RECOMMENDATIONS

[698] In our view, a move alone should not deprive a non-owner of a life estate. A home should remain available for a life estate indefinitely, as long as other criteria are met. There should be no time limit based on occupancy.

[699] One of the other criteria should be a time limit after separation. Instead of a time limit that starts to run when the couple or one of them moves there should be a time limit that starts to run when they separate. Consistency with other Alberta legislation is a key consideration here. We recommend time limits consistent with the ones for intestate succession in the *Wills and Succession Act*.

[700] This approach would 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. The difference is not ideal but we have concluded that it is necessary to prioritize consistency with the *Wills and Succession Act* in this case.

[701] These recommendations would not impose disproportionate burdens on owners or their estates because other criteria would limit the effect. 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. There would also be the option for a non-

owner to release their dower rights if the couple agreed that the non-owner should not receive a life estate.

[702] These recommendations address 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.³³⁵ 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.³³⁶

RECOMMENDATION 40

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

RECOMMENDATION 41

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 42

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.

C. Property Owned By Someone Other Than an Individual

[703] The *Dower Act* applies only to property owned by an individual. If a couple lives in a home that one of them co-owns with a third party or a home owned by a closely held corporation, a surviving non-owner will not receive a life estate.³³⁷

³³⁵ 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 146, s 3(1)(a)(ii).

³³⁶ See *Adult Interdependent Relationships Act*, note 146, s 3(1)(a)(i). A person who is married cannot enter an adult interdependent partner agreement: see *Adult Interdependent Relationships Act*, note 146, ss 3(1)(b), 7(2)(b).

³³⁷ *Dower Act*, s 25(1).

[704] In Chapter 11, we recommended that consent to disposition should be required for co-owned property or property owned by a closely held corporation.

[705] We have concluded that a different approach is required for the life estate. It is not feasible to provide a life estate in a home that one spouse or partner co-owns with a third party or in a home owned by a closely held corporation.

[706] 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.³³⁸ They may remain in the home for that time even if a third party has become the owner of the home.

1. CO-OWNERS

[707] The exclusion of co-owned property could leave some non-owners vulnerable to losing their home soon after the owner's death. This issue is only likely to affect a small number of people. It would only affect non-owners who lived in a home that the owner co-owned with a third party and who do not inherit the owner's interest in the home. Some non-owners may receive some other benefit under the owner's will that would allow them to remain in the home. A non-owner at risk of losing their home would also have the option to make an application for family maintenance and support from the estate. Among other things, a court making an order for family maintenance and support can direct that the claimant receive a specific property.³³⁹ If the owner's interest in the home is part of the estate, a court might be able to provide a remedy that allows the non-owner to stay in the home. Nonetheless, there could be some non-owners left without any interest in their home.

[708] A non-owner who finds themselves without an interest in their home would be able to remain in the home for 90 days after the owner's death. After that, they could lose their home.

[709] 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

³³⁸ *Wills and Succession Act*, s 75(1).

³³⁹ *Wills and Succession Act*, s 96(1)(b)(iii).

unclear whether a surviving non-owner could benefit from a life estate.³⁴⁰ We have not found any guidance from other jurisdictions about how to balance the interests of a surviving non-owner and a third party co-owner.

[710] 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.

[711] We have concluded it is not feasible to introduce a life estate in co-owned property.

2. PROPERTY OWNED BY A CORPORATION

[712] A non-owner who lives in a home owned by a closely held corporation could also be vulnerable to losing their home. In some cases, the non-owner will inherit the owner's shares of the corporation or assume control of the corporation. In other cases, someone else will assume control. That person 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.

[713] It is not clear that all non-owners who live in a home owned by a closely held corporation would benefit from the statutory right to possess the home for 90 days. 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.³⁴¹ If a corporation is the owner and the occupants did not have a lease –

³⁴⁰ 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, 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, s 1.

³⁴¹ See *Wills and Succession Act*, s 72(a).

for example, if they occupied the home under a license or an informal arrangement – the surviving non-owner might not be able to rely on the legislation.

[714] Other Canadian jurisdictions have legislation that defines matrimonial home or family home to include a home owned by a corporation.³⁴² 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.³⁴³ 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.”³⁴⁴ It may include a home owned by a corporation:³⁴⁵

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)

[715] We have not found any guidance about how this provision works in practice and how it affects the interests of a corporation.

[716] Giving a non-owner a life estate in property owned by a corporation would be complicated. It would require balancing the non-owner’s interests against those of the corporation and possibly other shareholders. A corporation is a separate legal person. Introducing a life estate would require taking property from the corporation. A corporation that had been the owner of land would become the owner of the remainder interest. It would lose its rights to occupy, use, or deal with the land during the life estate. It could not sell the land or make any major changes without the consent of the life tenant. Despite losing most of its rights, it would still be responsible for certain expenses. The effect on the corporation could be significant.

[717] We have concluded that it is not feasible to introduce a life estate or similar protection for a non-owner who lives in a home owned by a corporation.

³⁴² Ontario Act, s 18(2); New Brunswick Act, note 161, s 17; Nova Scotia Act, note 161, s 3(3); PEI Act, note 161, s 19(2); Newfoundland Act, s 6(3); Yukon Act, note 161, s 21(4); NWT Act, note 154, s 50(2); Nunavut Act, note 154, s 50(2).

³⁴³ Newfoundland Act, ss 5–6, 8.

³⁴⁴ Newfoundland Act, s 6(1)(a).

³⁴⁵ Newfoundland Act, s 6(3).

3. ARE THERE OTHER OPTIONS?

[718] We recognize that our recommendations will leave some non-owners unprotected. A non-owner who lives in a home co-owned with a third party or owned by a closely held corporation may lose their home when the owner dies. Sometimes it will be an unintended consequence. Sometimes the owner or other family members may want the home to go to someone else when the owner dies and use co-ownership or a corporation to achieve that goal.

[719] We considered whether there are other protections that could allow a surviving non-owner to remain in their home. One option might be to extend the 90 day period of temporary possession and clarify that it applies to a home owned by a corporation. In consultation, we heard some concerns that 90 days is not long enough. The issue deserves review but it may not be a simple change. The 90 day period of temporary possession applies to a broader range of homes, including rental accommodations.³⁴⁶ The estate has obligations to pay certain expenses and maintain the home during the 90 day period of temporary possession.³⁴⁷ Changes would affect others, including personal representatives, other heirs, and landlords. It would be outside the scope of this project to recommend changes to the 90 day period of temporary possession.

RECOMMENDATION 43

A surviving spouse or adult interdependent partner should receive a life estate for a home where both spouses or both adult interdependent partners lived together if the deceased homeowner was the sole owner of the home.

³⁴⁶ *Wills and Succession Act*, s 72.

³⁴⁷ *Wills and Succession Act*, ss 79, 80. The surviving spouse or partner may ultimately be responsible for the expenses because the estate may deduct them from the surviving spouse or partner's share of the estate: *Wills and Succession Act*, s 79(3).

CHAPTER 16

How Can the Life Estate Be Improved?

A. Introduction

[720] Redefining the property affected by the life estate will address many problems, but not all. This chapter recommends reforms to address other issues with the life estate. Resolving these issues would better serve purpose of the legislation, protect the vulnerable, and reduce conflict.

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

1. BACKGROUND

[721] During a life estate, a life tenant is responsible for some expenses and the owner of the remainder interest is responsible for others. It can be hard to find out who is responsible for which expenses because the rules are in case law.³⁴⁸ Some of the common law rules are not straightforward. For example, some case law states a life tenant must pay interest on a mortgage and the owner of the remainder interest must pay the principal.³⁴⁹ To apply this rule, each must know the amount of principal and interest for each mortgage payment and pay the appropriate amount. There are also gaps in the case law. It is unclear whether a life tenant has the obligation to insure a property.³⁵⁰ There is no guidance on responsibility for condominium fees.³⁵¹

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

³⁴⁸ See Ziff, note 18 at 210–12; *Kachur Estate*, 2017 ABQB 786 at paras 97–109.

³⁴⁹ See eg *Re Morrison Estate* (1921), 68 DLR 787 (Sask QB).

³⁵⁰ See eg *Powers v Powers Estate* (1999), 182 Nfld & PEIR 341, 1999 CanLII 19149 at paras 7–18 (Nfld SC(TD)).

³⁵¹ 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.

[723] 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.³⁵²

2. CONSULTATION RESULTS

[724] 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.

[725] ALRI's preliminary recommendation was that legislation should list the obligations of the life tenant and the owner of the remainder interest. *Dower Act: Life Estate*, Report for Discussion 37 included a proposal about how to divide expenses.

[726] The technical survey invited comments on ALRI's proposal. Only a few respondents commented on this issue. Most were generally in favour of ALRI's proposal. One respondent raised some specific issues about insurance and mortgage payments. This respondent pointed out that insurance provides different kinds of protection and it can be difficult to say whether it is for the benefit of the life tenant or the owner of the remainder interest. If there is a mortgage, the two parties benefit from it differently. This respondent suggested it would be better to resolve any disputes about these expenses on a case-by-case basis. Another respondent thought a surviving non-owner should receive the home outright and be solely responsible for maintenance and expenses.

3. ALRI'S RECOMMENDATION

[727] Our final recommendation is the same as our preliminary recommendation. We recommend responsibility for expenses should be set out in legislated rules.

[728] The existing common law rules are a good starting point but they could be improved. To simplify and avoid disputes, we propose that the owner of the remainder interest should pay all mortgage payments (principal and interest) and the life tenant should pay insurance premiums. We also propose rules to clarify responsibility for condominium fees.

[729] The life tenant should be responsible for:

³⁵² *Wills and Succession Act*, ss 79–80.

- 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 and land, including minor repairs;
- if the home is a condominium unit, paying condominium contributions assessed against the unit; and
- if the home is a mobile home, paying rent for the mobile home site.

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

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

RECOMMENDATION 44

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

C. Other Claims Against an Estate

1. BACKGROUND

[731] 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 3, these questions arise because there is an unresolved conceptual issue about whether an automatic life estate is part of the deceased owner's estate.

[732] 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 to treat a life estate like

other assets that pass by operation of law, excluding them from the estate. Practically, it would protect a non-owner against losing their home. The life estate would have priority over debts or other claims against the estate. 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.

[733] While the law should protect non-owners from losing their homes unexpectedly, a non-owner's interests must be balanced against those of others. We heard particular concern about minor children. There can be competing claims against an estate if the deceased had a spouse or partner and children from a previous relationship. If the home was the deceased's only significant asset and the life estate takes 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.

[734] In other contexts, a court has the power to consider and balance interests. In an application for family maintenance and support a court considers the applicant's circumstances but also the estate's obligations to other family members.³⁵³ Even the very modest right to possess a family home for 90 days can be terminated if necessary to meet the needs of another family member.³⁵⁴

[735] ALRI previously considered competing claims by a non-owner and other family members. In *The Matrimonial Home*, Report for Discussion 14, ALRI said: "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 dependants."³⁵⁵ ALRI's preliminary recommendation was 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.³⁵⁶

³⁵³ *Wills and Succession Act*, s 93.

³⁵⁴ *Wills and Succession Act*, s 88(4):

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.

³⁵⁵ RFD 14 at 49.

³⁵⁶ 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.

2. CONSULTATION RESULTS

[736] In *Dower Act: Life Estate*, Report for Discussion 37, ALRI made two preliminary recommendations to clarify how an automatic life estate interacts with other claims against an estate. One would clarify that a life estate that passes automatically to a surviving spouse or partner by operation of law is not part of the deceased's estate. The other would give a court power to terminate or limit a life estate if necessary to provide maintenance and support to another family member.

[737] Concern for other family members was a theme that emerged in both early and general consultation. In early consultation, we heard about a few cases where other family members had greater need for support than a spouse or partner. For example, we heard about situations where the deceased had a spouse and minor children from a previous relationship. In general consultation, respondents to both the general and technical surveys expressed concern about other family members, especially children. Some respondents objected to an automatic life estate because it prioritizes a spouse's or partner's interests over those of other heirs.

3. ALRI'S RECOMMENDATIONS

[738] New legislation should clarify that a life estate that arises because of legislation is not part of a deceased's estate. At the same time, a court should have the power to override a life estate if necessary to provide support for another family member.

RECOMMENDATION 45

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 46

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.

D. Valuation of the Life Estate

1. BACKGROUND

[739] Sometimes 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 occur in intestate succession, when the value of the estate determines the amount of a spouse or partner's preferential share. It can arise when there is a dispute or in civil enforcement or bankruptcy proceedings.

[740] 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.

[741] We considered whether legislation should include guidance for valuing a life estate. Our research uncovered various approaches to valuing a life estate in case law and legislation. In *Dower Act: Life Estate*, Report for Discussion 37, ALRI asked whether it would make sense to codify any of these approaches in legislation.

2. APPROACHES TO VALUING A LIFE ESTATE

a. Case law

[742] Case law is the main source of guidance about how to value a life estate. It shows a wide range of approaches.

[743] Litigants often rely on expert evidence. Most often, the evidence includes calculations from an actuary.³⁵⁷ 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.³⁵⁸ 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

³⁵⁷ 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 80; *Johnson Estate*, note 10.

³⁵⁸ *Morice v Davidson*, [1943] SCR 94 at 97-98.

appraisers gave opinions about the value of a life estate³⁵⁹ and one where a litigant relied on a calculation by a chartered accountant.³⁶⁰ In a recent Alberta case, the value of a life estate in farmland was at issue.³⁶¹ The parties relied on a report prepared by consultants with expertise in appraising farmland.

[744] A common way to calculate the value of the life estate takes into account the market value of the home (ie, 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.³⁶² Some used Statistics Canada life expectancy tables.³⁶³ 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.³⁶⁴

[745] Some experts used an entirely different method, like estimating the amount a buyer might pay for the life estate.³⁶⁵

[746] We heard anecdotally that some Alberta lawyers or experts have valued a life estate by determining the amount that could be earned by renting the property (ie, the rent a tenant would pay minus any expenses), multiplying that amount by the life tenant's life expectancy, and making an adjustment for present value.

[747] While case law is instructive, it also has its limits. 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

³⁵⁹ 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).

³⁶⁰ *Aho v Kelly* (1998), 57 BCLR (3d) 369 at para 76 (SC).

³⁶¹ *Kachur Estate v Kachur*, 2021 ABCA 343.

³⁶² See eg *Aho v Kelly* (1998), 57 BCLR (3d) 369 at para 76 (SC); *Stojkovich Estate*, note 80.

³⁶³ See eg *Re Zarowiecki*, [1982] 4 WWR 728 at 734 (Man Surr Ct); *Stojkovich Estate*, note 80.

³⁶⁴ 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.

³⁶⁵ *Johnson v Johnson*, 1999 ABCA 362.

evidence helps a court reach a fair result in individual cases, but it comes at a high cost.

b. Legislated rules

[748] 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.

[749] We considered whether legislated rules could help parties agree on a price or resolve disputes about the value of a life estate.

[750] Our research turned up a few examples of legislation from other jurisdictions about valuing a life estate. The most detailed example is from British Columbia's *Property Transfer Tax Regulation*.³⁶⁶ In British Columbia, there is a tax that a transferee must pay when registering a transaction at the land titles office. The tax is based on the fair market value of the property. There is a formula to determine the value of a life estate in order to calculate the tax.³⁶⁷

³⁶⁶ *Property Transfer Tax Regulation*, BC Reg 74/88, s 11.

³⁶⁷ *Property Transfer Tax Regulation*, BC Reg 74/88, s 11:

11 The fair market value of a life estate in land shall be the amount determined in accordance with the following formula: $VFS \times P$, where

VFS = the fair market value of the fee simple of the land determined

(a) as though the life estate did not exist, and

(b) under paragraph (a) of "fair market value" in section 1 of the Act;

P = the percentage in Column 2 of Table 1 that is opposite the period in Column 1 that corresponds to the term of the life estate.

Table 1 is:

Column 1 Term of Lease Agreement or Life Expectancy	Column 2 Percentage of Fair Market Value of the Demised Premises or the Land subject to the life estate
5 years or less	40%
More than 5 years but not more than 10 years	50%
More than 10 years but not more than 20 years	60%
More than 20 years but not more than 30 years	70%
More than 30 years but not more than 40 years	80%
More than 40 years but not more than 50 years	90%
More than 50 years	100%

[751] There is another example in an unrelated British Columbia statute. The *Municipal Replotting Act* requires valuation of parcels in a “replotting district” in certain circumstances. The legislation requires the use of Statistics Canada life expectancy tables in determining the value of a life estate.³⁶⁸ It does not include a formula or state what would be multiplied by life expectancy to determine the fair market value.

[752] In the United States, the Internal Revenue Service has its own actuarial tables that must be used for various purposes, including valuing life estates.³⁶⁹

[753] We also found examples of formulas used in the past to calculate succession duties. There used to be a requirement in Alberta, among other places, to pay a succession duty based on the value of property that a person inherited. There was a legislated formula in Alberta to determine the value of a life estate for the purpose of calculating the succession duty.³⁷⁰

c. Options for legislated rules

[754] In *Dower Act: Life Estate*, Report for Discussion 37, ALRI discussed some options for legislated rules. We presented some examples of possible approaches.

[755] 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. This option could streamline valuation 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

³⁶⁸ *Municipal Replotting Act*, RSBC 2016, c 1, s 11(3)(d):

11(3) The calculation of the 70% of the total assessed value referred to in subsection (1) must be determined as follows:

...

(d) if a former parcel is held by a tenant for life,

- (i) the true or market value of the life estate is its present worth as determined by using the Statistics Canada tables of British Columbia life expectancy in effect when the valuation is made, and
- (ii) the true or market value of the estate in remainder in fee simple is the resulting balance, after subtracting the true or market value of the life estate from the true or market value of the parcel;

³⁶⁹ 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].

³⁷⁰ *The Succession Duty Act*, RSA 1955, c 324, s 31. Some other Canadian jurisdictions had comparable legislation: see eg *Succession Duty Regulation*, Man Reg 76/88, s 2(2), Table II.

produce fair results. It might require regular review to ensure the formula and sources remain up to date.

[756] Another option would be a simplified formula. The formula could 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% of the market value of the property multiplied by the life tenant's life expectancy. The formula in British Columbia's *Property Transfer Tax Regulation* is an example of this approach. 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% of the market value.³⁷¹ 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.

3. CONSULTATION RESULTS

[757] We did not make a preliminary recommendation on how to value a life estate. The technical survey invited comments on the issue. Only three respondents mentioned this issue. One was opposed to adding guidance to legislation. The other two expressed lukewarm support.

4. ALRI'S CONCLUSION

[758] 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.

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

[760] After considering the options and the comments we received, we are not convinced that a formula would reliably produce fair results. We have concluded that the best option is to continue the current approach, with the value of a life estate determined on a case-by-case basis. In a negotiation, the parties will have to agree on a value or a method to determine the value. They can choose a method that is appropriate to the circumstances and the amount at stake. They

³⁷¹ See *Stojkovich Estate*, note 80 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.

might choose one of the approaches discussed above or create their own. In litigation, parties might agree on certain issues. Even if they cannot agree on the value of the life estate, they might agree on the method or certain factors to be used in a calculation. When they cannot agree, each party will have to decide what evidence to present. Some cases may require multiple experts. If the value of a life estate is an issue at trial, the court will have to weigh the evidence and determine the value.

E. Other Improvements to Forms or Procedures

[761] While ALRI is not making specific recommendations about forms or procedures, observations we made in our research and consultation may be useful to those who eventually prepare new forms or procedures.

[762] In our research, we noticed a gap in the Surrogate Forms, particularly the ones that a personal representative uses to apply for a grant of probate or administration.³⁷² The grant application forms were recently revised. The new versions include information to guide a personal representative through the application. The Grant Application form prompts a personal representative to identify all potential beneficiaries and claimants. The Notice to Beneficiaries and Other Interested Parties form informs beneficiaries of what they can expect to receive from an estate and informs potential claimants of claims they may have against an estate. While the forms are otherwise a good guide to the rights or claims to consider, none of the forms mentions the *Dower Act* or the right to receive a life estate. A personal representative or beneficiary relying on the forms might not realize that a surviving non-owner is entitled to receive a life estate. It would be helpful to both personal representatives and non-owners if the grant application forms included information about the automatic life estate.

³⁷² *Surrogate Rules*, Alta Reg 130/1995, Schedule 2.1.

CHAPTER 17

How Can the Life Estate in Personal Property Be Improved?

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

[763] 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.”³⁷³

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

[765] At common law, there is no such thing as a life estate in personal property.³⁷⁴ 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.

[766] 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. 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, time-consuming, and often impossible to prove 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

³⁷³ RFD 14 at 64.

³⁷⁴ See RFD 14 at 62-63.

the other.”³⁷⁵ Few spouses or partners rely only on the statutory life estate in personal property.

[767] Under the current rules, the life estate in personal property complements a life estate in a home. It is included in the *Dower Act* and only arises when a non-owner receives a life estate in a home under the *Dower Act*.

[768] 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.

[769] 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.³⁷⁶ Other Canadian jurisdictions have similar provisions in their family property legislation.³⁷⁷ 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.³⁷⁸

[770] ALRI’s preliminary recommendation was that a surviving spouse or partner should have the use and enjoyment of personal property related to a home. We heard very few comments specifically about this recommendation or about the life estate in personal property, although some respondents expressed the view that a non-owner should be able to keep all family property.

[771] In our view, 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 14.³⁷⁹

³⁷⁵ *Alberta Wills and Estates Practice Manual* (Edmonton: Legal Education Society of Alberta, 2020) at 4–12 (in Part I).

³⁷⁶ *Family Property Act*, s 25.

³⁷⁷ See eg *Family Law Act*, SBC 2011, c 25, s 90(2)(b); Ontario Act, s 24(1)(d); Newfoundland Act, s 15(1)(c).

³⁷⁸ *Wills and Succession Act*, s 76.

³⁷⁹ 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).

[772] ALRI recommends 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 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.³⁸⁰ It would be consistent to use the same wording.

RECOMMENDATION 47

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

B. Reforming Rights to Personal Property

1. PERSONAL PROPERTY TO BE INCLUDED

[773] It is less than ideal that the *Dower Act* refers to the exemptions in the *Civil Enforcement Act* and its regulations.³⁸¹ It is inconvenient to have to refer to other legislation to find the list. Further, a list developed for enforcement debtors is not 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.

[774] In *Dower Act: Life Estate*, Report for Discussion 37, ALRI considered options for defining the personal property that a surviving spouse or partner may keep.

³⁸⁰ *Family Property Act*, s 25; *Wills and Succession Act*, s 76.

³⁸¹ 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 73, s 88; *Civil Enforcement Regulation*, Alta Reg 276/1995, s 37.

[775] 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.

[776] 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*.

[777] 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:³⁸²

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.

[778] ALRI's preliminary recommendation was to use the third option. Our final recommendation is the same. This definition 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.

[779] 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

³⁸² *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.”³⁸³

RECOMMENDATION 48

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 49

A court should have the power to resolve any dispute about which items are household goods.

2. RIGHTS AND RESPONSIBILITIES

[780] It would 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;³⁸⁴
- pay any payments that fall due under a lease or loan in respect of the personal property; and
- insure the personal property.

[781] 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 intestate succession. The person could either take the item or give consent for the surviving spouse or partner to dispose of it.³⁸⁵

³⁸³ *Dover Act*, s 23(2).

³⁸⁴ 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*, 2017 ABQB 786 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.

³⁸⁵ See *Kachur Estate*, 2017 ABQB 786 at para 109.

[782] This process may not work in every situation, especially for items that have very little value. We recommend 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.³⁸⁶

RECOMMENDATION 50

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

RECOMMENDATION 51

A surviving spouse or adult interdependent 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.

³⁸⁶ 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).



2021/2022 DOWER ACT CONSULTATION RESULTS SUMMARY

ALRI ran two online surveys. Both surveys were open from 3 December 2021 to 7 March 2022.

One survey was aimed at the general public. We call this one the general survey.

Another survey was aimed at professionals who use the *Dower Act* in their work, including lawyers, real estate brokers and agents, landmen, and estate planners or administrators. We call this one the technical survey

Respondents were not required to answer all questions. Some skipped questions, so the number of responses to each question may be less than the total number of respondents.

We also received written comments from 8 individuals by email, LinkedIn, and YouTube.

586 people completed the general survey

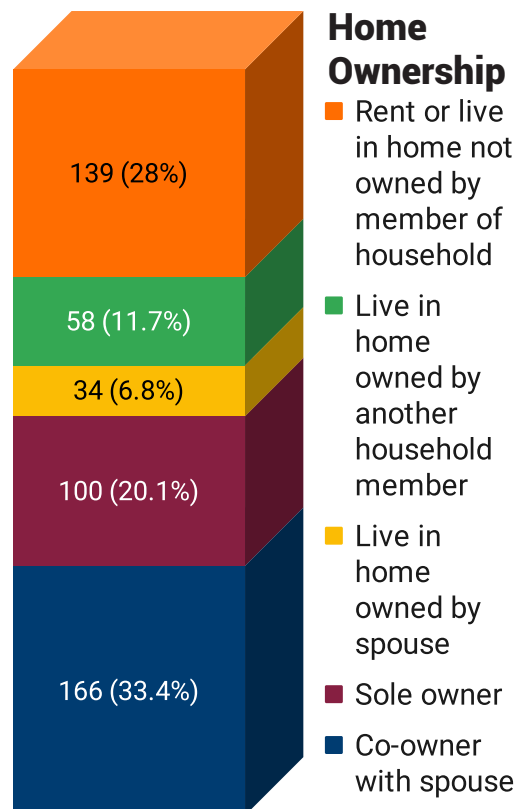
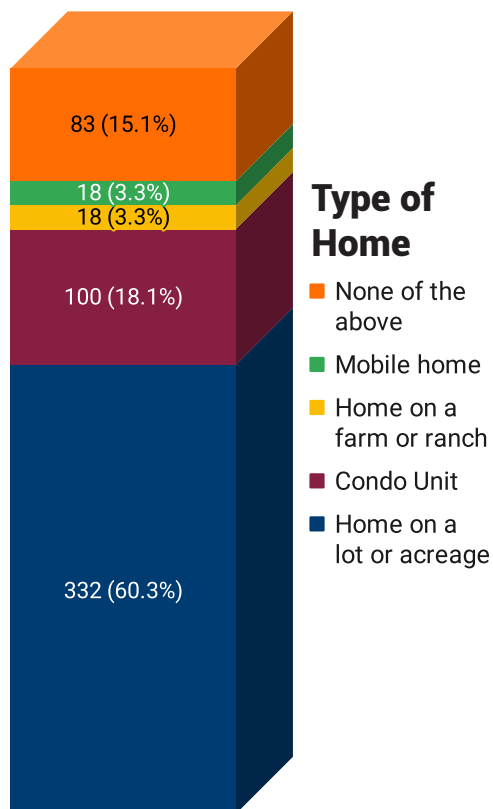
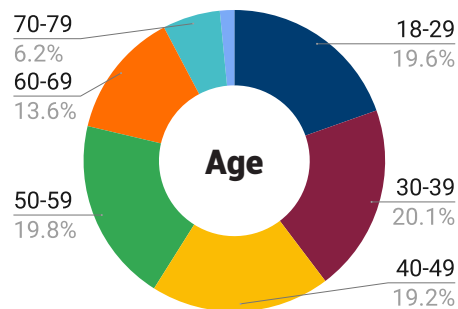
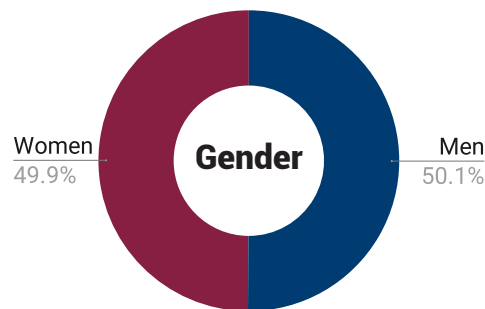
258 people completed the technical survey



WHO RESPONDED TO THE GENERAL SURVEY?

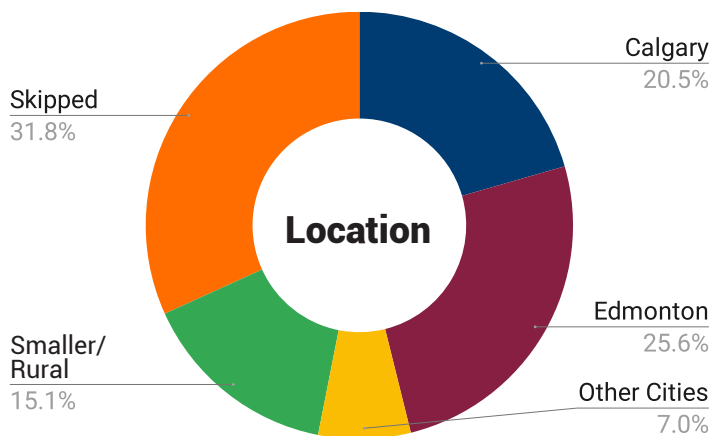
- All the respondents lived in Alberta.
- There were 286 men and 285 women. A small number of respondents selected "another answer or prefer not to say."
- Age groups from 18 to 79 were represented on the general survey.
- Respondents came from all parts of the province.
- Nearly half of respondents own their home, either by themselves or together with a spouse or partner.
- Most respondents live in a home on a lot or acreage.

205 from Calgary **180** from Edmonton **95** from smaller areas **62** from other cities



WHO RESPONDED TO THE TECHNICAL SURVEY?

- All the respondents lived in Alberta.
- There were 73 men and 91 women. 11 respondents picked "another answer or prefer not to say". 83 respondents skipped the question.
- Respondents came from all parts of the province.
- Most respondents were real estate professionals or lawyers.

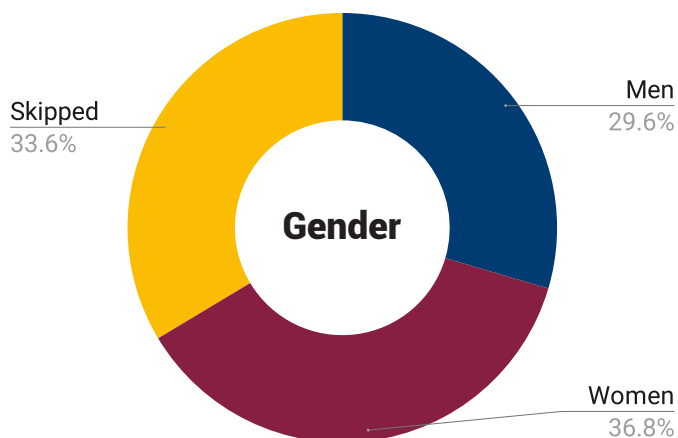


53
from Calgary

66
from Edmonton

18
from other cities

39
from smaller/rural areas



NUMBER OF RESPONDENTS BY PROFESSION

112 REAL ESTATE

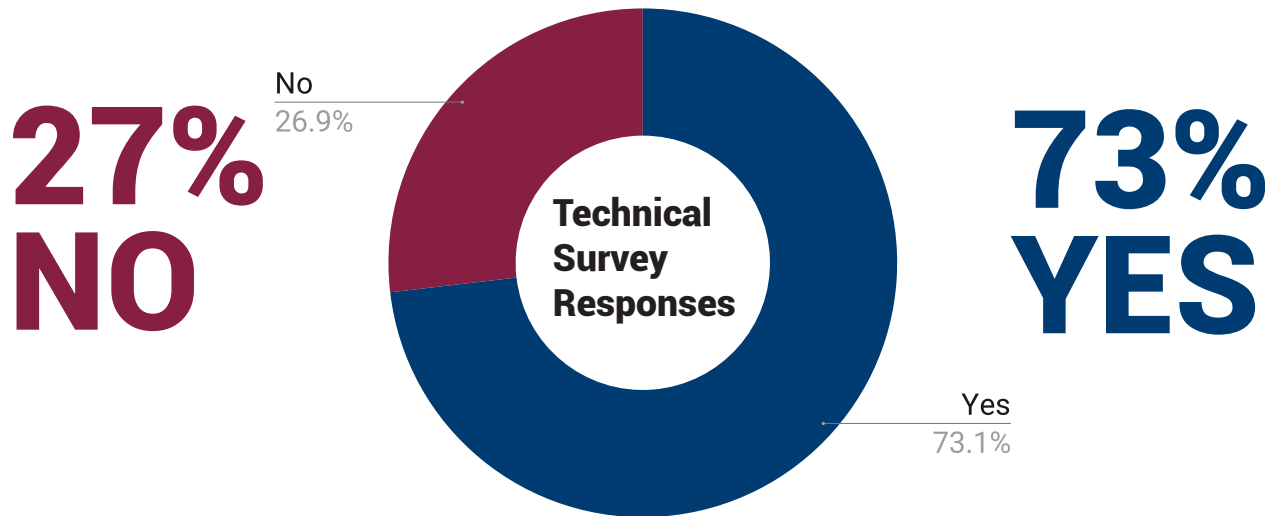
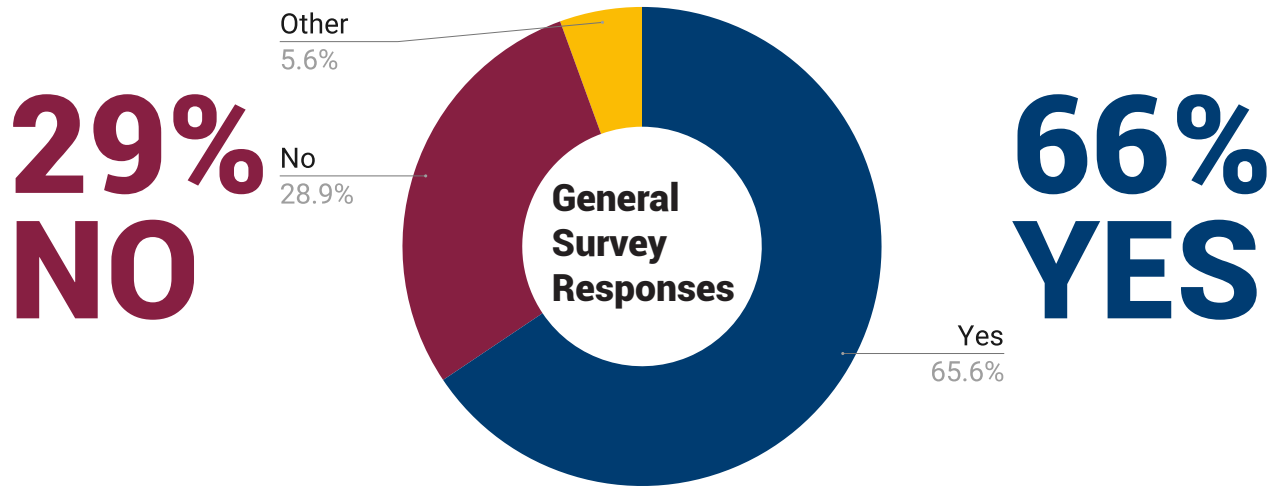
46 LAW REAL ESTATE, WILLS & ESTATE, FAMILY LAW, INSOLVENCY, BANKRUPTCY, CIVIL ENFORCEMENT

7 LANDMEN

4 ESTATE PLANNER

CONSENT TO DISPOSITION

A majority of respondents to both surveys agreed that a spouse should have to consent to a sale, transfer, or mortgage of a couple's home.



The most common reasons that respondents gave for wanting to get rid of this rule were:

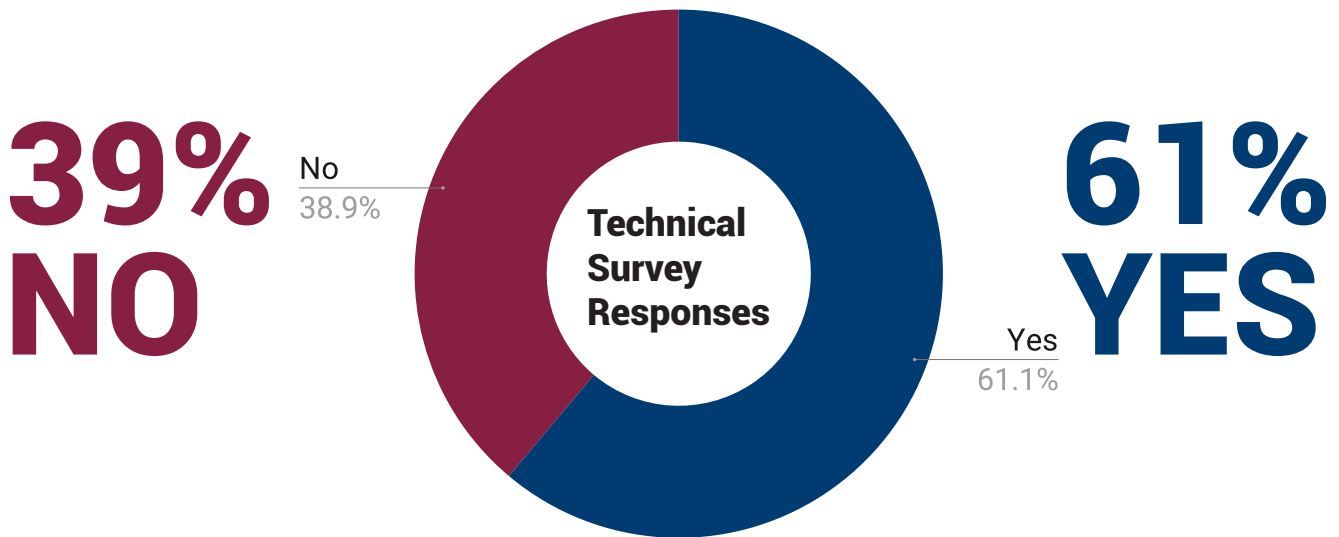
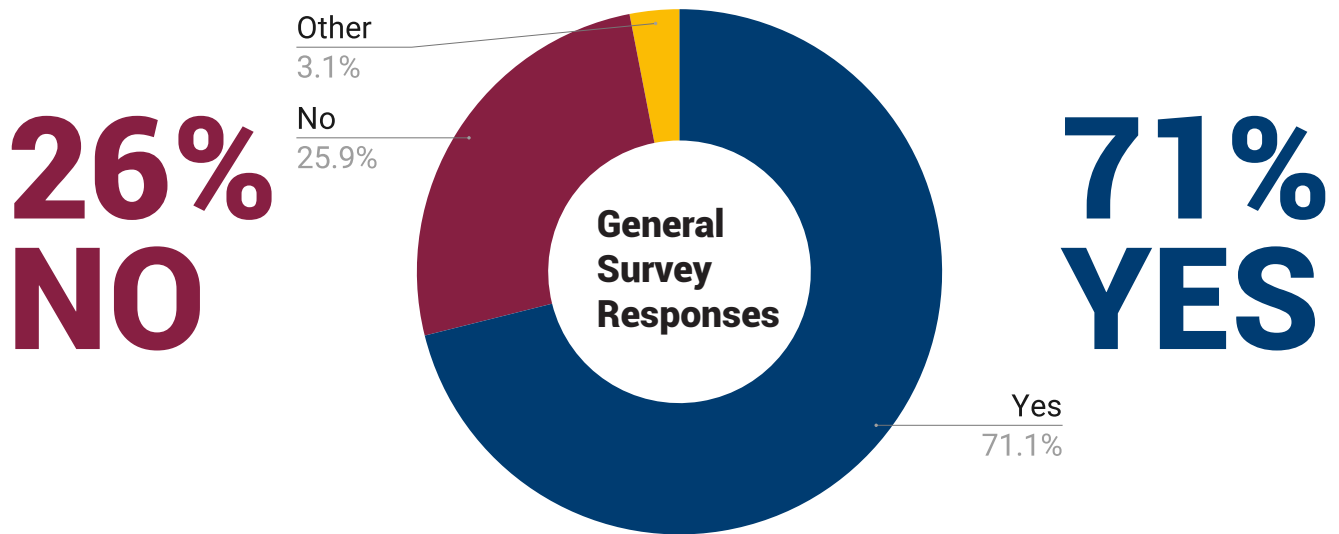
- The house belongs to the person on title,
- The person on title should have the power to decide what happens with the house,
- There are other ways to protect a spouse who is not on title,
- The rule requiring consent is inefficient or causes problems with transactions.

The most common reasons that respondents gave for wanting to keep the rule requiring consent were:

- A spouse should have a say in decisions that affect the couple's home,
- This rule protects a spouse who does not own the couple's home,
- A couple's home belongs or should belong to both of them, even if only one of them is on the title,
- A spouse often makes contributions to acquiring or maintaining the home.

LIFE ESTATE

A majority of respondents to both surveys agreed that a surviving spouse should keep the couple's home for the rest of their life.



The most common reasons that respondents gave for wanting to get rid of this rule were:

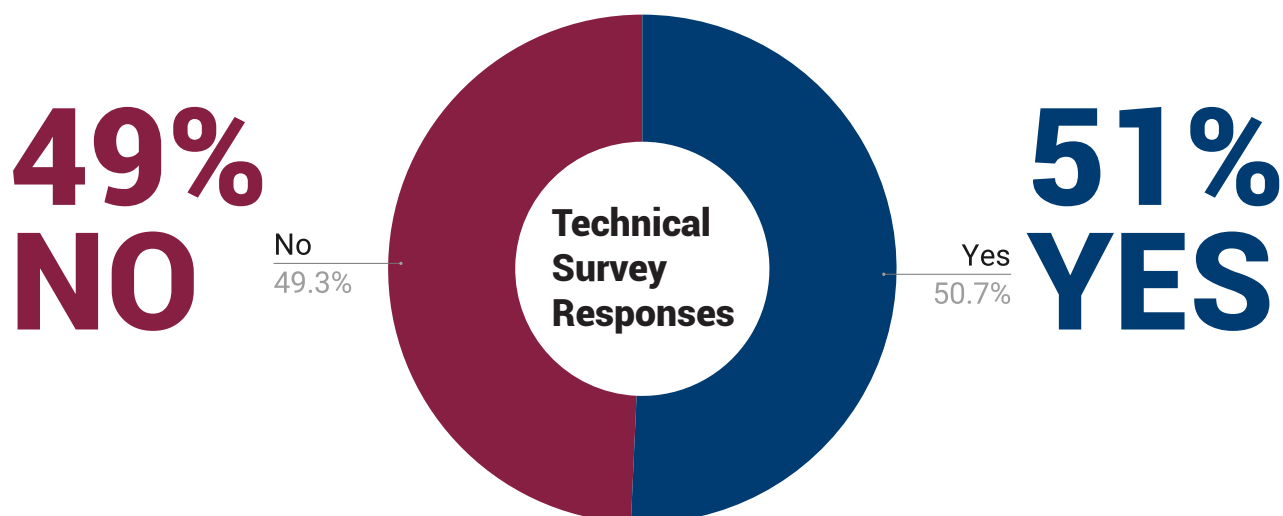
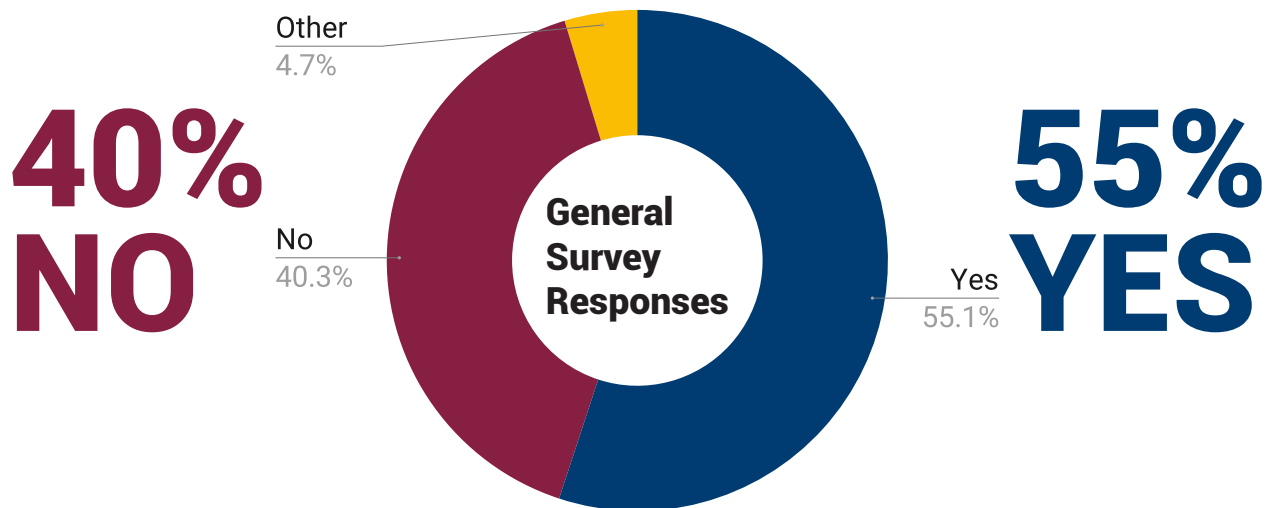
- The owner's wishes should prevail
- This rule interferes with the rights or needs of other heirs (such as the owner's children from a previous relationship)
- There are other ways to protect a spouse who is not on title.

The most common reasons that respondents gave for keeping this rule were:

- A spouse should be able to stay in the home after the owner's death
- A couple's home belongs or should belong to both of them, even if only one of them is on title
- The spouse contributed to acquiring or maintaining the home
- This rule is needed to support the survivor or prevent them from becoming homeless

ADULT INTERDEPENDENT PARTNERS

A majority of respondents were in favour of having the same rules for spouses and adult interdependent partners.



The most common reasons for wanting the Dower Act to apply only to married spouses were:

- It is important to have a clear rule for deciding who is affected. It is easy to prove that a couple is married but can be difficult to determine when an adult interdependent partner.
- Marriage is a bigger or more serious commitment than a common-law relationship.

The most common reasons for having the same rules for spouses and adult interdependent partners were:

- There is no real difference between the two kinds of relationships.
- Both kinds of couples already have the same rights under most other laws.
- Common-law partners contribute to acquiring and maintaining a home.
- Couples should not be penalized for making a choice not to marry or because they cannot afford to marry.

WHICH HOMES SHOULD BE AFFECTED?

75%

of respondents to the technical survey agreed that the *Dower Act* should apply only to a home where the owner and their spouse or adult interdependent partner live or have lived together, and that it should apply only while the couple lives in the home and for a transition period after a move or separation.

64%

of respondents on the general survey chose all the available options (a home on a lot or acreage, a home on a farm or ranch, a condominium unit, and a mobile home) when asked which homes the *Dower Act* should apply to. Many added comments to the effect of "a home is a home".

76%

of respondents to the technical survey agreed that the *Dower Act* should apply to mobile homes. Mobile homes are defined as homes that are separate from land.





Web: alri.ualberta.ca

Phone: 780.492.5291

Email: lawreform@ualberta.ca

Follow us on Twitter! @ablawreform
