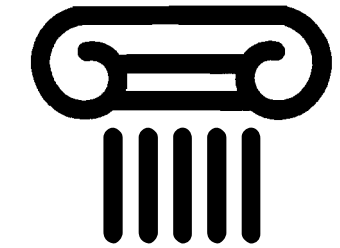

ALBERTA
LAW REFORM
INSTITUTE

THE MATRIMONIAL HOME

Report for Discussion No. 14

March 1995

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, 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 of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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Professor Bruce Ziff was the principal researcher for this Report. He was seconded to the Institute during the 1992-1993 academic year. Following the conclusion of the formal period of the secondment, he continued to work on this project. Others played an invaluable role. Lyndon Irwin (of the Institute's Board) and David Jones (formerly of the Board) served along with Professor Ziff on the project committee.

All of the members of the Institute's legal staff, at one time or another, provided assistance. In that regard, special mention must be made of the contributions of William Hurlburt, Eric Spink, Peter Lown, and Christina Gauk. The Institute's support staff — Shirley Ewmett, Cheryl Holowaty, Marlene Welton, Carol Fowlie, and Tanya Filanovsky — assisted in countless ways.

A final note of recognition is due to Wilbur Bowker, Director Emeritus of the Institute, and Canada's leading scholar on the law of homesteads. In his generous way, Professor Bowker provided insight and guidance at various times during the preparation of this Report. The insurance of his writings on the law of dower in Alberta is evident not only in this Report, but also in the dower jurisprudence that has developed in this province.

PREFACE AND INVITATION TO COMMENT

This is not a final report. It is a report of our conclusions and proposals. The Institute's purpose in issuing a Report for Discussion at this time is to allow interested persons the opportunity to consider these tentative conclusions and proposals and to make their views known to the Institute. Any comments sent to the Institute will be considered when the Institute determines what final recommendation, if any, it will make to the Alberta Attorney-General.

The reader's attention is drawn to the List of Recommendations in Part III. It would be helpful if comments would refer to these recommendations where practicable, but commentators should feel free to address any issues as they see fit.

It is just as important for interested persons to advise the Institute that they approve the proposals as it is to advise the Institute that they object to them, or that the proposals need to be revised in whole or in part. The Institute often substantially revises tentative conclusions as a result of comments it receives. The proposals do not have the final approval of the Institute's Board of Directors. They have not been adopted, even provisionally, by the Alberta government.

Comments on this report should be in the Institute's hands by October 15, 1995. Comments in writing are preferred. Our address is:

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PART I — EXECUTIVE SUMMARY

This Report for Discussion looks at the ways in which the matrimonial home can provide a means of support for married, divorced and widowed spouses. It proposes reforms to the law presently contained in the Dower Act and the Matrimonial Property Act.

Dower legislation in one form or another has been part of the law of Alberta since the early decades of this century. Generally speaking, dower law prohibits dispositions of the home that are undertaken without the consent of both spouses. It also confers upon a widowed spouse a right to a life estate in the home on the death of the owning spouse. These laws were introduced initially as a means of protection for women living in Alberta in the first half of the twentieth century (though the law is now gender neutral). The current Dower Act last underwent extensive reform in 1948; it is time for a reassessment.

The Report also examines the rights of separated and divorced spouses to obtain occupation of the matrimonial home under Part 2 of the Matrimonial Property Act. This Act allows a spouse to obtain an order of exclusive occupation of the home, regardless of whose name is on title.

In our view, the values and functions that underlie these two protections have enduring importance. In this Report we propose changes that will modernize the law and eradicate uncertainties that have arisen in its application. Presently, both the Dower Act and Part 2 of the MPA use the home as a means through which a spouse can obtain support. We propose the creation of a single regime to achieve that goal.

Chapter 1 contains a brief history of the law and an outline of the current rules.

In Chapter 2, we propose that both spouses be accorded an equal right of possession in the home, even without the need for a court order. We also suggest ways in which the law can be rendered more certain. At present, if one spouse seeks an order for exclusive possession, there is very little guidance in the law as to what a court should consider in granting an

order. Similarly, the ancillary orders that can be made when exclusive possession is granted (regarding such matters as the responsibility for the payment of current expenses, or obligations of repair) are not set out in the Act. We propose that Part 2 of the MPA be amended to provide better direction for the spouses, their counsel, and the courts as to the factors to be considered in making such orders.

In Chapter 3, we recommend that the dower life estate should be transformed into a right of occupation governed by Part 2 of the MPA. This would mean that the home would remain available for a widowed spouse. However, unlike the current dower life estate, the right of occupancy would be (i) variable as circumstances change; and (ii) subject to orders concerning payments and repairs (as in the case of other orders granted under Part 2 of the MPA). We also propose that the current 'life estate in personal property', which is intended to give a widowed spouse rights over specified household goods, be transformed into a right of exclusive possession of household goods under Part 2 of the MPA. We also recommend that matrimonial fault should not be a bar to the enjoyment of occupancy rights.

In Chapter 4, the rules governing the requirements for spousal consent to transfers of the home are considered. In our view, these rules provide important protections against dealings that might deprive a spouse of the occupancy rights which we propose in Chapters 2 and 3. Although the rules governing consent were originally enacted to preserve the home for the enjoyment of the dower life estate, they now also prevent the loss of occupancy rights under Part 2 of the MPA. This Report recommends that the law continue to require that dispositions of the home be accompanied by a consent signed by a non-owning spouse. We propose that lawyer or a notary public must acknowledge that the consenting spouse has signed the consent voluntarily, with knowledge that occupancy rights in the home are being waived. The law will clearly state that a disposition of the home will be invalid if undertaken without compliance with the consent and acknowledgement formalities. If, however, the home is transferred into the hands of a good faith purchaser for value who is entitled to take the home free from all unregistered interests, the non-consenting spouse will then no longer be able to invalidate the transaction, but will be able to seek compensation against the other spouse. Unlike the current law, even the improper granting of a short-term lease may give rise to compensation.

In Chapter 5, we examine the rules governing contracts made between the spouses concerning these rights of occupancy. In doing so, we attempt to balance the freedom of contract accorded to married couples, against other policies concerns, especially the importance of the provision of support for family members. This balance is struck by allowing the spouses to contract out of the rights conferred under these reforms, subject to several qualifications. First, these contracts can be varied by court order where a radical change of circumstances arises that undermines the basis of the original agreement, or where the terms of the contract are not in the best interests of any dependent children of the marriage. Second, even where a contract waives the rights of a spouse to occupancy of the home on the death of the owning spouse, the surviving spouse will be entitled to remain in the home for a 90-day period. Third, we propose that the right of occupation cannot be surrendered until the spouses have separated. A contract made earlier would be unenforceable.

Chapter 6 contains an analysis of Part 1 of the Matrimonial Property Act, which deals with the division of matrimonial property — including the home — on marriage breakdown. Here we recommend that no special rules for the division of the home be adopted. We do however suggest that Part 1 should be amended to provide expressly that an occupancy order under Part 2 of the MPA can be made in an application for division under Part 1.

In Chapter 7, we consider the law governing the exemption of the home from seizure by creditors of one of the spouses. From their inception, Alberta homestead laws have sought to protect the home from seizure. The current law allows a $40,000 exemption for non-rural homesteads. We recommend in this Report[1] that no changes should be made to the law governing the treatment of these exempt funds.

In Chapter 8, we endeavour to develop a definition of the 'matrimonial home'. Currently, the Dower Act contains a definition of 'homestead' which differs in significant ways from the definition of 'matrimonial home' now contained in the Matrimonial Property Act. Our proposed regime seems to require that these two definitions be replaced by

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[1] In our *Enforcement of Money Judgments* (Report No. 61, 1991), the rules governing exemptions were comprehensively addressed. A question concerning the fate of the $40,000 exemption was deferred until the policies governing dower were reviewed. The present Report takes up that question.

a single definition of the home. Drawing on features of both statutes, the matrimonial home will be defined to mean the home in which both spouses have resided and will include: homes on residential lots, or parcels up to one quarter section in size; condominium units and rights over the common areas of a condominium; rented suites; mobile homes; and residences found on business premises. Mineral estates will be excluded from the definition of the home, as will property owned by a corporation.

In Chapter 9, we consider the transitional provisions for these reforms. We recommend that the law should be given prospective effect, in accordance with the general principles governing the introduction of reforms. This will mean that dower life estates that have already vested will not be affected. Dispositions made, or contracts entered into, before the new law takes effect will also not be affected by the implementation of the new law.

In our view, the old law of dower, and the current rules governing possession of the home, will be rejuvenated and improved under these proposals. The commitment to the support of separated, divorced and widowed spouses, embodied within the law of dower in Alberta, will be renewed under this new approach.

PART II — REPORT

CHAPTER 1 — INTRODUCTION

A. Introduction

(1) The purpose of this report

This Report examines an integral feature of the lives of many Albertans — the family home. The purpose of the Report is to review two areas of law that directly affect rights of ownership, enjoyment and disposal of the home. These are: (i) the law governing homesteads, found in the Dower Act;[2] and (ii) the right to possession of the matrimonial home conferred by Part 2 of the Matrimonial Property Act[3] (sometimes referred to below as the MPA).

The main emphasis of this Report is on the Dower Act. That Act provides that both spouses must consent to a transfer of the home. It also confers a life interest in the home in favour of a widowed spouse. Of course, for many families these protections are unnecessary. This is because the family home may be jointly owned by the spouses, or the surviving spouse may be adequately cared for through the will of the decedent, under the law of intestate succession, or as a beneficiary under a life insurance policy. In other instances, the survivor may simply not be in need. Our concern is that there be a proper fall-back protection when these other means of support are not present or adequate.

This Report also considers the use of the home as a means of support before death. It examines the law relating to occupancy during marriage and on marriage breakdown, as presently found in Part 2 of the Matrimonial Property Act. That Act allows a spouse to apply to a court for an order of exclusive possession of the home on marriage breakdown.

These two rights (dower and the right to possession) are complementary. A principal goal of this Report is to create a regime in which entitlements to the home applicable on death are rationalized with

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[2] R.S.A. 1980, c. D-38.

[3] R.S.A. 1980, c. M-9.

the occupancy rights that exist before death. The approach that is adopted here is intended to improve the law by creating a single system. In general terms, the following will be recommended:

(i) The law governing occupancy of the home, before and after death, should be dealt with in Part 2 of the Matrimonial Property Act. The Dower Act should be abolished.

(ii) Under Part 2, both spouses should be accorded an automatic right of occupation of the home, regardless of whose name appears on title.

(iii) There should continue to be controls on the right of the owning spouse to transfer the home. These controls (found now in the Dower Act) should be redefined to protect and take account of rights on death, and also rights of occupancy during marriage and on breakdown.

(iv) On death, the survivor should be given a presumptive right to remain in the home. This would resemble the current law of dower. However, unlike the law of dower, this right would be subject to a variation based on changed circumstances. In addition, a court should be empowered to make additional orders concerning such matters as repairs and current payments. This is not possible under present dower law.

(2) A starting premise

At the core of this Report lies an important assumption: the home is a place of special significance; it is not just another asset accumulated over a lifetime. This premise can be understood at both philosophical and practical levels. Among the theories that justify a system of private property, there are two that help explain the centrality of the home. One justification of private property is that it promotes freedom, autonomy and *privacy*.[4] Closely connected with these ideas is the notion that private property encourages the development of the human personality.[5] Property allows for a manifestation and projection of individuality into the material

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[4] C.A. Reich, "The New Property" 73 Yale L.J. 733 (1964).

[5] See further M.J. Radin, "Property and Personhood" 34 Stanf. L. Rev. 957 (1982); M.J. Radin, *Reinterpreting Property* (1993).

world. Along with this, a degree of attachment to the objects of property often develops.[6]

These ideas help to explain why the home is so important to many people. It is perhaps with regard to the family home that the values of autonomy and personhood are most evident. So, it has been said that

> [a] home ... is a reflection of our personality, a signature of our identity ... Emotionally, the investment in a home — rented or owned — is often far greater than the monetary expenditure it represents. Financial investments may become sunk costs, but the emotional commitments to a home remain fresh in the mind and grow with the accumulation of memories. It should become apparent, therefore, that actions that are perceived as threats to the continued security of possession of one's home could evoke a strong response not only from the persons directly involved, but also from other members of the community who empathize with them.[7]

It is the need for privacy and security that drives the residential housing market, affects the rules governing police powers of search and seizure, and underscores the move for security of tenure for residential tenants.[8] More generally, where we live can determine many of our daily habits and practices, including where we shop, worship, play, work or learn. Typically, the home is the hub of one's life. For many couples, it represents the asset of greatest value and importance. This, in turn, raises expectations about entitlements.[9]

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[6] There is a wealth of psychological literature on the importance of ownership: see generally F.W. Rudmin, ed., *To Have Possessions: A Handbook on Ownership and Property, A Special Issue of the Journal of Social Behavior & Personality* (1991).

[7] W.T. Stanbury, *The Normative Basis of Rent Regulation*, (Ontario Commission of Inquiry into Residential Tenancies, Research Study No. 15, 1985) at 3-10.

[8] See further S. Makuch & A. Weinrib, *Security of Tenure* (Ontario Commission of Inquiry into Residential Tenancies, Research Study No. 11, 1985); Yee, "Rationales for Tenant Protection and Security of Tenure" (1989) 5 J.L. & Social Pol'y 37.

[9] Accord B. Hovius & T.G. Youdan, *The Law of Family Property* (1991) at 573-74.

This Report builds on these ideas. It examines the way in which the home can be used as a means of support for family members when marital relationships end, whether this occurs by virtue of marriage breakdown or death. It recognizes that the dislocation experienced when these events occur can be compounded by the loss of one's place of residence. The importance of the home and the principles affecting support of the family are blended together in the law that is examined below.

(3) The structure of the presentation

The remainder of this chapter contains a discussion of the principal laws under study: the Dower Act and Matrimonial Property Act. The historical development of the law and the current position will be outlined. Chapter 2 contains a detailed examination of the right of exclusive possession under Part 2 of the MPA. Chapter 3 considers the right to dower, the policies that underlie it, and the options for reform. These chapters contain the core recommendations. The remaining chapters are mainly involved with the implementation of these proposals. So, Chapter 4 examines the rules governing the transfer of the home, and Chapter 5 considers the rules relating to contracts affecting the home. In Chapter 6, the law concerning exemptions of the home from seizure by judgment creditors is considered. Chapter 7 contains a review of the law concerning the division of property under Part 1 of the MPA. In Chapter 8, a definition of 'the home' — one that is consistent with the policies considered in the preceding chapters — will be presented. Chapter 9 deals with transitional provisions.

B. The Origins and Nature of Dower Law in Alberta

(1) Introduction

The present law of dower is designed to provide special rights of ownership in the family home to widows and widowers. The common law developed a notion of dower rights, but these entitlements were abolished in the Northwest Territories in 1886.[10] Consequently, this type of dower was not part of the law of Alberta when it became a province in 1905. Current Alberta law is inspired by American homestead reforms. However, these in

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[10] The Territories Real Property Act, S.C. 1886, c. 26, s. 8. See now Law of Property Act, R.S.A. 1980, L-8, s. 3, which provides that: "[n]o widow is entitled to dower in the land of her deceased husband except as provided in the Dower Act".

turn owe something to the common law, and therefore the logical starting point of this discussion is the common law concept.

(2) Common law dower

English common law found the life estate in land to be a useful instrument of social policy, and in this context two such estates were recognized: dower and curtesy. The first gave property rights to widows; the second was for the benefit of widowers.

The dower life estate was intended to provide shelter for widows. In England, prior to 1926, land not disposed of by will devolved to the owner's heirs. This system conferred rights on the children of an intestate property owner and other blood relatives, but not on the spouse of the intestate.[11] It was within this context that the law of dower developed in England. Dower gave a life interest to a widow in the freehold lands of her deceased husband. This entitlement took precedence over both the normal intestacy rules and a gift of dowerable lands by will.

The precise genesis of English dower law has been traced to Germanic and Anglo-Saxon law and custom, but the early waters are mired.[12] The ancient practice of voluntarily providing the wife with a dowry on marriage seems to have evolved into an entitlement to a portion of her husband's lands on his death. During the marriage, the wife had a right to dower 'inchoate' as soon as the husband became seized of freehold property. This did not confer a direct power to deal with that land or prevent its alienation. However, unless the wife consented to the disposition of such property, her dower rights ran with the land. Understandably, the refusal of a wife to agree to release her dower interest could have a chilling effect on the husband's ability to transfer the property. On the death of the husband, the inchoate right became 'consummate' and could be enjoyed in possession. The precise quantum of the entitlement evolved over the centuries. By the time that English law was received into the colonies in British North America, a one-third portion of the husband's land became

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[11] See further R.E. Megarry & H.W.R. Wade, *The Law of Real Property* (5th ed. 1984) at 539 *et seq.*

[12] See further C.M.A. McCauliff, "The Medieval Origin of the Doctrine of Estates in Land: Substantive Property Law, Family Considerations, and the Interests of Women" 66 Tul. L. Rev. 919 (1992); G.L. Haskins, "The Development of Common Law Dower" 62 Harv. L. Rev. 21 (1948); C.M.A. McCauliff, "The Medieval English Marriage Portion from Cases of Mort D'Ancestor and Formedon" 38 Vill. L. Rev. 933 (1992).

the normal entitlement.[13] Whether the spouses had lived on a property was irrelevant in determining whether it was subject to the dower life estate.

As a support mechanism, common law dower had some unusual features. Its ambit was narrow, far more so than modern spousal support regimes: dower did not apply to leaseholds, joint tenancies, land held by a corporation, partnership lands, land under copyhold tenures, reversions, or remainders. Not until 1833 did it apply to purely equitable interests.[14] Additionally, an entitlement to dower was unconnected to actual need. The one-third rule was a rigid formula and the enjoyment of dower consummate was not even abridged by the widow's remarriage. Unlike modern marital property law, dower entitlements were not premised on direct or indirect contributions to the acquisition of property. There was also a fault element. A wife who committed adultery lost her rights to dower, unless there was a later reconciliation.[15]

Perhaps the most remarkable aspect of common law dower was the degree to which it could be avoided altogether by a reluctant husband. It was sometimes asserted that "a widow shall have her dower,"[16] meaning that the law protected this right vigilantly. That was not so. Through a form of conveyance known as a 'deed to uses', a husband could enjoy the incidents of fee simple ownership and yet insulate the property from his wife's claims. Until the abolition of dower in Ontario, this was a standard feature of conveyancing in that province and a large body of jurisprudence developed around the practice.[17] In England, after 1833, an *inter vivos* conveyance or devise would defeat a dower claim.[18] The principal motivation for this reform was to mitigate the impact of dower on the alienability of land.

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[13] See further G.L. Haskins, *supra*, note 12. There were some variants in England as to the precise quantum: Megarry & Wade, *supra*, note 11 at 545.

[14] Dower Act 1833, 3 & 4 Will., c. 105, s. 2.

[15] Megarry & Wade, *supra*, note 11 at 544.

[16] Recited in R. St. J. McDonald, "Observations on the Land Law in the Common Law Provinces of Canada" in E. McWhinney, *Canadian Jurisprudence* 197 (1958) at 218.

[17] See e.g., *Re Hazell* (1925), 57 O.L.R. 290 (C.A.).

[18] Dower Act 1833, 3 & 4 Will., c. 105, ss 6, 7.

Dower was abolished in England in 1925.[19] Likewise, following the extensive family law reforms undertaken across Canada in the 1970s, no province has retained common law dower.[20]

(3) Curtesy

The widower's interest in the lands of his deceased wife was known as an estate by the Curtesy of England. Putting aside the technical differences between dower and curtesy, the two estates look equivalent.[21] However, their elements were not identical, nor were their respective functions. There is controversy surrounding the true purpose of curtesy. The most commonly accepted view is that it was designed to avoid or postpone the claims of feudal lords to incidents of tenure (primarily wardship) that might otherwise arise on the devolution of land from the mother to an infant heir. As long as the father was alive, this "gracious rule"[22] (i.e., curtesy) prevented the lands from passing from the deceased mother to the infant, an event that otherwise would have allowed the lord to reap profits from the land during that heir's minority. It has also been suggested that the rule was designed to promote family cohesion, by granting to the father — and therefore not to the children — control over the wife's estate on her death.[23]

The law of curtesy conferred upon the widower a life estate in all the realty undisposed of at the death of the wife, provided heritable issue had been born — 'and heard to cry within the four walls' — during the marriage. Like common law dower, there is little evidence that curtesy had much practical value for widowers in England or Canada. Curtesy has now

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[19] Administration of Estates Act 1925, 15 & 16 Geo. 5, c. 23, s. 45(1).

[20] Law of Property Act, R.S.A. 1980, c. L-8, s. 3; Family Law Act, R.S.O. 1990, c. F.3, s. 70; Law of Property Act, R.S.M. 1970, c. L-90, s. 10, Estate Administration Act, R.S.B.C. 1979, c. 114, s. 107; Marital Property Act, S.N.B. 1980, c. M-1.1, s. 49; Matrimonial Property Act, S.N.S. 1989, c. 275, s. 33; Family Law Reform Act, S.P.E.I. 1978, c. 6, s. 62; Intestate Succession Act, R.S.S. 1978, c. 1-13, s. 15. See also Chattels Real Act, R.S. Nfld. 1990, c. 11.

[21] See further *DeBury* v. *DeBury* (1903), 36 N.B.R. 57, aff'd 36 N.B.R. 90 (C.A.).

[22] F. Pollock & F.W. Maitland, *The History of English Law* (C.U.P. ed. 1968) vol. 2, at 417. See also T.F.T. Plucknett, *A Concise History of the Common Law* (4th ed. 1948) at 537.

[23] F.E. Farrer, "Tenant by the Curtesy of England" (1927) 43 L.Q.R. 87 at 90-91.

been abolished in Alberta and in the other common law provinces of Canada.[24]

(4) The advent of homestead protections in Alberta: a brief history

Homestead protections are a nineteenth century American invention, built on the footing of common law dower.[25] Typically, homestead legislation (a) exempts the family home from seizure by creditors; (b) prohibits a disposition without the consent of the non-owning spouse; and (c) provides a life estate in the home after the death of the owner.[26] Generally speaking, these three elements remain part of the law in the four western provinces.[27] While the Canadian statutes are clearly derivative of the American model, a faint resemblance with common law dower can also be seen: common law dower took precedence over the claims of a husband's creditors;[28] the refusal of a wife to release her dower interest often functioned to prevent dispositions; and, of course, the essence of dower consummate at common law was the life estate.

In 1878, the federal government enacted homestead protections for the Northwest Territories.[29] This legislation, the Homestead Exemptions Act,[30] contained the three components of the American-style laws. First, the Act permitted the registration of homesteads and provided that the registered homestead was exempt from seizure up to a value of $2,000.00. Second, where the owner registered an affidavit declaring that he was

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[24] Law of Property Act, R.S.A. 1980, c. L-8, s. 4; Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 48; Law of Property Act, R.S.M. 1970, c. L90, s. 10; Estate Administration Act, R.S.B.C. 1979, c. 114, s. 107; Married Women's Property Act, R.S.N.B. 1973, c. M-4, s. 8; Matrimonial Property Act, R.S.N.S. 1989, c. 275, s. 33; Family Law Reform Act, S.P.E.I. 1978, c. 6, s. 62; Devolution of Real Property Act, R.S.S. 1978, c. D-27, s. 18. See also Chattels Real Act, R.S.N. 1990, c. 11.

[25] The first homestead legislation was enacted in Texas in 1839. See generally A. Milner "A Homestead Act for England?" 22 Mod. L. Rev. 522 (1959).

[26] See W.F. Bowker, "Western Canadian Homestead Laws" in A. Bissett-Johnson & W.H. Holland, *Matrimonial Property Law in Canada* at I-43.

[27] In Alberta, the exemption from seizure is contained in the Exemptions Act, R.S.A. 1980, c. E-15, ss 1(j) and 1(k). See Chapter 7, where these exemptions are reviewed.

[28] This was altered by statute in England: see Dower Act, 3 & 4 Will., c. 105, s. 5.

[29] Which at that time included the area that now forms the Province of Alberta.

[30] S.C., 41 Vict., c. 31.

married, the wife became entitled to a life interest on the death of the husband. This was defeasible if the wife left her husband and had committed adultery. An interest in the homestead would pass to any minor children on the death of the surviving spouse. The children's entitlements would last until they reached their majority.[31] If the husband died intestate, the wife was required to elect to receive either her homestead rights or her entitlements arising from the intestacy. Third, no disposition could be made without the wife's consent.[32] The Act was gender-neutral: a husband could enjoy the benefits of the Act where the home was owned by the wife.[33]

The Act had a curious, short, and largely neglected life.[34] As a complement to its provisions, an Ordinance was passed by the Territorial Council, designed to augment the exemptions conferred by the Homestead Exemption Act. However, this was held to be *ultra vires* the Council because it was inconsistent with the terms of the Act.[35] By 1893, there were calls to strengthen the legislation, but the federal Parliament responded differently: in 1894, the Homestead Exemption Act was repealed. The federal government had decided it would vacate the field, and leave the entire matter to the Territorial Council.

The Act had virtually no practical value. To trigger it, the owner had to register the land as a homestead. Over the 16-year life span of the Homestead Exemption Act, there had been only one registration.[36] The repealing legislation explicitly revived the Territorial Ordinance containing the exemption provisions that had been declared *ultra vires*. But that Ordinance dealt only with exemptions, and conferred no additional homestead-type rights on the spouses.

In 1886, while the Homestead Exemption Act was in force, common law dower and curtesy were abolished in Alberta. The conventional wisdom

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[31] Section 5.

[32] Section 4.

[33] Section 11.

[34] See W.F. Bowker, "Our Earliest 'Homestead' or 'Dower' Act" (1986) 24 Alta. L. Rev. 522.

[35] *Re Claxton* (1890), 1 Terr. L.R. 282 (S.C.).

[36] Bowker, *supra*, note 34 at 528.

is that these common law interests were regarded as inconsistent with the newly-created land titles system,[37] since at common law these life estates ran with the land and therefore would bind subsequent purchasers for value without notice. This was patently at odds with one of the objectives of Torrens registration, that is, to create a register of all interests affecting a given parcel. So, on the day that Torrens became law in the territories, common law dower and curtesy were abolished. An additional impetus for the abolition of these common law interests may have been that the Homestead Exemption Act was regarded as providing sufficient protection.

The efforts to re-introduce a law of dower into Alberta began in 1909, together with a call for equal homesteading rights for men and women. These were central issues in the suffragist movement in western Canada. The promotion of non-indigenous settlement on the prairies formed a key feature of the federal National Policy from 1872 to 1930. The settlement policy was implemented, in part, through federal legislation under which homesteads were sold by the government at a nominal rate to those willing to work the land. The federal policy favoured men over women, and most of the homestead titles were granted to men. Dower was therefore seen as a way of providing a safeguard for women on the death of their husbands, because it created an interest in the homestead property in favour of widows.

The absence of more extensive rights of homesteading for women provided only part of the rationale of dower reform. The economy in the west in the first decades of the 20th century was volatile. During that period, the prairies

> had experienced a land boom, particularly in the cities and towns, with all its attendant speculation. The wives in Alberta said, in effect, to the Legislature, where this speculation affects our homes we want it stopped. We have home in the morning but it is sold or mortgaged at night. Our husbands may deal with their lands as they please subject only to their duty of providing us with a

[37] See also *In Re McLeod Estate*, [1929] 3 W.W.R. 241 (Alta. C.A.) at 242 (per Harvey C.J.A.).

> home which shall be placed beyond the risk of their speculation.[38]

The prospect that the family home might be lost through improvident dealings by the husband prompted the women's movement to seek protection through the re-introduction of dower. Many of the women living in the province had come from central and eastern Canada, where common law dower still existed, and this may have influenced the approach to reform.[39]

In 1915, the Province of Alberta responded by enacting The Married Women's Home Protection Act.[40] The Act had a limited scope. It provided that a married woman could file a caveat against the homestead in the land titles office. As long as the caveat remained in force, the land titles office could not register any transfer, encumbrance or other instrument made by or on behalf of the husband that purported to affect the homestead. The wife could withdraw the caveat at any time. The husband could also apply to have the caveat removed, although no criteria for removal were set out in the Act. On hearing the application, the judge was empowered to make "such order in the premises as to such judge may seem just".[41]

The Married Women's Home Protection Act was repealed and replaced by the Dower Act in 1917.[42] That Act provided that a disposition of the homestead was null and void unless made with the consent of the wife.[43] The Act also provided for a right to a life estate on the death of the owning spouse. That estate would have priority over any testamentary disposition or a devolution on intestacy.[44] When these two provisions are taken together with the existing homestead exemptions, it can be seen that

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[38] *Overland* v. *Himmelford*, [1920] 2 W.W.R. 481 (Alta. S.C.A.D.) at 490 (per Ives J.).

[39] M. McCallum "Prairie Women and the Struggle for Dower Law, 1905-1920" (1993) 18 Prairie Forum 19 at 21.

[40] S.A. 1915, c. 4.

[41] Section 7.

[42] S.A. 1917, c. 14.

[43] Section 3.

[44] Section 4.

by 1917 Alberta had again established homestead protections based on the American model.

The enactment of dower legislation was initially heralded as a victory for the women's movement. But it was not long before the limited effect of the reforms were recognized. Those urging for dower protections hoped that this would provide a means of rewarding women for their contributions to the arduous and often perilous homesteading process. Given this goal, the rights conferred by the legislation were seen as inadequate:

> By 1917 feminists in Alberta had fought for and won dower rights guaranteeing the married woman a voice in the management and control of family property and a life estate in her deceased's husband's estate. Yet many women were left with a sense that the justice they had sought had eluded them. To paraphrase Henrietta Muir Edwards, the wife had still not got what she wanted. While the Dower Act granted protection to the married woman in her home, it did not extend to her the full recognition of her contribution to the family home that most women sought.[45]

The perceived limitations of dower law led to a renewed effort at strengthening the entitlements of women over the property holdings accumulated during marriage. In 1925, a bill to create a form of community sharing was introduced, but it failed to gain passage.[46] This initiative was not renewed.

The Dower Act of 1917 underwent periodic amendments in the years that followed. In 1926, a right to a life estate in personal property was added.[47] The last major reforms were undertaken in 1948.[48] The 1948 Act revised the rules for spousal consent, added a penalty provision for a wrongful disposition, and provided for an action in damages for a wrongful

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[45] C.A. Cavanaugh, "The Women's Movement in Alberta as Seen Through the Campaign for Dower Rights 1909-1929" (Unpublished Masters Thesis, Department of History, University of Alberta (1986)) at 95.

[46] *Id.* at c. 4, *passim.*

[47] The Dower Act Amendment Act, 1926, S.A. 1926, c. 9, s. 4.

[48] The Dower Act 1948, S.A. 1948, c. 7.

disposition of the home. It also made the rights under the Act available to both husbands and wives. The present law is based on the 1948 Act, as incrementally modified over the past 45 years.

Here is a synopsis of the major dower developments in Alberta:

1878: Homesteads Protection Act passed

1886: common law dower (and curtesy) abolished; the land titles system implemented

1894: Homestead Protection Act repealed; the Territorial Exemptions Ordinance revived

1915: Married Woman's Home Protection Act passed

1917: Dower Act replaced the 1915 Act

1926: life estate in personalty added

1948: Dower Act substantially amended.

(5) An outline of Alberta dower rights today

Current Alberta dower law still reflects the three features of American homestead laws (consent, exemptions, and the life estate), together with some unique Alberta elements. As it now stands, the Dower Act describes five main dower rights.[49] These are:

(i) a right to prevent the disposition of the homestead by withholding consent;

(ii) the right to damages for a wrongful disposition of the homestead;

(iii) the right to make a claim from the assurance fund under the Land Titles Act when a judgment for damages is unpaid;

(iv) the right to a life estate in the homestead on the death of the owning spouse;

[49] The Act states that the term 'dower rights' means all the rights given under the Act, and includes, but is not restricted to these five main rights: para. 1(d).

> (v) the right to a life estate in the personal property of the deceased spouse;

There is also a sixth right, contained in the Exemptions Act:[50]

> (vi) the right to certain exemptions of the homestead from execution by creditors.

The legislation does not purport to place these rights in a hierarchy. However, it is suggested that the 'primary' right under the scheme continues to be the life estate. All of the other rights can be seen as ancillary to the life estate. The right to the life interest in personalty is dependent on the existence of the life estate in realty. The ability to withhold consent serves to preserve the home so that the life estate can be enjoyed in possession. The remaining rights under the Act — the action for damages and the right to make a claim against the assurance fund — are related to infringements of the consent requirement.

(6) Dower and homestead laws elsewhere in Canada

Homestead protections continue to exist on the prairies and in British Columbia.[51] In 1984, the Manitoba Law Reform Commission undertook a review of its dower legislation, recommending that dower rights be continued in a modified form.[52] Many of the proposed reforms have now been enacted.[53] In 1989, Saskatchewan renewed its commitment to homestead protections by introducing a new law,[54] designed to improve, but not dramatically alter, the law then in place.[55] The initiatives in

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[50] R.S.A. 1980, c. E-15. The Civil Enforcement Act, R.S.A. 1980. c. C-10.5, has been enacted to replace, among other things, the Exemptions Act. Under the Civil Enforcement Act, the broader exemption would be retained for a debtor who is a bona fide farmer, whose principal residence is located on the farm. In other cases, the extent of the exemption for a home would be fixed by regulation: see ss 88(f), 88(g). The new Act received royal assent on Nov. 10, 1994, but as of Mar. 1, 1995 has not been declared in force.

[51] Land (Spouse Protection) Act, R.S.B.C. 1979, c. 223.

[52] Manitoba Law Reform Commission, *Report on An Examination of 'The Dower Act'* (Report No. 60, 1984).

[53] The Homesteads Act, S.M. 1992, c. 46, repealing Dower Act, R.S.M. 1987, c. D100.

[54] The Homesteads Act 1989, S.S. 1989-90, c. H-5.1.

[55] As found in The Homesteads Act, R.S.S. 1978, c. H-5 (repealed by S.S. 1989-90, c. H-5.1, s. 31).

Manitoba and Saskatchewan have provided valuable guidance in the preparation of our Report.

Homestead laws were never enacted in the central and eastern provinces. However, in these jurisdictions, the English law of dower and curtesy formed part of the received law. As we have seen, in all of these jurisdictions, dower and curtesy have now been abolished.[56] In general, the marital property statutes that replaced the common law provide for the division of property and occupancy rights in the home.[57] Some of these statutes allow for the sharing of matrimonial property on death, but none creates rights that resemble common law dower or its homestead counterpart.

(7) Summary

The Alberta law of dower is derived from the common law and the American reforms, although it possesses some unique elements. Dower first took root on the prairies in the early part of this century and it continues to hold an important place in Alberta's social history. The last major revision of our dower law occurred in 1948. Since that time much has changed in Alberta society in general, and in the law governing marital property in particular. The law of dower and homesteads has undergone review and reform elsewhere in Canada. However, in the process of family law reform over the past 20 years, the continued value of a dower protection has not been the subject of close scrutiny in this province.[58]

C. Matrimonial Property Legislation

(1) The advent of reform

The common law treated marriage as, among other things, an economic partnership, but it was by no means a partnership of equals, for the husband was accorded the upper hand in the control of matrimonial property. This was one feature of the doctrine of marital unity, under which the legal personalty of a wife was merged into that of her husband. One result of this was that a married women was deprived of various rights of

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[56] *Supra*, notes 20 and 24.

[57] See generally Hovius & Youdan, *supra*, note 9.

[58] Dower was not extensively discussed in our Report on *Matrimonial Property* (Report No. 18, 1975). Nor was dower considered at length in *Family Relief* (Report No. 29, 1978).

ownership, including unilateral control over her real property holdings. Facets of the doctrine were eventually abolished by the married women's property legislation, under a process of reform that began in the latter part of the nineteenth century.

The changes introduced by the married women's property statutes produced what has been described as a "non-system"[59] of marital property: with a few exceptions, the rules governing property rights between spouses were those applicable to all property owners under the general law. Although this so-called 'separate property' approach created an illusion of spousal equality, bitter experience demonstrated that it could operate to the detriment of women. Not all forms of contribution to the acquisition of property within a household are adequately recognized under principles of separate property. Work such as child care and other domestic services of various sorts is normally done by spouses without pay. Yet, these contributions often enhance the well-being of a family in material and non-material ways.

The potential for the rules of separate property to produce inequitable results was exemplified by the case of *Murdoch* v. *Murdoch*,[60] where a wife's claim to an interest in the ranch property of her husband failed even though she had contributed through her labour both to the ranching operations and to the improvement of the property. The *Murdoch* ruling, viewed by many as unjust, sparked an ambitious process of reform in which contemporary Canadian matrimonial property law was developed.

(2) The nature of property division under Part 1 of the MPA

In Alberta, the product of these reform efforts is the Matrimonial Property Act, which came into force in 1979. The MPA creates a system for the sharing of property accumulated during marriage. Under Part 1, the law provides that most property acquired by the spouses during the marriage is subject to a presumption of equal sharing. The Alberta system is one of 'deferred' sharing, for until marriage breakdown occurs the rules of separate property continue to apply. In other words, while the family continues to function as a unit, neither party has an interest in the property

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[59] R. Bartke, "Ontario Bill 6, or How Not to Reform Marital Property Rights" (1977) 9 Ottawa L. Rev. 321 at 324.

[60] [1975] 1 S.C.R. 423.

of the other by virtue of the operation of the Act. The right to a sharing is triggered by the occurrence of an event denoting marriage breakdown, such as separation for one year, or divorce.[61]

The death of a spouse is not a triggering event under the MPA. Nevertheless, there are two situations in which the Act can apply on death. First, if an action for a division under Part 1 of the Matrimonial Property Act has been initiated, and the applicant dies, the action may be continued by that person's estate.[62] Second, if at the time of the death of a spouse, the surviving spouse was in a position to launch an application for a division, that action may be commenced against the estate.[63] In other words, if a triggering event has occurred, the death of a party does not preclude the commencement of an action under the Act based on that event. Accordingly, some actions under the Matrimonial Property Act may proceed in circumstances in which the right to the dower life estate has also arisen.

(3) The development of occupancy rights[64]

Under the common law, rights of possession in the matrimonial home can arise in three different ways. First, co-owners, whether joint tenants or tenants in common, enjoy a basic right to possession. Each co-owner has an equal right to the possession of all of the property, and this is so regardless of the size of the share of the property that each holds. Second, it is possible for one spouse to grant a right of occupancy, in the form of a licence or a lease, to a non-owning spouse. Third, a non-owning spouse might have a right of possession arising by virtue of the marriage relationship.

This third right is not well understood, and its elements are not clearly defined. At common law, a wife can claim a right to reside in the

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[61] See sections 7, 8.

[62] Section 16, as amended by R.S.A. 1990, c. 21, s. 24. See further Alberta Law Reform Institute, *Section 16 of the Matrimonial Property Act* (Report No. 57, 1990).

[63] Section 11.

[64] See generally M. C. Cullity, Property Rights During the Subsistence of Marriage" in D. Mendes da Costa, ed. *Studies in Canadian Family Law* (1972) 179; R.C. Secord, "The Occupation of the Family Home" (Unpublished Masters Thesis, Faculty of Law, University of Alberta (1979)).

home — indirectly — by virtue of her right to her husband's consortium,[65] and her right to be maintained by him. A husband's right to remain in the home owned by his wife rested solely on her duty to cohabit with him.[66]

These common law entitlements are fragile. They are not proprietary in nature. Therefore, the right of one spouse to remain in the home of another is not binding on a third party transferee of the home. This is the case even if the transferee had notice of the non-owning spouse's 'right of occupancy'.[67] Even as between husband and wife, the entitlement does not attach to a specific property.[68] In cases where the husband is paying support, the right to reside can no longer be claimed.[69] Providing alternative means of accommodation also suffices to eliminate a claim to reside in the home.[70] If the wife commits a matrimonial offence, relieving her husband of his duty to support, the right to possession is also lost.[71] Furthermore, these possessory rights end on divorce.

Under the common law it is possible for a non-owning or co-owning spouse to obtain exclusive possession. This is done through the granting of an injunction (typically referred to in this context as a 'restraining order') under which a spouse (including an owner or co-owner) is precluded from entering the premises. The order is available as an ancillary remedy where legal proceedings (such as a divorce petition) have been commenced. There are no rigid criteria for the granting of a restraining order, and there is inconsistency among the decided cases as to the factors that should be

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[65] This is enforceable through the decree of restitution of conjugal rights: see *National Provincial Bank Ltd.* v. *Ainsworth*, [1965] A.C. 1175 (H.L.) at 1245.

[66] *Symonds* v. *Hallett* (1883), 24 Ch. D. 346 (C.A.) at 351; *Shipman* v. *Shipman*, [1924] 2 Ch. 140 (C.A.) at 146; *Maskewycz* v. *Maskewycz* (1973), 13 R.F.L. 210 (Ont. C.A.). See also M. McCaughan, *Legal Status of Married Women in Canada* (1977) at 82.

[67] See *National Provincial Bank Ltd.* v. *Ainsworth*, *supra*, note 65 overruling *Bendall* v. *McWhirter*, [1952] 2 Q.B. 446. See further B. Laskin, "The Deserted Wife's Equity in the Matrimonial Home: A Dissent" (1961-62) 14 U. of T. L.J. 67. See also *Stevens* v. *Brown* (1969), 2 D.L.R. (3d) 687 (N.S.S.C.). It is also irrelevant that the transferee is a volunteer.

[68] *National Provincial Bank* v. *Ainsworth*, *supra*, note 65 at 1220.

[69] *Richardson* v. *Richardson*, [1970] 3 O.R. 41 (H.C.).

[70] See e.g., *Matty* v. *Matty* (1968), 62 W.W.R. 62 (B.C.S.C.).

[71] *Gurasz* v. *Gurasz*, [1969] 3 All E.R. 822 (C.A.) at 823.

treated as relevant.[72] Some courts have considered matters such as whether it is impossible for the spouses to live together;[73] whether the conduct of one spouse has effectively destroyed the marriage relationship;[74] whether there is a threat of violence;[75] or whether the welfare of children would be enhanced.[76] Others have suggested that the test is, more generally, whether it is fair, just and reasonable in all of the circumstances to grant exclusive possession.[77]

In the wave of reform of the law of marital property in the 1970s, the uncertain position of the common law right of occupancy has been replaced or complemented by statute. In Alberta, occupancy rights have been introduced through Part 2 of the Matrimonial Property Act. This Part is largely based on the recommendations found in our Report on *Matrimonial Property*.[78]

The general nature of the occupancy rules introduced in the other common law provinces is similar to that in Alberta, although each system is somewhat different in detail. Under Part 2 of the Alberta Act, the Court of Queen's Bench is empowered, among other things, to grant exclusive possession of the home to a spouse. The order may also involve possession of certain household goods. The rules are described more fully in the next chapter.

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[72] Accord Hovius & Youdan, *supra*, note 9 at 576.

[73] *Hall* v. *Hall*, [1971] 1 W.L.R. 404 (C.A.) at 406; *Hersog* v. *Hersog* (1975), 22 R.F.L. 380 (B.C.S.C.); *Bassett* v. *Bassett*, [1975] 1 All E.R. 513 (C.A.); *Phillips* v. *Phillips*, [1973] 1 W.L.R. 615 (C.A.).

[74] *Krentz* v. *Krentz* (1975), 21 R.F.L. 87 (Sask. Dist. Ct.). See also *Iachetta* v. *Iachetta* (1973), 11 R.F.L. 309 (Ont. H.C.); *Humphrey* v. *Humphrey* (1977), 4 R.F.L. (2d) 189 (Ont. Co. Ct.).

[75] See further M. Hayes "Evicting a spouse from the matrimonial home" (1978) 8 Family Law 4.

[76] *Visscher* v. *Visscher* (1972), 6 R.F.L. 392 (B.C.S.C.); *Montgomery* v. *Montgomery*, [1965] P. 46 at 51.

[77] See *Walker* v. *Walker*, [1978] 3 All E.R. 141 (C.A.).

[78] *Supra*, note 58.

CHAPTER 2 — PART 2 OF THE MATRIMONIAL PROPERTY ACT

A. Introduction

The purpose of this chapter is to review the law governing the right of occupancy of the matrimonial home, now contained in Part 2 of the Matrimonial Property Act.[79] The discussion will focus on the following issues: the time at which the right of occupation arises; the grounds upon which exclusive possession of the home can be ordered; the types of orders that can be made; who may seek an award; and the ancillary orders that can be made when exclusive possession is conferred. Other issues, such as controls over a transfer of the home, and the right to enter into a contract that affects rights under Part 2, will be addressed in subsequent chapters.

The recommendations in this chapter are minor. Some of these call for fuller descriptions of the rights conferred by the Act. Our review of the law and our consultations with the bench and bar has revealed few concerns about the workings of Part 2. However, the discussion in this chapter sets the stage for more extensive recommendations in relation to the dower life estate, found in Chapter 3. There, an expanded role for Part 2 of the MPA will be proposed.

B. An Overview of Part 2 of the Matrimonial Property Act

Under Part 2 of the Matrimonial Property Act, the Court of Queen's Bench may: (a) grant exclusive possession of the matrimonial home to a spouse, together with some surrounding lands; (b) evict a spouse from the home; and (c) restrain a spouse from entering or attending at or near the matrimonial home. The Act permits a court to grant exclusive possession to either spouse, regardless of which of them is the owner of the property.

When an application is made, the court must have regard to the following considerations:

> (a) the availability of other accommodations within the means of both spouses

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[79] R.S.A. 1980, c. M-9.

> (b) the needs of any children residing in the home
>
> (c) the financial position of each spouse
>
> (d) any order made by a court with respect to the property or the maintenance of one or both of the spouses.[80]

Orders under Part 2 may be made subject to conditions and may be varied.[81] They may endure for any time that the court considers necessary.[82] Such an order takes precedence over an order for division under Part 1 of the Act, or an order for the partition and sale of the property.[83] The award may be registered in the appropriate Land Titles Office,[84] and once this is done the owning spouse may dispose of or encumber the property only with the written consent of the spouse in possession, or under an order of the court.[85]

The granting of exclusive possession, coupled with a restraining order, provides a means by which a court may respond to the threat of family violence. Therefore, the system must be able to react quickly where circumstances warrant. Accordingly, an order for possession may be made without notice to the other party if the court is satisfied that there is a danger of injury to the applicant or a child residing in the home.[86]

The court may also grant an order of exclusive possession of some or all of the household goods. That term means:

> personal property that is owned or leased by one of the spouses, and that was ordinarily used or

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[80] Section 20.

[81] Section 19.

[82] Sections 19(3), 25(2).

[83] Section 21.

[84] An order affecting a mobile home owned or leased by one of the spouses may be noted on the Personal Property Security Register created under the Personal Property Security Act by the filing of a financing statement: s. 23.

[85] Section 22(3).

[86] Section 30(2).

> enjoyed by one or both spouses or one or more of the children residing in the matrimonial home, for transportation, household, educational, recreational, social or aesthetic purposes.[87]

Orders relating to household goods, as with those pertaining to the home, may be made subject to conditions; they are variable; and may endure for any period of time fixed by the court.[88] An order covering chattels may be registered under the Personal Property Security Register. This has the effect of binding of subsequent creditors or purchasers of the goods.[89] As with the home, the goods covered by the order may not be sold without the consent of the non-owning spouse or under an order of the court.[90]

C. Reform of Part 2 of the Matrimonial Property Act

(1) When should the right to possession arise?

Under Part 2, no possessory rights are conferred until an order has been made. Where the property is co-owned, each spouse has a right of possession based on their respective property holdings. Where title is in the name of only one spouse, the right to remain in possession is more precarious; it is based on the nebulous common law rights that were briefly reviewed in the introductory chapter.[91] In other Canadian jurisdictions the law is different. For example, Ontario law provides that "[b]oth spouses have an equal right to possession of the matrimonial home".[92] This is also

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[87] Section 1(b).

[88] Section 25.

[89] Sections 26, 27.

[90] Section 27(2).

[91] See Part C(1), Chapter 1. Additionally, unless an order has been granted and is registered, the owning spouse is free to dispose of the home without infringing the Matrimonial Property Act. Protection against the sale of the matrimonial home is conferred indirectly, under the Dower Act, which requires that transfers of the home be consented to by the non-owning spouse: See Chapter 4, where the rules governing consent are considered in detail.

[92] Family Law Act, R.S.O. 1990, c. F.3, s. 19(1).

true of the law in five other provinces.[93] Such a provision replaces the need to rely on the rights conferred by the common law.

From a practical perspective, the distinction between the Alberta approach and those jurisdictions that confer an immediate statutory right is not great. In Ontario, the spouse on title cannot expel the non-owner. In Alberta, the common law right to shelter still exists to prevent this from occurring (unless the ousted spouse is provided with alternative accommodation). Moreover, in Alberta, a right of possession can be conferred by court order, so the excluded spouse in this province can be put into possession as promptly as the judicial process allows. Therefore, in many cases, the difference between the two approaches can probably be measured in days.

However, even if the practical distinction is slight, there is little to commend the Alberta law as it now stands. There is no reason to require a non-owning spouse to obtain an order of possession after having been ousted, perhaps even lawfully so, by the owning spouse. Expulsion from the home can be a serious and traumatic event. We feel that the law should provide that such an expulsion is wrongful.

In those provinces in which a right to occupation of the matrimonial home arises on marriage, such as Ontario, the law states that only a personal right is conferred.[94] Strictly speaking, this should mean that third parties are not affected by the existence of the right of occupation. However, in Ontario, an improper transfer of the home can be set aside unless the transferee is a *bona fide* purchaser for value without notice that the property was a matrimonial home.[95] In this way, occupancy rights can affect third parties. In our view, the right should be regarded as proprietary, at least for the purposes of allowing a spouse to file a caveat on title. (In principle, only an interest in land can be protected by a caveat.) Once filed, it would bind third parties in accordance with the ordinary

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[93] Manitoba: Marital Property Act, R.S.M. 1987, c. M45, s. 6(2); Newfoundland: Family Law Act, R.S.N. 1990, c. F-2, s. 8; New Brunswick: Marital Property Act, S.N.B. 1980, c.M-1.1, s. 18; Prince Edward Island: Family Law Reform Act, R.S.P.E.I. 1988, c. F-3, s. 34; Saskatchewan: Matrimonial Property Act, R.S.S. 1979, c. M-6.1, s. 4; Nova Scotia: Matrimonial Property Act, R.S.N.S. 1989, c. 275, s. 6.

[94] This is explicitly stated in Ontario: Family Law Act, R.S.O. 1990, c. F.3, s. 19(2)(a).

[95] Family Law Act, R.S.O. 1990, c. F.3, s. 21(2).

principles governing land titles registration. A spouse should be able to take this preventive measure.

RECOMMENDATION 1

Spouses should be entitled to equal possession of the matrimonial home, regardless of the state of title, and without the need to obtain a court order. Spouses may therefore not expel each other from the home. This right of possession should be capable of being protected by the filing of a caveat in the Land Titles Office.

(2) Factors to be considered in granting exclusive possession

The MPA sets no threshold test for determining whether an order for exclusive possession can be made. However, as we have seen, four factors must be considered when assessing an application. To reiterate, these are: the availability of other accommodations, the needs of children, the financial position of the spouses, and other orders pertaining to property or support.

The approach taken to the articulation of factors varies across the country. In some jurisdictions, very little guidance is provided (as is the case in Alberta). In others, a more extensive list is set out. The broadest is that found in the Saskatchewan Matrimonial Property Act.[96] There, in addition to the four factors found in the Alberta Act, it is also provided that the court must have regard to:

- the conduct of the spouses towards each other and towards any children
- any interspousal contract or, where the court thinks fit, any other written agreement between the spouses
- any other fact or circumstance

[96] R.S.S. 1979, c. M-6.1, s. 7.

The Ontario case of *Caines* v. *Caines*,[97] provides an even more extensive set of considerations:

- Any agreement, formal or informal, between the parties as to the future use of the home
- The date when the property was acquired
- The historical ties of any parties to the property in question
- The extent to which the property may have been acquired by one of the spouses by gift or special effort
- The number of children who would continue to reside in the home
- The financial ability of the parties to continue to reside in the home
- The financial ability of the parties to continue to maintain the property as well as to continue to dwell under separate roofs
- The special character of the neighbourhood including such considerations as the presence of friends, relatives, members of a specific ethnic community
- The needs of the respondent for immediate funds
- The impact of a move on the children's ability to attend school or university or to continue extra-curricular activities
- The health of the children
- The reaction of the children of the marriage and their need for continued stability

This itemization provides a useful framework with which to examine the issues. The *Caines* case identifies four main factors: (i) the interests of children; (ii) spousal conduct; (iii) special factors relating to the home; and (iv) agreements. The first three of these are considered below. The effect of a contract is examined in Chapter 5.

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[97] (1984), 42 R.F.L. (2d) 1 (Ont. Co. Ct.). See also *Plowman* v. *Plowman* (1973), 9 R.F.L. 160 (N.S.W.S.C.).

(a) The interests of children

Our Act presently accords weight to the needs of children when possessory orders are sought. In practice, it is a dominant consideration.[98] However, there is one element of the Alberta law that could be improved. Presently, the Act requires that the court take account of the needs of "children residing in the matrimonial home".[99] We feel that this is both over and under-inclusive. We would prefer the court to have regard to **dependent** children of the marriage. Only those children who have an entitlement to support ought to be taken into account. At the same time, it is uncertain why the Act would only be concerned with those children of the marriage who are currently living in the home. We would prefer to remove that qualification, leaving the court the opportunity to consider situations (however rare), where a child of the marriage is not at present in the home about which an order is sought.

(b) Conduct

The order of exclusive possession, along with the restraining order, provides a means of responding to family violence. Our consultation with members of the bench suggests that the courts are sensitive to these concerns. Yet issues of conduct are not mentioned in Part 2, except to the extent that the court may grant an *ex parte* order where there is a danger of injury to a spouse or child.[100]

There is some virtue in a statutory statement that recognizes the significance of family violence and treats it as a factor influencing the awarding of occupation.[101] But listing conduct as a factor would not be merely symbolic. Conduct would become a factor in determining who should prevail in a contest over possession. This would mark a serious departure from the current stated criteria, which deal exclusively with practical or instrumental concerns.[102]

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[98] See e.g., *Portigal* v. *Portigal*, [1987] A.J. 1119 (C.A.).

[99] Section 20(b).

[100] Section 30(2).

[101] See also Law Commission, *Family Violence and the Occupation of the Family Home* (Law Com. 207, 1992) at 17.

[102] In *Verburg* v. *Verburg*, [1994] A.J. 77 (Q.B.), Veit J. doubted whether conduct was a factor to be taken into account under Part 2.

In our view, the Act should be amended to refer to conduct. It **is** a factor that the courts address in determining whether to grant a restraining order,[103] or exclusive possession. The Act should reflect the factors actually taken into account. Of course, fault *per se* should not deprive a spouse of the right to remain in the home.[104] The central question should be this — which form of order would best protect the health and safety of the family? This should form part of the listed criteria. This consideration is especially important when a restraining order is being sought (currently available under section 19(1)(c) of the MPA). It would also be relevant in cases in which the court decides to make no order at all, or one which confers a part of the home to each spouse. If the home were equipped with a security system, the threat of violence might prompt a court to order that the potential victims should occupy the premises. In all of these circumstances, the operative question should be this — which form of order would minimize the risk of violence? Described in this way, the recognition of conduct as a factor does not mean that 'matrimonial fault' has been introduced into the law, by denying a 'guilty spouse' a right to remain in the home. Instead, the law is endeavouring to prevent family violence.

(c) Special features of the home

This Report is premised on the belief that people regard their home as an asset of special significance. Should it matter that one spouse owns the home, received it through a gift, or has in some other way a special connection with the residence? Is the time of acquisition important, especially when this was prior to the marriage? How should the rights of third parties who may also have an interest in the premises be taken into account? When all else is equal — i.e., there is no threat of violence and the needs of children are not in issue — these factors may be pertinent. In fact, there are times when such matters might be highly significant, as where a portion of the home is used for a business carried on by one spouse.[105] These concerns would be captured by allowing the court to consider the balance of convenience and fairness in granting exclusive possession. Presently, the criteria in Part 2 do not reflect these considerations. We recommend that they be set out in the Act.

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[103] Under section 19(1)(c).

[104] See further the discussion of matrimonial conduct in Part E, Chapter 3, *infra*.

[105] Accord Scottish Law Commission, *Report on Occupancy Rights in the Matrimonial Home and Domestic Violence* (Scot. Law Com. No. 60, 1980) at 13.

In sum, we have concluded that there should continue to be no threshold factor or condition required to launch an application under Part 2. When called upon to make an order, a court should take into account a number of considerations. To accomplish this, we recommend that the factors currently listed in Part 2 and the ruling in *Caines* v. *Caines* be taken as the starting points, subject to three modifications. First, the rules governing formal contracts should be dealt with under a separate provision (to be described in detail in Chapter 5). Second, the list should not be exhaustive, so that judges can respond to unique situations. The stated criteria should be designed to encourage counsel and the courts to think broadly about questions of possession, not to foreclose the scrutiny of individual circumstances.[106] Third, some account must be taken of rights of any third parties who have an interest in the premises. In Chapter 8, we recommend that the rights of occupancy proposed in this Report be applicable where the property is owned by a spouse, together with another person. The position of such a person should be taken into account when an order under Part 2 is made.[107]

RECOMMENDATION 2

When granting an order under Part 2 of the Matrimonial Property Act, a court should have regard to the following factors:

(a) The interests of any dependent children, taking into account such factors as (ii) the health of the children and their need for continued stability , and (ii) the impact that a move might have on the ability of the children to attend school or participate in extra-curricular activities.

(b) The financial position of the spouses, including their ability to continue to maintain

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[106] The absence of statutory guidance may explain the limited analysis of the respective claims of the spouses in cases such as *Radan* v. *Radan* (1990), 111 A.R. 76 (Q.B., Master), and *Hickey* v. *Hickey* (1980), 13 Alta. L.R. (2d) 39 (Q.B.).

[107] See Part E(2), Chapter 8.

the property as well as to continue to dwell under separate roofs.

(c) Any existing orders pertaining to property or support.

(d) The health and safety of the family, including the apprehension of violence.

(e) The special character of the neighbourhood, including such considerations as the presence of friends, relatives, members of a specific ethnic community.

(f) The date when the property was acquired.

(g) The historical ties of the parties to the property in question.

(h) The extent to which the property was acquired by one of the spouses by gift or special effort.

(i) The effect of an order on any other person who holds an interest in the home.

(j) Any informal agreement between the parties as to the home.

(k) Any other fact or circumstance that is relevant.

(3) Types of orders

The powers contained in Part 2 appear to contemplate an all-or-nothing order. It is far from clear that the Act allows a form of partition of the property into two units. Should this be possible?

Family breakdown imposes real costs on the parties. Therefore, a temporary division, where the property can accommodate this, may

occasionally be the only solution that is economically feasible.[108] However, there are obvious dangers in granting such orders. Exclusive possession is often sought because the parties find continued cohabitation intolerable. As we have said, it provides one legal response to the threat of violence. That being so, such an order would only seem feasible where the parties are willing to adhere to the arrangement, or where there is no apprehension of violence.

RECOMMENDATION 3

An order for possession of the home can be made to cover the whole or any part of the premises. However, an order should not be made granting possession of part of the premises to one of the spouses, and part to the other, where there is an apprehension of violence.

(4) Who may apply?

Generally, rights of occupation are conferred exclusively on spouses under the regimes now found in Canada. However, the law in Nova Scotia goes further, providing for rights of occupation for children in limited circumstances:

> s. 11(3) Where a surviving spouse does not reside in the matrimonial home at the time of the death of the other spouse and a child resides in that matrimonial home at the time, the court may, on the application of the child, direct that the child be given possession of the matrimonial home
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> > (a) until he [or she] reaches the age of majority, or

[108] See e.g., *Metcalf* v. *Metcalf* (1984), 47 O.R. (2d) 349 (U.F.C.).

> (b) while the child is attending a post-secondary educational institution, until the age of twenty-four years.[109]

We have considered a specific provision of this nature, and also the broader question of whether applications for possession should generally be maintainable by children of the marriage. There may be times when this is appropriate, such as the circumstance described in the Nova Scotia Act. Nevertheless, our concern for the welfare of children does not necessitate providing a direct right of occupancy. The law's method of providing for dependent children is by imposing obligations on their parents. For example, child support and custody are sought by parents for their children. The same method is presently adopted with regard to occupancy of the home. In that realm, the needs of children are considered; in practice, they are a central and often controlling concern. Until a different way is found to ensure the welfare of children — a topic outside of the terms of reference of this Report — the current approach under Part 2 should be continued.

RECOMMENDATION 4

Children should not be entitled to seek orders for possession under Part 2 of the Matrimonial Property Act.

(5) Household goods

Under Part 2 of the Act, the court may make an order granting the exclusive possession to one of the spouses of any or all of the household goods. As with the dower life estate in personalty, the function of this provision is to supplement the right of occupation and make that right more useful. In our view, the policy governing the awarding of household goods is sound and our consultations have revealed no difficulties in practice. Therefore, we make no recommendations for reform.

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[109] Section 11(4) provides further that the court may only make an order for the possession of the home when it is of the opinion that the provision for shelter is not adequate, or that the order would be in the best interests of the child.

RECOMMENDATION 5

When granting an order of possession under Part 2, a court should continue to be able to grant orders allowing for the possession of household goods.

(6) Orders concerning expenses

When an order is made for exclusive possession of the home, the court may attach conditions. These often relate to the ongoing expenses associated with the home. An order may also be made requiring the party in possession to make a compensatory payment to the excluded spouse.

In other jurisdictions, the powers of the court are more precisely described. For example, in Saskatchewan,[110] when dealing with an application for the possession of the matrimonial home, the court may

- fix any rights of spouses that may arise as a result of the occupancy of a matrimonial home and postpone any rights of the spouse who is the owner or lessee, including the right to apply for partition and sale or to otherwise dispose of or encumber the matrimonial home
- authorize the disposition or encumbrance of the interest of the spouse in a matrimonial home subject to the right of exclusive possession contained in the order
- fix the obligation to repair and maintain a matrimonial home
- fix the obligation to pay, and the responsibility for, any liabilities whatsoever that may arise out of the occupation of the matrimonial home
- direct a spouse to whom exclusive possession of a matrimonial home is given to make any payment to the other spouse that is prescribed in the order.

There is merit in listing these options in the statute. They provide a checklist for counsel and the courts to ensure that practical considerations are taken into account. This is especially important when the orders remain

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[110] Matrimonial Property Act, R.S.S. 1979, c. M-6.1, s. 5.

in place for a considerable period of time. Although Part 2 orders are often intended to serve as interim measures only, they can be in place for extended periods. And sometimes arrangements that were meant to be temporary endure for longer periods than planned. Moreover, in the following chapter we will be recommending that Part 2 rights replace the current law of dower. In that context, the ability of the court to grant orders concerning expenses and related matters becomes especially important.

RECOMMENDATION 6

When granting an order for possession under Part 2 of the Matrimonial Property Act, the court may also:

(a) determine any rights of spouses that may arise as a result of the occupancy of a matrimonial home and postpone any rights of the spouse who is the owner or lessee, including the right to apply for partition and sale or to dispose of or encumber the matrimonial home

(b) authorize the disposition or encumbrance of the interest of the spouse in a matrimonial home subject to the right of exclusive possession contained in the order

(c) fix the obligation to repair and maintain a matrimonial home

(d) fix the obligation to pay, and the responsibility for, any liabilities whatsoever that may arise out of the occupation of the matrimonial home

(e) direct a spouse to whom exclusive possession of a matrimonial home is given to make any payment to the other spouse that is prescribed in the order.

(f) grant such other orders as are necessary for the proper management or maintenance of the property covered by the order.

CHAPTER 3 — THE DOWER LIFE ESTATE

A. Introduction

In Chapter 1 we saw that current dower law in Alberta is a composite of influences and ideas.[111] At its centre is the idea that a surviving spouse may be entitled to enjoy a life estate in a home owned by the deceased spouse. In Alberta, the life estate in realty is complemented by a right to enjoy certain items of personal property for life. The purpose of this chapter is to assess the continued value of these property interests.

B. The Dower Life Estate in Realty

(1) General nature and rationale

Section 18 of the Dower Act provides that:

> 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 the spouse of the married person, which is hereby declared to be vested in the surviving spouse.**[112]

The life estate provides support to the surviving spouse by conferring a proprietary interest in the home. In rural areas, this estate confers enough land (a quarter section)[113] to allow for subsistence farming. Although the central idea is that dower is a support device, it may also be regarded as based on an implicit recognition of the contributions of the non-owning spouse to the acquisition of the home. This was a consideration in

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[111] Chapter 1, Part B.

[112] Dower Act, R.S.A. 1980, c. D-38, s. 18. This language can be traced to The Dower Act, S.A. 1917, c. 14, s. 4. Dower rights can be protected by caveat: *Schwormstede* v. *Green Drop* (1990), 74 Alta. L.R. (2d) 162 (C.A.); *Schwormstede* v. *Green Drop (No. 2)* (1994), 40 R.P.R. (2d) 1 (C.A.); *Rigby* v. *Rigby*, [1922] 1 W.W.R. 397 (Alta. S.C.A.D.). A caveat may not be filed: Manitoba *Holy Spirit Credit Union Ltd.* v. *Brown*, [1988] 3 W.W.R. 248, aff'd [1988] 6 W.W.R. 480 (Man. C.A.).

[113] Dower Act, R.S.A. 1980, c. D-38, s. 1(e)(ii)(B).

the minds of the proponents of dower reform in Alberta in the early part of this century.[114]

(2) Other rights arising on death and their relationship to dower

The right to the life estate represents only one way in which property may pass to a widow(er) on death. In analyzing the significance of dower, it is necessary to identify its place within the context of these other rights. Property of a deceased spouse may pass to the widow(er) by will or on an intestacy. In addition, a widow(er) may be entitled to make a claim against the estate of a deceased spouse under the Family Relief Act,[115] or, in some instances, under the Matrimonial Property Act.[116] These rights can come into conflict with the dower life estate. In general, dower can trump all of them.

(a) Wills and intestacy

Insofar as the right to dower given by section 18 postpones any disposition of the homestead by will, its function is fundamentally different from that of the law of wills. Wills legislation is designed to regulate the freedom of an owner to dispose of property holdings, while dower is aimed at curbing this freedom of testation. Dower seeks to ensure that the widowed spouse receives adequate support and security, even if the deceased owner was indifferent or opposed to that result.

The Intestate Succession Act[117] provides for the distribution of a deceased person's property that is not disposed of by a valid will. The policy of the Act is to distribute property in a way that is consonant with the likely intentions of the property owner, as influenced by societal views about what would be appropriate. The Act gives all of a deceased person's property to that person's spouse, if there are no children of the marriage. A preferential share of $40,000 is given to the surviving spouse if there are

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[114] See generally C.A. Cavanaugh, "The Women's Movement in Alberta as Seen Through The Campaign for Dower Rights" (Unpublished Masters Thesis, Dept. of History, University of Alberta (1986)) at 49 *et seq.*

[115] R.S.A. 1980, c. F-2.

[116] R.S.A. 1980, c. M-9.

[117] R.S.A. 1980, c. I-9.

children. The remainder of the estate is shared among the children and the spouse (with a minimum of one-third of the estate going to the spouse).

The Intestate Succession Act places the spouse in a preferred position under the scheme of distribution. Dower supplements those benefits. Under section 18 of the Dower Act (quoted above), the right to the dower homestead takes postpones the distribution of that home under the Intestate Succession act. Moreover, there is an important feature of dower law not present in the Intestate Succession Act. The Dower Act preserves the home *in specie*. In other words, where a spouse dies owning a homestead, the survivor has a right to that property, which cannot be transformed by a court into a money payment, or some other entitlement. The Intestate Succession Act confers **shares** in the estate of the deceased, and there is no requirement that property be retained in its existing form. When the home passes on intestacy, the Act implicitly contemplates that it will be sold and the proceeds distributed in accordance with the Act, unless the beneficiaries agree to a different result.

(b) Part 1 of the Matrimonial Property Act

In the introductory chapter it was seen that Part 1 of the Matrimonial Property Act may also apply on the death of a spouse in two circumstances.[118] First, if an action for a division under Part 1 of the Matrimonial Property Act has been commenced, and the applicant dies, that action may be continued by the applicant's estate.[119] Second, when, at the time of the death of a spouse, the survivor was in a position to launch an application for a division, the surviving spouse may bring an action against the decedent's estate.[120] In an application by the survivor, the court must take into consideration any benefit received by that spouse as a result of the death of the other spouse.[121] Therefore, the right to a life estate under the Dower Act would be treated as a property-holding of the surviving spouse.

The rationale of the Alberta system of deferred sharing is different from the main justification underlying dower law. A division under the

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[118] See Part C(2), Chapter 1.

[119] Section 16, as amended by R.S.A. 1990, c. 21, s. 24.

[120] Section 11.

[121] Section 11(3).

Matrimonial Property Act is premised on presumed equal contributions. In other words, determining entitlements under that Act is a backward-looking accounting process in which most spouses are regarded as having contributed equally to the marriage partnership. Future needs, the primary focus of dower law, are not material in assessing the share of the accumulations that each spouse should receive under Part 1.[122]

(c) Part 2 of the Matrimonial Property Act

As we have seen (in Chapter 2), by virtue of Part 2 of the Matrimonial Property Act, orders may be made granting exclusive possession of the home to a spouse. Both dower law and Part 2 use the home as a means of providing support. Part 2 provides that possessory orders are in addition to rights conferred by the Dower Act. If a dower life estate vests in a surviving spouse, the registration of the possessory order may then be cancelled on an application by the surviving spouse.[123]

Unlike the dower estate, Part 2 occupancy rights are typically invoked on marriage breakdown.[124] Whether an order can be made on death, or can survive the death of the owner, is unclear. The language of the Act may support these possibilities: Part 2 allows an application to be made by a "spouse", which includes a former spouse.[125] The orders may be made to last "for any time".[126] The matrimonial home is defined to include property that is owned by one of the spouses and that "is or **has been** occupied by the spouses as their family home".[127] However, to qualify as a matrimonial home the property must be owned by one of the spouses. After the death of the owner, the property is no longer 'owned' by that person.

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[122] However, issues of need may be considered under Part 1 of the MPA when deciding how one should give effect to the property reallocation.

[123] Matrimonial Property Act, R.S.A. 1980, c. M-9, s. 28.

[124] But see the discussion of option (6), in Part C(7), *infra*.

[125] Sections 1(e), 19(1).

[126] Section 19(3).

[127] Section 1(c)(ii) (emphasis added).

(d) The Family Relief Act

The function of family relief legislation is comparable to that of dower. The Family Relief Act[128] provides a mechanism for dependants to obtain support from the estate of a deceased spouse. Where a spouse dies, with or without a will, and adequate provision is not made for the proper maintenance and support of the dependants of that spouse, an application may be made for a family relief order.[129] Therefore, as with dower, family relief provides support in a way that abridges freedom of testation.

A claim under the Family Relief Act is adjudicated on a case-specific basis. In assessing an application, the benefits to which a spouse is entitled under the Dower Act must be taken into account.[130] The Act does not allow a court to override dower entitlements; dower takes precedence. However, it is possible for a court, under the Family Relief Act, to make an order conditional on a spouse relinquishing rights under the Dower Act.[131] Furthermore, where a family relief claim is successful, the court has wide powers to fashion orders to give effect to the award. In particular, the court can grant an order conferring a life estate in property of the deceased on a dependant, whether that person is a spouse or a child.[132] In this way, a court hearing a family relief application may create dower-like rights.

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[128] R.S.A. 1980, c. F-2.

[129] Section 3(1) sets out the basic test: "If a person (a) dies testate without making in his will adequate provision for the proper maintenance and support of his dependants or any of them, or (b) dies intestate and the share under the Intestate Succession Act of the intestate's dependants or of any of them in the estate is inadequate for their proper maintenance and support, a judge ... may ... notwithstanding the provisions of the will or the Intestate Succession Act, order that such provision as he considers adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them."

[130] Section 4.

[131] See e.g., *Re Willan Estate* (1951), 4 W.W.R. 114 (Alta. S.C.).

[132] Section 5(3)(c).

C. Reform Issues and Options

(1) Introduction

Dower is premised on a support obligation owed by spouses to each other on the termination of a marriage by death. The Institute is of the view that as a matter of general policy this obligation should continue, in some form.

Support obligations for family members form an integral feature of family law across Canada, under both federal and provincial law. These obligations apply during the currency of the marriage and afterwards. Under federal and provincial law, orders can be made that survive the death of the paying spouse for the benefit of the survivor — the duty of support does not necessarily end on death. This is because the need for support does not vanish once a spouse has died. In fact, on the death of the primary income earner, the need for some basis of support may be especially pronounced.

In our review of the Domestic Relations Act,[133] the Institute has acknowledged the continuing importance of spousal and child support.[134] We have endorsed the idea that the principles governing support under provincial law should conform with those applicable on divorce, where federal law governs. The proposals contained here draw on the same core principles as those adopted in relation to the DRA. Our aim in this Report is to ascertain whether and how the family home can be used as a means of providing support.

The life estate provides a measure of security and continuity for the widowed spouse, and its enduring value in pursuing these ends has recently been affirmed in Manitoba and Saskatchewan. Both of these jurisdictions have recently revised their dower laws, and have retained the life estate. As these provinces have recognized, there is a benefit associated with a self-executing and certain dower right. However, there are other ways in which the objective of support can be pursued. Six approaches are considered below. These are:

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[133] R.S.A. 1980, c. D-37.

[134] See *Domestic Relations Act Project: Spousal and Child Support — Guiding Premises* (March 19, 1992).

(1) retention of the life estate, wholly or substantially in its present form;

(2) the abolition of dower, without more, so that the widowed spouse is left to the other protective measures now available, including, especially, the Family Relief Act;

(3) enlargement of the dower life estate into a fee simple;

(4) the creation of a statutory form of co-ownership;

(5) the abolition of dower, coupled with an amendment to Part 1 of Matrimonial Property Act so as to provide for the division of matrimonial property on death; and

(6) the replacement of dower with occupancy rights under Part 2 of the Matrimonial Property Act.

These options are reviewed below. Our recommendation will be that option (6) be adopted.

(2) Option 1: retention of the dower life estate either completely or substantially in its present form

The family home can sometimes be an appropriate means with which to provide support. The death of a spouse is an event that is likely to prompt change in many ways for a family. Allowing a surviving spouse to remain in the home minimizes disruption; this can be especially important for the elderly.

The dower life estate may seem to be of limited practical value, since the home is often given to the surviving spouse under the will of the decedent. Furthermore, the property may be held by the spouses as co-owners. In either case, there is no apparent need to rely on the Dower Act. While this may be so, it must be remembered that the dower life estate serves as a fall-back: when all else fails, the widowed spouse can rely on this dower interest. Although in the normal case we expect that the dower life estate will be superfluous, the law should anticipate the occurrence of hardship cases. Our discussions with lawyers involved in estates practice suggest that, from an estate-planning perspective, questions of dower can arise in the context of second marriages. In this setting, it is possible for a spouse to wish to provide for the children of a first marriage. The expectations and needs of those children may conflict with those of the second spouse (the step-parent) concerning who should receive the house on

the death of the parent. In these instances, the dower protection provides a tangible benefit to the surviving spouse.

Additionally, even if the property is owned by both spouses, dower is not necessarily irrelevant. This is reflected in the current Act, which creates a right to dower in a co-owned homestead.[135] Where the spouses are tenants in common, on death, one spouse's share will (dower aside) pass by will or on intestacy. The right to possession acquired by any new co-owner will be postponed pending the termination of the dower interest of the surviving spouse. Even if the property is held as a joint tenancy (which is probably more common in a family setting),[136] dower may still be relevant, because the joint tenancy may be converted, by acts of severance, into a tenancy in common. If this occurs, the right of survivorship associated with a joint tenancy is lost, and the rules governing tenancies in common apply.

It might appear that the Family Relief Act renders dower unnecessary. As we have seen above, that Act, as with dower, is concerned essentially with the same matter — the adequate provision for dependants on death. Some form of family protection has existed in this province since 1910.[137] Hence, these two complementary devices have existed side by side throughout most of this century. Are both necessary?

Although both family relief and dower law pursue the same ends, there are nevertheless significant differences in approach. The Family Relief Act provides a highly flexible mechanism; dower is more fixed and certain. This is the most significant distinction. The rigidity of dower may provide solace to the widowed spouse, who can count on this right, and who may enjoy it without the need to seek a court order. But the fixed nature of the dower entitlement can also be viewed as a major weakness. A life estate is a rigid instrument with which to provide support on death. As with dower at common law, the rights conferred under the Dower Act are impervious to

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[135] Dower Act, R.S.A. 1980, c. D-38, s. 25. See also Law of Property Act, R.S.A. 1980, c. L-8, s. 21.

[136] Law Reform Commission of British Columbia, *Report on Co-Ownership of Land* (1988) at 30.

[137] Married Women's Relief Act, S.A. 1910 (2nd. Sess.), c. 18. The Act allowed a widow to make an application where her husband's will provided less for her than she would have received on an intestacy. This was replaced by the Testator's Family Maintenance Act, S.A. 1947, c. 12.

actual need and to changed circumstances. It is irrelevant if the widow remarries or is able to use other accommodation. Sometimes it might be best to lease or mortgage the home and use the proceeds to provide other accommodation for the widow(er). The home may be far too large for the realistic needs of the survivor. An elderly person may not be able to maintain the home, and might be better off in a senior citizens' village or a nursing home. Additionally, the Dower Act preserves the family home for the surviving spouse, without direct account for the needs of children. 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.

The use of a life interest in land as an instrument of social policy raises other practical problems. When a life estate is created out of a fee simple estate, those entitled to the remainder hold an asset of limited worth, with limited marketability. Likewise, the dower life interest, if it becomes unsuitable for the widowed spouse, would not likely have a ready market. Unless those entitled to the remainder join in the transaction, the widowed spouse will be able to sell only the life estate. This confers on the buyer a very precarious interest in land. Furthermore, the surviving spouse may have difficulty in obtaining mortgage financing when the land security is a mere life estate. Finally, whenever there is a settlement of property under which a life interest is granted to one person, with the remainder granted to someone else, issues may arise concerning the sharing of responsibilities. As a general rule, a life tenant is responsible for current expenses, such as taxes and the interest payments under a mortgage. Similarly, the life tenant is limited in his or her ability to alter the property by the law of waste. Principles of waste provide only general guidelines about the type of conduct that a life tenant is permitted to undertake.

The life estate in land is of ancient origin, and these instrumental problems are not novel. There are several ways in which they can be overcome. First, when a life estate is created by a party, it is possible to confer additional powers on the life tenant, allowing that person to raise money by selling or mortgaging the whole property, including the remainder. In other words, the life tenant may be given the ability to overreach the life estate and sell or mortgage the full fee simple interest. Second, the legal title may be reposed in trustees, with instructions to hold the property on trust for the life tenant and those entitled to the remainder. Under such arrangements, the trustee is typically given the power to sell or

charge the property, if necessary.[138] Third, in some jurisdictions, the limited common law powers of life tenants have been augmented by statute.[139]

These solutions are not fully suitable to the spouse holding a life estate under the Dower Act of Alberta. The first two methods are totally inapplicable, since they do not apply to a life estate arising by operation of law, but rather to one created by the fee simple owner. As to the third method, Alberta has not enacted legislation that increases the incidental powers of life tenants, although the English Settled Lands Act, 1856[140] forms part of our received law. That Act confers limited powers on life tenants to sell or lease property, but contains no provision permitting the mortgaging of the remainder interest.[141]

Compare the approach under the Family Relief Act. As mentioned above, that Act enables a court to grant orders based on need and other actual circumstances and confers on the court the ability to transfer property in the implementation of an order. Under the Act, the court can fashion an order that creates a proprietary right very similar to the dower life estate. As with the Dower Act, an order conferring a life interest in the home cannot later be varied.[142] However, unlike the law of dower, the Family Relief Act permits the court to account for the needs of all dependants and to deal with the ability of the owner of the home to encumber the property.

The contrast between the Dower Act and the Family Relief Act reflects a common phenomenon in the law — the striking of a balance between certainty and flexibility. The Dower Act confers an automatic, self-executing right. There is no special cost in putting such a protection in

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[138] See e.g., *Josephs et al.* v. *Canada Trust Co.* (1992), 90 D.L.R. (4th) 242 (Ont. Div. Ct.).

[139] See e.g., Settled Estates Act, R.S.O. 1990, c. S.7.

[140] 19 & 20 Vict., c. 120. See further *Re Moffat Estate* (1955), 16 W.W.R. 314 (Sask. Q.B.).

[141] Most action requires court approval. There is a power to lease property, without prior court approval for a period of not more than 21 years, but this does not apply to the "principal Mansion house": s. 32.

[142] The power of variation is available only to orders for periodic payments: Family Relief Act, R.S.A. 1980, c. F-2, s. 6(b).

place, even if it is rarely used.[143] In fact, the automatic entitlement to dower can be a more efficient means of providing support than claims under the Family Relief Act. The right to dower is clear (most of the time), creating entitlements under what has been helpfully called a 'crystal rule'.[144] The Family Relief Act allows for a more tailored solution, but this requires that an initial finding of entitlement be made, based on a flexible standard. Once this threshold test is passed, attention must then be directed to designing an appropriate order. Such a regime creates a 'mud' rule,[145] which allows for a consideration of factors relevant to a given case, at the expense of reducing certainty as to the rights of potential claimants under the Act.

There is no need to regard these approaches as mutually exclusive, since a balance can be struck that optimizes the primary advantages of both. Presently, dower entitlements must be taken into account in an application under the Family Relief Act. One mode of reform would be to retain this presumptive right to a dower life estate, but allow a court in an application under the Family Relief Act the power to grant an order that would have precedence over the Dower Act. The result would be a modified 'crystal' rule. It would reverse the current law, under which orders under the Family Relief Act are made in addition to rights enjoyed by a surviving spouse under the Dower Act (after taking those rights into account). The court would possess the power to sell the home, grant it to other dependants, or make any other order that would be appropriate.[146]

Of course, this would undermine the security that a widow(er) now enjoys under the Dower Act, given that the home is now insulated from family relief claims. Presently, an elderly widowed spouse can rest assured that this right cannot be overridden by the exercise of judicial discretion. Under dower law, the home may be enjoyed by the surviving spouse

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[143] There are costs associated with the procedures for obtaining consent to a disposition. These are discussed in Chapter 4. There it will be maintained that this consent requirement is important to preserve both dower rights and possession rights under Part 2 of the MPA.

[144] C.M. Rose "Crystals and Mud in Property Law" 40 Stanf. L. Rev. 577 (1988).

[145] *Id.*

[146] In accordance with the current law governing family relief litigation, the application would have to be commenced within six months of the grant of probate or administration: Family Relief Act, R.S.A. 1980, c. F-2, s. 15(1).

"without danger of loss, harassment, or disturbance by reason of the improvidence of the head or any other member of the family".[147] Under this option (that is, allowing a court under the Family Relief Act to grant an order overriding the dower life estate), a presumptive right to the home would still exist. This could be bolstered, if necessary, by statutory language limiting the basis on which the dower right can be overridden.

(3) Option 2: abolition of the dower life estate

The other extreme position would be to eliminate dower altogether. Alternatively, one could provide for a 'transitional period' of occupancy (for example, one year) to replace the life estate. The justification for abolition would be that circumstances have changed dramatically since the introduction of homestead protections in the Province of Alberta some 80 years ago. At that time, women were less likely than their contemporary counterparts to have an independent means of support; they were less likely to work outside of the home; and they were less likely to own property in their own right. In addition, when dower was introduced, the Matrimonial Property Act did not exist. Similarly, the principles of unjust enrichment, under which spouses may claim an equitable interest in marital property, had not yet developed.[148] In short, there was a time in the history of Alberta when dower played a more prominent role in protecting the economic welfare of women than it does today.

Abolishing dower would leave the spouses to the other remedies discussed above, including those available under the Family Relief Act. This is the position in some provinces in Canada. However, the problems associated with this approach were identified earlier — applications for family relief can be protracted and costly. In our view, this is not consistent with our notions of familial support and the importance of promoting continuity and security when a marriage ends on death. A caring society can surely do more for the elderly widow or widower.

(4) Option 3: replacement of the life estate with a fee simple

If the granting of a life estate creates problems relating to such things as marketability and management, one method of overcoming this would be to grant to the survivor the full fee simple estate. That property

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[147] *Re Hetherington* (1910), 14 W.L.R. 529 (Sask. K.B.) at 532 (per Lamont J.).

[148] See further B. Ziff, *Principles of Property Law* (1993) at 163-69.

could then be sold, leased or mortgaged by the survivor or enjoyed in possession.

The drawback of this option is obvious: it interferes too greatly with the freedom of testation. To confer such an extensive right would be to undermine too extensively the power of a property owner to dispose of the home as he or she sees fit. It might disappoint the legitimate expectations of those who would otherwise have received the remainder. This group could include children from a first or second marriage. Moreover, as with the current law of dower, the granting of a fee simple by operation of law would create an inflexible right to support, unconnected to actual need.

(5) Option 4: the creation of a statutory form of co-ownership

Under this option, spousal rights over the home would be conferred by treating both owners as co-owners of the home, regardless of how the property was acquired, or in whose name title is registered. Newfoundland has adopted this approach. In that province, the matrimonial home is deemed to be held as a joint tenancy. The Newfoundland Family Law Act[149] provides that:

> 8(1) Notwithstanding the manner in which the matrimonial home is held by either or both spouses, each spouse has a one-half interest in the matrimonial home owned by either or both spouses, and has the same right of use, possession and management of the matrimonial home as the other spouse has.
>
> (2) Subsection (1) creates a joint tenancy with respect to the matrimonial home.

This provision creates an automatic right of possession for both spouses — in their capacity as co-owners. The creation of a joint tenancy also provides for a right of survivorship on death. Under the general law, when one of two joint tenants dies, the surviving owner becomes entitled to the entire property.

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[149] R.S.N. 1990, c. F-2, s. 8.

However, the adoption of a marital joint tenancy, alone, would be insufficient to perform the functions of Alberta dower law. Joint tenants at common law are permitted to sell their own shares; our dower law requires the consent of both spouses. In Newfoundland, there is a super-added consent requirement similar to that found in Alberta. A joint tenancy may be transformed by acts of severance into a tenancy in common.[150] This destroys the right of survivorship, which is the functional equivalent of the dower life estate. The Newfoundland statute expressly provides that the joint tenancy creates a right of survivorship.[151] It is likely, but by no means certain, that this right of survivorship is unseverable.

Even if these problems could be dealt with in the reform legislation, an important issue of policy still persists: conferring joint ownership entails some of the drawbacks associated with the fee simple proposal. The effect of the recommendation would confer full ownership on the survivor — a greater right than that needed for support — and this would be conferred at the expense of other potential recipients.

(6) Option 5: abolition of dower, coupled with an amendment of the Matrimonial Property Act so as to provide for the division of marital property on death

Another approach would be to repeal the Dower Act and extend the application of Part 1 of the Matrimonial Property Act, so that Part 1 applies generally on death, not just in the two special circumstances mentioned earlier.[152] The effect of this would be to make all matrimonial property divisible on the death of one spouse.

The question of whether the Matrimonial Property Act should be triggered by death was reviewed in our Report on *Matrimonial Property* in 1975.[153] At that time, the Institute considered three options: (i) that the Act apply on death, in favour of either the survivor or the estate of the deceased spouse; (ii) that the right to a sharing be available on death in favour of the surviving spouse only; and (iii) that the right to sharing be

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[150] See generally A.J. McClean "Severance of Joint Tenancies" (1979) 57 Can. Bar Rev. 1.

[151] Section 8(5)(a).

[152] See Part 2(b), *supra*.

[153] Alberta Institute of Law research and Reform, *Report on Matrimonial Property* (No. 18, 1975).

inapplicable on death, leaving the survivor dependent on the other available protections, such as dower and family relief. The majority of the Institute's board recommended the second of these options. This option would have allowed the surviving spouse to have the benefit of the Act, while denying a claim by the estate of a deceased spouse. The rationale of this limitation was to ensure that the survivor would not be denied benefits from the marriage by a claim made by the estate. Among other things, it was argued that this could reduce the ability of the survivor to care for children of the marriage.[154]

The Matrimonial Property Act, in its initial form, allowed a surviving spouse to bring an application against the estate of a deceased spouse if a triggering event had occurred prior to that death. Only marriage breakdown — not the death of a spouse — could give rise to a right to a division under the Act. These issues were revisited by the Institute in 1990, in our Report on *Section 16 of the Matrimonial Property Act*. The 1990 Report responded to a specific problem: that delays in the prosecution of MPA claims sometimes occurred in the expectation that the death of the applicant would prematurely terminate the action. In recommending its solution — that the law should allow an action that had been commenced by a spouse to be continued on death of the applicant by his or her estate — the Report reiterated the three options examined in 1975. However, accepting that the legislature had clearly decided in 1979 that marriage breakdown was required to trigger deferred sharing, the Report did not address the broader question of whether the Act's system of deferred sharing should be triggered on death. (The MPA was amended in 1991, adopting the Institute's recommendation that a spouse's estate could continue an action for division.)

The 1975 Report recognized that to deny the applicability of the MPA on death was inconsistent with the underlying premise of the reforms to be achieved by the Act, namely, that marriage is an economic partnership. If this is an apt characterization, then it is no less so merely because that partnership happens to be terminated by death rather than divorce. Moreover, it seems anomalous that a divorced spouse has more rights than a widowed spouse. In the case of divorce, a spouse has a **right** to make an

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[154] The majority were prepared to allow a claim to be made by the estate "to relieve against the hard case of a spouse who has dependant children from a previous marriage and who, it may be assumed, would want to provide for them": *id.* at 95.

application for a property division. The Act creates a presumption of equal sharing of marital accumulations, a presumption which our courts have said should not be lightly ignored.[155] In contrast, where the marriage ends by the death of a spouse, the widowed spouse has no right to share, but only an expectation that some benefits will be conferred by will.

To say, in response, that when marriage ends by death it is, in fact, likely that the survivor will receive property through the law of succession is to ignore the value of the contributions which the Matrimonial Property Act seeks to validate. It also overlooks the right of the deceased spouse to leave property by will to his or her chosen beneficiaries, and the possibility that the surviving spouse may in fact be excluded. It creates an incentive for a spouse to acquire property in his or her own name, for this will have significance if the marriage ends by the death of either spouse. That is an ironic result, given that the MPA is predicated on overcoming the unfairness that results from the application of the rules of separate property to married couples. For these reasons a number of Canadian provinces now treat death as an event that invokes the presumption of equal sharing of marital property.[156]

One effect of denying spouses the right to a division on death is to encourage claims based on principles of unjust enrichment by the survivor against the estate of deceased spouse. The modern law of unjust enrichment had not fully developed in Canada when our 1975 Report was published; the impact that unjust enrichment might have on spousal property rights was therefore not a concern to law reformers at that time. In fact, the 1975 Report and the Matrimonial Property Act were both premised, in part, on the assumption that the equitable principles then extant would often be inadequate to produce a fair sharing of marital property. The law has changed dramatically in the last twenty years — the courts have shown a willingness to apply the principles of unjust enrichment as a means of recognizing non-monetary contributions to the acquisition, preservation or improvement of property.[157] These claims are not precluded by the

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[155] See *Mazurenko* v. *Mazurenko* (1981), 23 R.F.L. (2d) 113 (Alta. C.A.).

[156] The Manitoba Law Reform Commission has recommended that the rules governing the deferred sharing of marital property should apply on death: *Report on An Examination of the 'Dower Act'* (1984) at 42 *et seq.*

[157] See e.g., *Peter* v. *Beblow*, [1993] 1 S.C.R. 980, in which the leading authorities are reviewed.

Matrimonial Property Act.[158] Moreover, such an action may be maintained by the estate of a claimant against the survivor.[159] While it is not clear that such claims are regularly pursued, this possibility remains open.

If Part 1 of the Matrimonial Property Act were to be triggered by death, this would, arguably, eliminate the need for the retention of the dower life estate.[160] The assumption underlying the abolition of dower would be that the division of assets would provide the main basis for support. In cases where there is a family home, an order could be made under the Matrimonial Property Act transferring that home to the surviving spouse for life. Alternatively, an order for possession could be made in favour of the surviving spouse under Part 2 of the Matrimonial Property Act. Such an approach would allow the court to allocate the home to the deceased spouse's estate, subject to the possessory right of the widowed spouse. In other words, the court could, if necessary, make an award that closely replicated the right to dower. Applications for an order under the Family Relief Act would, of course, also remain available.

Making the MPA applicable on death, if accepted, would have far greater impact on married couples than merely affecting entitlements to the home: this change would affect all marital property. Additionally, it would be invoked in a much larger number of marriages than is now the case. Most marriages (perhaps as many as 65%) do not end in divorce. At the same time, if this option were adopted, the number of applications by widowed spouses under the Family Relief Act would decrease, because (presumably) awards under the MPA would eliminate in many cases the need for a surviving spouse to seek support under the Family Relief Act.

It is possible, in theory, to restrict the application of the MPA on death to the home itself. However, that approach would artificially sever the family home from other accumulated property. The operation of the Act requires an assessment of the net worth of both spouses, taking into account all of their holdings. Normally, some type of equalizing order is

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[158] See *Rawluk* v. *Rawluk*, [1990] S.C.R. 70.

[159] See *Novic Estate* v. *Miller* (1989), 58 D.L.R. (4th) 185 (Sask. C.A.), leave to appeal to the S.C.C. refused, Oct. 19, 1989. See further M.M. Litman, "Recent Developments in the Law of Unjust Enrichment: Survival of Actions, Accounting and Beyond" (1988-89) 9 Est. & Tr. J. 287.

[160] See contra Manitoba Law Reform Commission, *supra*, note 156 at 166-67.

made from one spouse to the other, which may or may not include the transfer of an interest in the home.

(7) Option 6: the replacement of dower with occupancy rights under Part 2 of the Matrimonial Property Act

If the ultimate goal is to make the home available to the survivor, there is a simpler approach than that proposed in Option #5: this is to allow occupancy of the house to be awarded under Part 2 of the Matrimonial Property Act, without the need to invoke the rules for division under Part 1.

Under this option, Part 2 of the MPA would be amended to provide that on the death of the owning spouse, the survivor would be entitled to remain until a further order is made. Therefore, as with the dower life estate, the right of possession would be automatic. This right to remain in the home would be a natural extension of the proposals made in Chapter 2, where it was recommended that both spouses acquire a statutory right of possession.[161]

Replacing dower with Part 2 occupancy rights would open up a possibility now precluded by the Dower Act: it would allow claims to the home to be made by others, including family members. The right to apply would be open to those persons who are entitled to make an application under the Family Relief Act, provided that the time for bringing that application had not elapsed. The right to apply would also be open to anyone who is entitled to the home under the will or intestacy of the deceased owner. These are the only persons who should be permitted to launch a claim.

What factors should be taken into account when an application to vary the right of occupancy is brought? One approach would be to adopt the same criteria that govern when for an application for exclusive possession brought by one spouse against the other (contained in Recommendation 2 of this Report). In such an application, the law contains no starting preference in favour of one spouse over the other.

In our view, applying the same criteria would sacrifice too much of the security of tenure that widowed spouses presently enjoy under dower law. Current dower law permits a widow(er) to stay in the home for life,

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[161] See Part C(1), Chapter 2.

regardless of the needs of others who have an interest in the home. As a means of adopting a measure of the security of tenure that is part of dower law, we believe that the presumptive right of a widowed spouse to remain in the home on the death of the owning spouse should not be easy to overcome. The presumption should clearly signal that priority over the home is to be given to widowed spouses. Therefore, in a contest between a widowed spouse and others who hold or claim an interest in the home, we believe that the widowed spouse should be allowed to prevail unless there are compelling reasons to order otherwise. To defeat the former spouse, we feel that an applicant should be required to show that the benefits of the home to the widowed spouse are substantially outweighed by the benefits that would accrue to the applicant. However, this calculation should not be based purely on financial considerations. For example, it should not be enough that the claimant is in greater economic need than the widowed spouse. Factors such as the personal attachment to the home and the harms of dislocation should also be relevant. If that widow(er) remarried, this would be a consideration. In addition, if the widowed spouse were no longer able to remain on the property, this should also be taken into account.

In our view, this option should be adopted. It provides a means of support to a spouse that best balances the certainty of dower with the flexibility associated with the general law of support. It adopts a sensible and caring approach to the support of widows and widowers in a way that reflects the best features of Alberta dower law. It is designed to discourage disputes over the home by providing a strong presumption in favour of the surviving spouse. At the same time, it recognizes that in some cases the right of occupancy may be unnecessary or impractical. When that is clearly the case, the court should have the power to vary or terminate the right of occupancy.

This approach to the home is somewhat consistent with other notions of spousal support, all of which are case-specific. Of course, the match is not perfect; occupancy rights are not identical to other spousal support mechanisms. In particular, the presumption of entitlement to the home has no equivalent in the general law of support. Despite this, one can still discern a common thread between occupancy rights and core notions of support. There is a criterion of support hidden within the presumed right of occupancy — a spouse is entitled to a minimum degree of protection to relieve hardship. This approach fits well with the policies underlying the

Family Relief Act,[162] where the court is concerned with ascertaining whether surviving dependants have received adequate provision for their proper maintenance. Likewise, the relief of hardship is a relevant factor on divorce. In an application for support on divorce, the court is required to relieve any economic hardship of the spouses arising from the breakdown of the marriage.[163]

RECOMMENDATION 7

The right to a life estate under the Dower Act should be replaced with a right of occupancy governed by Part 2 of the Matrimonial Property Act. The right should arise automatically on the death of the owning spouse and should continue until the surviving spouse dies, or until a court orders otherwise. 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.

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[162] Family Relief Act, R.S.A. 1980, c. F-2, s. 3(1).

[163] Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 15(7). In the realm of divorce, it has been recognised that the breakdown of the marriage often works to the material disadvantage of women, contributing to a process now referred to as the 'feminisation of poverty': see *Moge* v. *Moge*, [1992] 3 S.C.R. 837 at 853-57. See also Department of Justice, *Evaluation of the Divorce Act-Phase II: Monitoring and Evaluation* (1990); M. Eichler, "The Limits of Family Law Reform or, The Privatization of Female and Child Poverty" (1990-91) 7 C.F.L.Q. 59. This may also be true for widows deprived of succession benefits on the death of their husbands—the type of situation considered by this report. The protections advanced here are likely to redound to the benefit of women. Put another way, while some widowers will undoubtedly need, and benefit from, our reforms, the improvement of dower or occupancy rights will probably have a more significant impact on widows than widowers.

Under the current Part 2, a court may attach conditions when granting an order for exclusive possession.[164] In Chapter 2 of this Report, we have recommended that the Act be amended to state explicitly the types of ancillary orders that can be made when possession is granted. The power to grant such orders would allow a court sufficient scope to respond to the problems normally associated with the changing demands of home ownership. Among other things, the court would be able to charge expenses against the property where appropriate. It would also allow the court to raise capital so that, when warranted, the widowed spouse could acquire alternative accommodation. In granting such an order the court would have to take account of the interests of those entitled to the property following the termination of the right of possession. The property could not be sold without their consent.

The law should not require every widowed spouse to seek directions from the court concerning such matters as the payment of current expenses. To allow the right of possession to remain self-executing on death, the law should establish a set of standard conditions under which occupancy is enjoyed. We propose that a widowed spouse be responsible for current expenses and repairs. This approach is based in part on the position at common law in relation to life tenants, and on considerations of convenience and fairness. Where these obligations are inappropriate under the circumstances, they should be variable by court order.

RECOMMENDATION 8

The powers of a court to grant ancillary orders under Part 2 of the Matrimonial Property Act should be applicable to situations in which a widowed spouse remains in the home on the death of the owning spouse. Unless varied by court order, the surviving spouse should be responsible for all current expenses and repairs.

With these changes contemplated by Option #6, the term 'dower' will no longer form part of the language of the law. In its place, our reforms will

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[164] Section 19(3).

confer a flexible right of occupancy. The replacement of dower will be accompanied by a reaffirmation of the importance of the home as a source of support. When it is needed, the home will still be available for widowed spouses, in the same way as it is for spouses who undergo marriage breakdown. The powers conferred on the courts to adjust the rights of the parties ensure that entitlements can be tailored to respond to specific needs, as is the case under the general law of support.

D. The Life Estate in Personalty

(1) The current law

Section 23 of the Dower Act provides that:

> (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 declared in the Exemptions Act to be free from a writ of execution in his lifetime and the surviving spouse is entitled to the use and enjoyment of that personal property.
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> (2) If a dispute arises as to the articles that are included in the personal property referred to in subsection (1), the question shall be submitted by way of notice of motion to the Court which shall summarily decide the question.

The granting of a life estate in the personal property of the deceased spouse is unique in two respects. First, no other homestead laws in Canada create such a right. Second, under the common law, the doctrine of estates is inapplicable to personalty.[165] The inclusion of a dower life estate was

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[165] See *Re Troupe*, [1945] 2 D.L.R. 450 (Man. K.B.). The common law rule is subject to several substantial exceptions. First, the granting of a leasehold interest in a chattel — a bailment — is possible. Second, equity permits time-limited gifts of personalty contained in a trust. For instance, stocks and bonds might be placed in the name of trustees to hold for the benefit of a succession of beneficiaries. Third, it is now accepted that a parsing up of the legal title of personalty by will is valid. If a chattel is bequeathed 'to A for life, then to B absolutely', this creates a type of future interest. However, estates cannot be created over consumable items: see further E.E. Nemmers, "Legal Relations of Owners of Present and Future Interests in Personalty — Consumables" 27 Marquette L.J. 82 (1942-43).

introduced into Alberta dower law in 1926, "in total disregard of the old theory that there could be no life estate in personal property".[166]

The life estate in personal property is dependent on the existence of a dower homestead: it only applies if the real property life estate vests in the surviving spouse. To ascertain which items are to be held for life, section 23 of the Dower Act adopts a list of items contained in the Exemptions Act.[167] Under that Act the following articles are exempt from seizure under a writ of execution, and therefore within the purview of the dower life estate:

- the necessary and ordinary clothing of the execution debtor and his family
- furniture and household furnishings and household appliances to the value of $4,000.00
- cattle, sheep, pigs, domestic fowl, grain, flour, vegetable, meat, dairy or agricultural produce, for direct use or for conversion into money to provide in various ways for the family of the debtor.
- horses other animals and farm machinery, dairy utensils and farm equipment reasonably necessary for the agricultural operations for a period of twelve months
- one tractor, if required by the execution creditor for his or her trade or calling
- one car worth not more than $8,000, or one truck required for agricultural purposes or for the debtor's trade or calling
- seed grain sufficient to seed the land of the debtor under cultivation

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[166] *In re McLeod*, [1929] 3 W.W.R. 241 at 242 (per Harvey C.J.A.).

[167] Section 5 of the Exemptions Act, R.S.A. 1980, c. E-15, provides that in the case of the death of an execution debtor, his property that is exempt from seizure remains so, as long as the property is being used by the surviving spouse or minor children and is necessary for their support. This provision does not overlap with the Dower Act. Section 5 creates an enduring exemption. The Dower Act provision does not create an exemption. That provision merely defines which assets are part of the dower interest by reference to whether they are exempt or not.

- the books of a professional person required in that person's profession

- necessary tools and equipment up to the value of $7,500.[168]

(2) Reform of the personal property life estate

The basic idea that some personal property should accompany the homestead is eminently sensible. The right to a life estate in the property is diminished greatly if the home is empty. This, too, is a factor in the general law governing exemptions, which seeks to leave to the judgment debtor some basic necessities of life.

Despite the general harmony between the goals of dower and exemptions, the fit between these two areas is not perfect. The law of exemptions leaves the debtor the means of livelihood; hence, tools and farm implements are exempt from seizure. These are irrelevant to the dower life estate.

In our Report on *Enforcement of Money Judgments*,[169] we concluded that from the point of view of the law of creditor's remedies, the law governing exemptions was in need of reform. We recommended a new approach under which exemptions would be categorized as relating to: (i) basic necessities; (ii) shelter; (iii) livelihood; or (iv) farm exemptions. The property exempt as 'basic necessities' would be as follows:

(a) food required by the enforcement debtor and his dependants during the next 12 months;

(b) the necessary clothing of the enforcement debtor and his dependants;

(c) household furnishings and appliances to the value of $4,000;

(d) one automobile to the value of $5,000;

(e) medical and dental aids required by the enforcement debtor or his dependants;

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[168] Exemptions Act, R.S.A. 1980, c. E-15, s. 1(1).

[169] Report No. 61, 1991.

(f) items of a sentimental value to the enforcement debtor, to the value of $500.[170]

This list is more suitable to the dower life estate. However, while adopting it for the purposes of dower law is convenient, it may not be entirely appropriate. In the law of exemptions, a balance is struck between the irreducible needs of the debtor and the rights of unpaid judgment creditors. In the law of dower, the rights of the surviving spouse are balanced against those who might otherwise take the property of the deceased under a will or on intestacy. Their rights arise from a gratuitous transfer on death, not in the satisfaction of a judgment of a court which itself is based on some pre-existing legal obligation. Given this, it seems preferable to grant more to the surviving spouse than that which is left to a judgment debtor.

An alternative approach would be to adopt the definition of 'household goods' now found in the Matrimonial Property Act.[171] That definition establishes a test based on the use of items by the family, which embraces personal property ordinarily used by both spouses (or one or more of the children) for transportation, household, recreational, social or aesthetic purposes.

As with the reform of the life estate in realty, the basic choice is between certainty and flexibility. The Exemptions Act list enables the relevant parties to segregate assets without court intervention (although subsection 23(2) of the present Dower Act contemplates that disputes may still arise.) The MPA definition is far more flexible, and is therefore more likely to produce a disagreement as to which items fall within the scope of the definition. This is not particularly problematic under the current operation of Part 2 of the MPA. Under that Part, a spouse must commence legal proceedings in order to obtain exclusive possession of the home. At that time, the additional transaction costs involved in identifying which household goods are to remain in the home will not normally be significant.

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[170] *Id.* at 254 *et seq.* This approach has been taken up in the newly-enacted Civil Enforcement Act, R.S.A. 1980. c. C-10.5, Part 10 (especially s. 88). That Act allows the same types of exemptions, except for articles of sentimental value are excluded from the list. The monetary values are set by regulation. Other exempt property may be prescribed under the regulations. The Act received royal assent on Nov. 10, 1994, but as of Mar. 1, 1995 has not been declared in force.

[171] Section 1(b).

As in the case of the proposed reform of dower, we prefer an approach that combines the advantages of both methods. In our view, a special list should be adopted which describes the items to be enjoyed along with the right of occupancy. This list would include household furnishings and appliances and one automobile, unless the surviving spouse owns an automobile. A widowed spouses's entitlements to these goods would should be subject to the same strong presumption that applies in relation to the right of occupancy in the home (as proposed in Recommendation 7). In addition, if the basic personal property entitlements are insufficient, the widowed spouse should be able to apply for an order to obtain the right to use other items within the definition of household goods now found in the MPA. A spouse would not normally be entitled to sell any of the items without the consent of the ultimate beneficiaries or by order of the court. In some instances, the surviving spouse might wish to purchase a new car, and there would normally be no reason to prevent this. At the same time, it would be wrong to allow that spouse to sell a family heirloom (or an antique car) unilaterally.

RECOMMENDATION 9

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). This right should arise automatically on the death of the owning spouse and should continue until the surviving spouse dies, or until a court orders otherwise. Such an order should not be granted unless a court is convinced that the benefits of to the widowed spouse in relation to the personal property are substantially outweighed by the benefits that would accrue to those entitled to make a claim. A court may also grant an order of possession in favour of the widowed spouse in relation to other 'household goods' (as that term is defined in the Matrimonial Property Act).

E. Bars to the Life Estate: The Question of Fault

(1) The relevance of fault

Under the Dower Act, matrimonial misconduct may disentitle a spouse to the dower life estate. The Act provides that

> When at the time of the death of a married person the spouse of the married person is living apart from the married person under circumstances that would disentitle the spouse to alimony, no life estate vests in the spouse and the spouse takes no benefit under this Act.[172]

This ambit of this bar to dower is connected to the bars associated with claims for alimony. In Alberta, alimony is payable when the claimant would be entitled to a judgment for either judicial separation or the restitution of conjugal rights. The bars to these actions include adultery and 'conduct conducing' the other party to commit adultery.[173]

(2) Reform

This section is a throwback to an era when fault was an integral element of family law doctrine. Vestiges of this approach are found in other areas of family law in Alberta, although in federal law governing divorce, and elsewhere in the common law world, these features have been largely eliminated. Fault remains relevant in applications under the Family Relief Act. Under that Act, a court may "refuse to make an order in favour of any dependant whose character or conduct is such as in the opinion of the judge disentitles the dependant to the benefit of an order."[174] Likewise, under the Intestate Succession Act,[175] a surviving spouse who left the intestate and was living in adultery at the time of the intestate's death is not entitled to a share of the intestate's estate.

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[172] Section 22(1).

[173] See further *Grosberg* v. *Grosberg Estate* (1990), 65 Man. R. (2d) 256 (Q.B.); *Re Haddad*, [1978] 5 W.W.R. 117 (Man. Surr. Ct.) and the authorities cited there.

[174] R.S.A. 1980, c. F-2, s. 3(5).

[175] R.S.A. 1980, c. I-9, s. 15.

We recommend that matrimonial fault not be relevant to the awarding of occupancy rights on death.[176] Occupancy rights in the home should become aligned with reforms in the law of support that have eliminated fault as a factor. A widowed spouse who has been guilty of marital misconduct may nevertheless have suffered a material disadvantage arising out of the marriage relationship. That spouse may be in a position of hardship. The widowed spouse may be caring for children and require the home for the benefit of those children.

In our review of the child and spousal support obligations under the Domestic Relations Act, we have recommended the following:

> RECOMMENDATION #6(1): It is recommended that Alberta should follow the example of other Canadian provinces that have abolished the doctrine of the matrimonial offence.
>
> RECOMMENDATION #6(2): Spousal misconduct should be irrelevant to any determination of the right to, quantum or duration of spousal support. However, the economic consequences of such conduct may be relevant.[177]

The proposals in this Report conform with those concerning the Domestic Relations Act. We leave to another study the question of whether comparable reform should be undertaken in relation to the Family Relief Act[178] and the Intestate Succession Act.

The proposals under the Domestic Relations Act provide that the economic consequences of fault remain relevant in applications for support. This, too, will remain part of the law governing occupation of the matrimonial home. In Chapter 2, we have suggested that the threat of

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[176] Fault was removed in Manitoba: see Homesteads Act, S.M. 1992, c. 46, repealing but not replacing section 22 of the Dower Act, R.S.M. 1987, c. D100.

[177] Alberta Law Reform Institute, *Domestic Relations Act Project: Spousal and Child Support — General Guidelines*, *supra*, note 134 at 4.

[178] The issue of conduct in family relief applications was last considered by the Institute in 1978: alberta Institute of Law Research and Reform, *Family Relief* (Report No. 29, 1978). At that time, we recommended that "conduct of the dependant in relation to the deceased" be a factor to be taken into account by a judge on the hearing of an application: Recommendation 13 (at pp. 64-65).

violence should a factor to be taken into account in granting an order under Part 2 of the MPA.[179] In these two ways, conduct will continue to be a consideration. The significance of our approach here is that fault will not bar a spouse from seeking the benefits conferred by law in relation to the home.

RECOMMENDATION 10

Matrimonial misconduct should not constitute a bar to the enjoyment of any of the rights contained in Part 2 of the Matrimonial Property Act.

[179] Part C(2), Chapter 2.

CHAPTER 4 — TRANSFER OF THE HOME

A. Introduction

The Dower Act regulates the right of an owning spouse to dispose of the family home. As general rule, the Act requires that the non-owning spouse consent to all dispositions of the home. The requirement of consent of the non-owning spouse is a central feature of American homestead laws and the Canadian versions of these statutes. This right is ancillary to the dower life estate. The promise of a dower life interest is less valuable if the home can be sold, leased or mortgaged by the owner without the consent of the other spouse.

Under Alberta law, the requirement of consent to a disposition of property under the Dower Act performs an additional function: it also preserves the family home for the enjoyment of rights of possession under Part 2 of the Matrimonial Property Act. Presently, the MPA contains a requirement for consent by a spouse to a disposition of the matrimonial home by the owner only in those cases in which the non-owning spouse has already obtained and registered an order for possession of the home. In other Canadian provinces, a consent requirement, modelled on western homestead law,[180] preserves possessory rights by fettering the right to dispose of the home unilaterally.

Under the Dower Act, no disposition of the homestead can made by the owner without the consent of the other spouse, unless an order has been obtained dispensing with that requirement, or the rights have been previously waived. In consequence, a study of the consent provisions involves a consideration of: (i) the meaning of a 'disposition'; (ii) the formal requirements for consent; (iii) the legal effect of a transfer made without the requisite consent; (iv) the provisions for dispensing with the consent requirements; and (v) waiver of consent. The first four matters are discussed in this chapter. The law concerning waiver by contract is discussed in Chapter 5.

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[180] W.F. Bowker, "Homestead Law in the Four Western Provinces" in A. Bissett-Johnson & W.H. Holland, *Matrimonial Property Law in Canada*, I-43 at I-65.

B. The Dower Rules

(1) What is a disposition?

A consent is required for a 'disposition' of a dower homestead. Under the Act, a disposition means:

> (i) ... 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 three years or any other instrument intended to convey or transfer an interest in land
> >
> > (B) a mortgage or encumbrance intended to charge the 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.[181]

This definition is intentionally broad. It has been applied to a listing agreement with a real estate agent for the sale of the home. In *Re/Max Real Estate Ltd.* v. *Dachlter*,[182] the court accepted that the terms of the agreement created an 'encumbrance' within the meaning of the Land Titles Act.[183] The definition also appears to encompass an easement, a profit *a*

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[181] Dower Act, R.S.A. 1980, c. D-38, s. 1(c).

[182] (1984) 53 A.R. 383 (Q.B.).

[183] Following *A.E. LePage Melton Real Estate Ltd.* v. *Doris Anderson et al.*, Unreported Q.B. No. 105084 (per Hope J.).

prendre,[184] and a quit claim deed by a spouse who holds an equitable interest in the home under an agreement for sale.[185]

However, the Act does not prevent transfers in all circumstances. For instance, when an owner purposefully defaults under a mortgage (one that had been properly consented to), in the hope that the home will be sold by the mortgagee, this is not a disposition under the Act, though it may result in the loss of the home. An order for partition and sale of co-owned property is also not a disposition.[186] An act by one joint tenant severing that interest and transforming it into a tenancy in common is not caught by the consent provisions of the Dower Act.[187] Similarly, it has been held that the Act does not apply where the home is transferred from one spouse to the other.[188]

In *McNeil* v. *Martin*,[189] an issue arose as to whether the sale by a sheriff to satisfy a judgment against the husband amounted to a disposition under the Dower Act. If a consent was required by the Act, the proposed sale by the sheriff would have been prevented, since the wife of the judgment debtor refused to consent. The Alberta Court of Appeal held that the sheriff's action was not covered by the definition of a disposition. The sale by the sheriff was not one which strictly was "required to be executed by the owner of the land disposed of", as contemplated by the provision quoted above.[190] As a matter of policy, to include the sheriff's sale would have effectively rendered all homesteads completely exempt from seizure.

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[184] Accord Bowker, *supra*, note 180 at I-50.

[185] *Clark* v. *Clark* (1965), 54 W.W.R. 744 (Alta. C.A.).

[186] Law of Property Act, R.S.A. 1980, c. L-8, s. 21(1).

[187] See *Earl* v. *Earl*, [1979] 6 W.W.R. 600 (Alta. Q.B.). But see *Toth* v. *Kancz*, [1975] W.W.D. 90 (Sask. Q.B.), where an attempt to convert a tenancy in common into a joint tenancy without complying with the Saskatchewan Homestead Act was held to be void.

[188] *Scott* v. *Cresswell*, [1975] 3 W.W.R. 193 (Alta. C.A.) at 222-23. See contra *Delves* v. *Delves*, Unreported, May 1977 (Alta. Dist. Ct.).

[189] (1982), 23 Alta. L.R. (2d) 318 (C.A.).

[190] Section 1(c)(i).

That would run counter to the rules governing urban homes, which confer only a limited exemption (presently $40,000).[191]

(2) The basic rules for consent

The primary purpose of the consent requirement is straightforward. The disposal of a homestead can undermine dower rights. To prevent this, one of the incidents normally associated with property — the right to alienate — is curtailed, or at least, this proprietary incident is shared between the spouses. The Act also seeks to ensure, to the extent that the law can do so, that the consent is given voluntarily with knowledge of the rights being surrendered.

The current provisions governing consent, which are detailed and technical, date back to the 1948 amendments.[192] The law now requires that a special form must be signed by the non-owning spouse. The Act provides that the

> consent in writing ... shall, in the prescribed form, state that the spouse consents to the disposition of the homestead and has executed the consent for the purpose of giving up the life estate of the spouse and other dower rights of the spouse in the homestead to the extent necessary to give effect to the disposition.[193]

The consent must be contained in or attached to the instrument giving effect to the disposition, and when that instrument is presented for registration the consent must also be produced and registered.[194] When the consent is contained in the instrument, the signature to the instrument is sufficient for the consent (as well as for the instrument). However, if the consent is annexed to the instrument, the spouse must sign both documents.[195]

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[191] The question of exemptions is discussed in Chapter 7. At the time of the *Martin* decision, an urban home was subject to an $8,000 exemption; the exemption is now $40,000. Rural homesteads were fully exempt; this is still the case.

[192] The Dower Act, 1948, S.A. 1948, c. 7.

[193] Dower Act, R.S.A. 1980, c. D-38, s. 4(2).

[194] Section 4(1).

[195] Sections 4(3)-4(5).

Every transfer of land in Alberta undertaken by an individual raises the possibility that the property is a homestead and that consent by a spouse is therefore required. As a result, a disposition that does not contain a dower consent, or is not accompanied by an order dispensing with consent, cannot be registered unless it is accompanied by an affidavit[196] stating either (a) that the owner is not married; (b) that the property is not a homestead; (c) that a release of dower rights has been registered; or (d) that a judgment of damages (for a wrongful disposition[197]) has been registered.[198] When the property is owned by the spouses as joint tenants or tenants in common, the execution of a disposition by them constitutes the necessary dower consent.[199]

The Act also provides that the consent must be **acknowledged** by the non-owning spouse; this must be done apart from the other spouse. The consenting spouse must acknowledge that he or she: (a) is aware of the nature of the disposition; (b) is aware that the Dower Act grants a life estate to the survivor, and of the right to prevent a disposition of the homestead by withholding consent; (c) consents to the disposition to the extent necessary to give effect of the disposition; and (d) is executing the document freely and voluntarily without any compulsion.[200] The acknowledgment must be made before a person authorized to take proof of the execution of documents under the Land Titles Act.[201] That person signs the acknowledgment form.[202]

When a proper consent and acknowledgment have been given to an agreement for sale, no additional consent is needed for the consequent transfer.[203] Furthermore, no acknowledgement is needed if the spouses

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[196] Found in Form B of the regulations: see Alta. Reg. 194/85.

[197] See Part E(6), *infra*.

[198] When the disposition is made under a power of attorney on behalf of the owning spouse, the affidavit may be made by the attorney, if he or she is acquainted with the facts: s. 4(6).

[199] Section 25(2).

[200] Section 5(1).

[201] R.S.A. 1980, c. L-5.

[202] See Form C: Alta. Reg. 470/81.

[203] Section 6(1).

are co-owners.[204] The Act also contains a curative provision. If the court is satisfied that there has been due execution of the consent and acknowledgment, the court may authorize the registration even if the proof of the execution of the consent or acknowledgment is defective.[205] The exact ambit of this provision is unclear, since the use of the words "due execution" suggests that it applies only if there has been proper execution of the necessary documents.

(3) The effect of non-compliance

The Dower Act sets out the required rules for transfer in clear terms, but it does not explicitly deal with the problems that arise when there has not been adequate compliance. In this context, several scenarios can arise in which lack of compliance becomes an issue: the spouses might both wish to sell the home, but some element of compliance with the consent rules may be missing; the property may be sold without regard to dower consent at all; the consent document may be forged; a spouse might be misled as to the effect of the consent. Three questions emerge out of these situations: (i) what counts as non-compliance? (ii) what is the effect of a formally defective consent (or acknowledgment) under the Dower Act? and (iii) at what point, if ever, is the effect of non-compliance spent? These questions are considered in turn.

(a) What counts as non-compliance?

The leading authority concerning the degree of compliance required under the Dower Act is the Supreme Court of Canada decision in *Senstad* v. *Makus*.[206] In that case, A agreed to purchase five quarter sections from B, one of which was the homestead property. B's wife signed the standard consent form, but there was no acknowledgment. The purchaser (A) brought an action against the vendor (B) seeking a declaration that the agreement was binding. At trial, the declaration was granted, but this was reversed by the Court of Appeal. The Supreme Court of Canada restored the trial decision, holding that the consent was valid even though it had not been acknowledged.[207] The court said that the purpose of the acknowledgment

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[204] Section 25(2).

[205] Section 5(3).

[206] (1977) 4 Alta. L.R. (2d) 160 (S.C.C.).

[207] Cf. *Reddick* v. *Pearson*, [1948] 2 W.W.R. 1144 (Alta. S.C.T.D.).

was to prevent a spouse from attacking the validity of his or her consent. Absent a valid acknowledgment, the validity of that consent (and therefore the transaction) was open to attack on the ground that the spouse was not aware of the nature of the disposition or of the rights conferred by the Dower Act, did not appreciate the effect of the consent, or did not give a free and voluntary consent. The Court added that an acknowledgment is required to enable the Registrar to place the transfer on title. In *Senstad*, the wife of B did not testify and there was no evidence that her consent was not genuine. Therefore, there was no basis on which to invalidate the transaction.[208]

An implication that one might draw from the *Senstad* ruling is that had the acknowledgment been signed, the spouse would not have be enable to raise coercion or lack of knowledge, but that the absence of an acknowledgment would have opened the way for a challenge on those grounds. This issue was addressed in *Amyotte* v. *Urchyshyn*.[209] There, the acknowledgment had not been signed by W separate and apart from H, as required by the Act. Following *Senstad*, the trial judge found that the agreement was nevertheless valid. It was also concluded that the signing of the acknowledgment and consent "raised an irrebuttable presumption that the consent ... is valid and is not subject to attack".[210] The court held that this was true of an acknowledgment that was valid on its face, as in the instant case. A purchaser could therefore rely on the validity of such a consent, as long as that person was not a party to fraud, or guilty of some "other act of impropriety toward the spouse of the married person".[211]

Compare the approach taken in *Prpich* v. *Komisar et al.*[212] There, a spouse successfully set aside a transaction on the basis that she did not understand the nature of the transaction. She had signed a consent form. The decision does not indicate whether an acknowledgment was completed, but a notary was in attendance at the time of the sale. The plaintiff's

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[208] See also *McFarland* v. *Hauser* (1979), 88 D.L.R. (3d) 449 (S.C.C.). The implication in *Senstad* is that had the acknowledgment been signed, the spouse would not be able to raise coercion or lack of knowledge. This matter is considered in Part D(4), *infra*.

[209] (1978), 6 Alta. L.R. (2d) 26 (Q.B.).

[210] *Id.* at 41 (per Brennan J.).

[211] *Id.*

[212] [1981] 3 W.W.R. 757 (Alta. Q.B.).

testimony that the notary had not explained the form to her was accepted by the trial judge. While the case might seem to stand for the view that a spouse may challenge a transaction even in the face of a valid consent, that reading of the judgment is questionable. The trial judge held that the consent was invalid because it was signed in the presence of the husband, hence the case was treated as involving an improper consent. However, under the Dower Act it is not necessary for the consent to be signed apart from the owning spouse; it is only the acknowledgment that must be completed in that fashion.

The facts in *Senstad* involved an unimpeachable consent, but no **acknowledgment**. The validity of an imperfect **consent** arose in *Gibraltar Mortgage Corp. Ltd.* v. *Korner*,[213] where the reasoning in *Senstad* was extended. In *Korner*, the non-owning spouse merely signed the transfer document. That spouse admitted having given consent, although it is not clear that he understood the effect of the transaction on his dower rights. It was said, taking the judgment in *Senstad* as a whole, that the absence of compliance with formal requirements of the Dower Act do not invalidate the transaction if consent can be proven, for if this can be shown, the evil that the Act is designed to prevent is not present.[214]

To what extent will an oral consent suffice? Can a verbal representation later bind the spouse seeking to assert dower rights? These issues have arisen in the case law under the rubric of the doctrine of estoppel. Estoppel is a broad concept which, in this context, refers to a representation of fact, by words or conduct, made by A, intended to induce B to act in a particular fashion, and which in fact causes B to act to his or her detriment.[215] In such a case, the doctrine of estoppel is based on the

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[213] (1983), 45 A.R. 14 (Q.B.). See also *Suppes et al.* v. *Wellings et al.*, [1982] 4 W.W.R. 106 (Sask. Q.B.) where the Saskatchewan cases are reviewed; *McLenaghan et al.* v. *Haley et al.* (1983), 23 Sask. R. 212 (C.A.). The Saskatchewan authorities are canvassed in J. Williams, "The Homesteads Act: Reflections on its Purpose and Operation in Saskatchewan" (1983-84) 48 Sask. L. Rev. 57.

[214] Not all courts have gone this far. In *Westward Farms Ltd. et al.* v. *Cadieux et al.*, [1982] 5 W.W.R. 1 (Man. C.A.), the Manitoba Court of Appeal rejected the argument that Senstad could be extended to apply to a mere signature on a transfer. This was so even though the court concluded on the facts that the spouse had signed the transfer in order to confer consent with full knowledge that her dower rights were being surrendered.

[215] See generally Spencer Bower & Turner, *The Law Relating to Estoppel by Representation* (3rd ed. A.K. Turner, 1977). See also *Rural Municipality of Storthoaks* v. *Mobil Oil Canada Ltd.* (1975), 55 D.L.R. (3d) 1 (S.C.C.).

recognition that it may be inequitable to allow A to assert a fact that is inconsistent with the initial representation. The doctrine can apply whether or not A is aware that the fact asserted is false. The gist of the idea is one of simple fairness — a party asserting a fact should not be able to later shelter behind the true state of affairs to the detriment of an innocent party who has relied on the representation.

To illustrate, consider a case where H purports to sell Blackacre to P. At the time of the transaction, W, the non-owning spouse of the vendor, assures P either that the property is not subject to a dower claim, or that no such claim will be asserted. P then purchases the property, in part, on the strength of these representations. Is W estopped from raising her lack of dower consent to undermine the agreement? Put another way, does estoppel apply to preclude a party from relying on a formal defect relating to consent, when, in substance, consent has been given, or a representation has been made that, if true, would mean that dower was irrelevant?

The availability of estoppel within the framework of dower law has never been conclusively resolved. In the Supreme Court of Canada decision of *B.A. Oil Co. Ltd.* v. *Kos*, Martland J., speaking for the Court, stated that "[w]hether the statutory requirement for a written consent to the disposition of a homestead could be released by estoppel is, I think, questionable".[216] However, the matter was left unresolved in that case. In a later decision, an Alberta court suggested that "the doctrine of estoppel can rarely and perhaps never be used to avoid the consequences of non-compliance with The Dower Act."[217]

Despite this uncertainty, estoppel has been raised in a number of Canadian dower cases.[218] In the Supreme Court of Canada decision of *Meduk et al.* v. *Soja et al.*,[219] W accepted an offer for the sale of the homestead, which was in her name alone. The offer was subject to the

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[216] [1964] S.C.R. 167 at 175.

[217] *Martens* v. *Burden et al.*, [1974] 3 W.W.R. 522 (Alta. S.C.T.D.) at 543 (per Shannon J.).

[218] See *Martens* v. *Burden*, *supra*, note 217; *Warne* v. *Sweet et al.* (1980), 12 Alta. L.R. (2d) 104 (Prov. Ct.); *Hulowski* v. *Hulowski*, [1945] 3 W.W.R. 140 (Sask. K.B.) aff'd [1945] 3 W.W.R. 753 (C.A.); *Lett* v. *Kettins*, [1918] 3 W.W.R. 614 (Sask. C.A.); *Graham* v. *Hammil*, [1926] 2 W.W.R. 15 (Man. C.A.).

[219] [1958] S.C.R. 167.

"execution by the Vendor [W] of [the] necessary conveyances and formal documents required".[220] H did not execute a proper dower consent. When asked, in the presence of the purchasers, whether he would sign the agreement, H responded that he would not, and that since the home belonged to W, she could do "whatever she pleases"[221] with the property. The Supreme Court of Canada held that the agreement was void, there being no consent to the disposition as required by the Dower Act. The Court assumed, without deciding, that the doctrine of estoppel could be raised to render the sale valid even absent compliance with the Dower Act. However, it found that there was no foundation for estoppel on the facts. The parties had acted without an appreciation of the Dower Act, so that it would be wrong to use estoppel to validate an act that had been expressly prohibited by statute.[222]

An estoppel was imposed at first instance in *Palinko* v. *Bower*.[223] There, W, the owner of the homestead, attempted to raise the absence of compliance with the Dower Act as a means of resiling from an agreement for sale. H, who had separated from W, had signed a release of dower that was not in registerable form, but remained willing throughout the dispute to consent to the disposition. (During the trial of the case he signed a release, which was registered). Throughout the negotiations for the sale of the home, W had intimated that H had no dower rights:

> All of the real estate agents and salesmen with whom [W] had dealings knew of the requirements of the Dower Act. All of the printed forms ... contain a space for the signature of the spouse and except the price reduction sheet, contain the forms required under The Dower Act. The fact that none of these persons insisted on the husband's signature leads me to conclude that they accepted

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[220] *Id.* at 169.

[221] *Id.*

[222] *Id.* at 176 (per Cartwright J.). See also *Pinsky et al.* v. *Wass et al.*, [1953] 1 S.C.R. 399 at 406.

[223] [1975] 1 W.W.R. 756 (Alta. S.C.T.D.), rev'd on other grounds [1976] 4 W.W.R. 118 (A.D.).

> her statement that he had no interest in the property.[224]

On these facts, the court concluded that "the husband's possible right to dower was considered, and the wife misled the plaintiff into believing that her husband had no such claim."[225] Accordingly, the trial judge held that the wife was estopped from raising the lack of dower consent as a defence. The trial judgment was reversed by the Court of Appeal on other grounds, and estoppel was not considered at the appellate level.[226]

The doctrine of estoppel was applied in the Saskatchewan case of *Baldwin* v. *Rhinhart*.[227] Here, the wife had actively assisted in the sale transaction that she later asserted was void owing to the absence of her dower consent. The wife admitted that she knew of the requirements of the Homesteads Act. She also admitted that she would have signed the necessary consents had certain monies been paid. The court concluded that the wife was "trying very hard to get out of an agreement which she herself helped create".[228] The wife's willingness to facilitate the deal, coupled with her knowledge of the homestead provisions, were held to be sufficient to found an estoppel against her, for to do otherwise "would allow her and others like her to take undue advantage of persons who act in a completely *bona fide* manner".[229] This is the only dower case in which the outcome was affected by imposing an estoppel. However, the authorities which cast doubt on the availability of estoppel in the dower context were not cited by the court.

The current law, then, is somewhat uncertain. We do know that the absence of a properly executed acknowledgment is not fatal to the validity of a transaction, and that **some** formal imperfection relating to the consent itself has also been tolerated. The ability to challenge an agreement that

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[224] *Id.* at 759 (per Dechene J.). The precise statements made by the wife do not appear in the judgment.

[225] *Id.* at 760.

[226] *Supra*, note 223.

[227] (1967), 63 D.L.R. (2d) 420 (Sask. Q.B.).

[228] *Id.* at 440 (per Sirois J.).

[229] *Id.* at 442.

has been properly signed at a later time is not clear. Likewise, the applicability of estoppel, doubted in some cases, but considered in others, remains unsettled.

(b) What is the effect of non-compliance on the validity of the transaction?

The effect of non-compliance on the validity of the transaction has plagued Alberta dower law almost from its inception. Under the 1917 Act, there was a debate as to whether a disposition without consent was null and void for all purposes,[230] or only as regards the wife's life estate.[231] Under this latter approach, the life estate would run with the land, just as in the case of common law dower. Statutory amendments in 1919 confirmed this view — in that year the Act was changed to provide that a wrongful disposition was only void in so far as the life estate was concerned.[232] But these words were removed from the Act in 1926,[233] raising doubts once more as to the effect of non-compliance under the Act. The old debate was revived. As a result, in one case, it was said that a disposition made without consent after 1926 was void for all purposes;[234] in another, it was held that the life estate survived the transfer.[235] In 1942, the Act was amended to provide that a disposition was "absolutely null and void for all purposes".[236] By 1948 the Act had been changed again,[237] and all references to the effect of non-compliance were removed. The 1948 amendments also contained a quasi-criminal penalty, and an action in damages in the event of a wrongful disposition.

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[230] *Overland* v. *Himmelford*, [1920] 2 W.W.R. 481 (Alta. S.C.A.D.).

[231] *Choma* v. *Chmelyk*, [1918] 2 W.W.R. 382 (Alta. S.C.T.D.); *Overland* v. *Himmelford*, *supra*, note 230.

[232] An Act to Amend the Dower Act, S.A. 1919, c. 40, s. 2.

[233] The Dower Act Amendment Act 1926, S.A. 1926, c. 9.

[234] *Re Miller*, [1928] 3 W.W.R. 643 (Alta. S.C., Chambers).

[235] *Spooner* v. *Leyton et al.*, [1939] 1 W.W.R. 734 (Alta. S.C.), aff'd [1939] 2 W.W.R. 237 (A.D.).

[236] The Dower Act Amendment Act 1942, S.A. 1942, c. 51, s. 2. See further *Dach* v. *Bochan*, [1948] 1 W.W.R. 622 (Alta. S.C.T.D.); *Reddick* v. *Pearson*, *supra*, note 207.

[237] The Dower Act 1948, S.A. 1948, c. 7.

The approach taken in the 1948 Act represents the current law. The Dower Act does not explicitly provide that a transfer in contravention of the Act is invalid. This again raises a range of possibilities as to how the law should be read. One view is that the direct prohibition, together with the provision for a penalty, makes the agreement unenforceable at the instance of the married person.[238] Another opinion is that a formal defect does not invalidate the agreement at all.[239] However, the prevailing position under the current Act is that a disposition without consent is **void**.[240] Accordingly, an order for specific performance of a contract that violates the consent provisions of the Dower Act will be refused.[241] So will a claim for damages.[242] A purchaser withdrawing from a transaction owing to the failure to obtain the necessary dower consent is entitled to a return of the deposit monies.[243]

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[238] See the judgment of Estey J. in *Pinsky* v. *Wass*, *supra*, note 222 at 405. See also *Worton* v. *Sauve* (1977), 80 D.L.R. 382 (Alta. Dist. Ct.)

[239] *Pinsky* v. *Wass*, [1950] 2 W.W.R. 1278 (Alta. S.C.T.D.).

[240] See e.g., *B.A. Oil Co. Ltd.* v. *Kos*, *supra*, note 216; *Meduk* v. *Soja*, *supra*, note 219; *Champagne* v. *Aljean Constr. Ltd.* (1979), 11 Alta. L.R. (2d) 1 (Q.B.); *Warne* v. *Sweet*, *supra*, note 218; *Earl* v. *Earl*, *supra*, note 187; *Shopsky et al.* v. *Danyliuk* (1959-60), 30 W.W.R. 647 (Alta. S.C.T.D.). See also *Vandermeulen* v. *Weiler et al.*, [1980] 4 W.W.R. 164 (Man. Q.B.). This conclusion is criticised in W.F. Bowker, "Reform of the Law of Dower in Alberta" (1956-61) 1 Alta. L. Rev. 501 at 507. There is an exception to this general rule. A disposition by will is subject to the requirements of the Dower Act; there must, in theory, be a consent. However, under section 18 of the Act a disposition of the homestead by will is merely **postponed** in favour of the dower life estate.

[241] See e.g., *Hyder* v. *Edgar* (1979), 10 Alta. L.R. (2d) 17 (Dist. Ct.); *Worton* v. *Sauve*, *supra*, note 238; *Bereziuk* v. *Bereziuk* (1981), 31 A.R. 159 (Q.B.).

[242] *Bauer* v. *Anheliger* (1978), 15 A.R. 622 (Dist. Ct.); *Gostevskyh* v. *Klassen et al.* (1979), 21 A.R. 170 (C.A.); *Bereziuk* v. *Bereziuk*, *supra*, note 241. In *McKenzie* v. *Hiscock* (1968), 65 D.L.R. (2d) 123 (S.C.C.), the Supreme Court approved the following statement from *Scott et al.* v. *Miller* (1922), 65 D.L.R. 330 (Sask. C.A.) at 344 (per Lamont J.A.): "Although the [Homestead] Act gives the wife an interest in the homestead independent of her husband, it must not be forgotten that they are still man and wife, with, in most respects, interests which are identical. The prosperity of the husband, generally speaking, means the prosperity of the wife, while any losses sustained by him are losses which she must share. If, therefore, the husband enters into an agreement to sell the homestead, and if it be held that his wife's refusal to consent to the sale results in the husband being mulcted in heavy damages for breach of his contract, which damages will be so much loss to the joint estate, it seems to me that the freedom of will and the absence of compulsion which the statute requires on the part of the wife would be very greatly interfered with."

[243] *Warne* v. *Sweet*, *supra,* note 218.

The prevailing view — that a wrongful disposition is void — was recently questioned by the Court of Appeal in *Schwormstede* v. *Green Drop Ltd. et al.*[244] There it was argued that an improper disposition is **voidable**:

> if a spouse failed to consent in proper form, a consent could later be produced and registered to make the transaction proceed validly. This could not, in law, be done if it were void. Furthermore, it may well be that a spouse, in a situation of knowledge or fraud by the transferee, may elect to pursue a remedy in damages. Under that interpretation, again, the transaction would be voidable, not void.[245]

There may be little difference in substance between those cases which describe an improper transfer as void and the characterization preferred in *Green Drop*. Both approaches recognize the ability of the non-owning spouse to set aside an improper transaction. Whether differences lie in the ability of a non-spouse to raise lack of compliance with the consent rules under the *Green Drop* characterization is uncertain. That right is arguably available where the transaction is void.

(c) When, if ever, is the effect of non-compliance spent?

It might be assumed that the judicial treatment of imperfect dower consent as void (questions of estoppel aside) renders the transaction of no effect whatsoever. As pointed out in the *Green Drop* decision,[246] this has not been the attitude of the courts. Even when the Act provided that an improper transfer was void for all purposes, it was held that if the property found its way into the hands of a *bona fide* purchaser for value without notice, who was protected under the provisions of the Land Titles Act, this title could not be defeated by a spouse's dower interest.[247]

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[244] (1994), 40 R.P.R. (2d) 1 (Alta. C.A.).

[245] *Id.* at 15 (per Rooke J.).

[246] *Id.*

[247] *Essery* v. *Essery*; *Tatko* v. *Leifke*, [1947] 2 W.W.R. 1044 (Alta. S.C.A.D.).

In *Senstad* v. *Makus*, Martland J., in *obiter*, dealt with the question as to when it was no longer possible to set aside a transaction for failure to comply with the Dower Act. He considered a hypothetical case in which a spouse succeeded in registering a transfer of the homestead without having obtained spousal consent. (The transferring spouse might accomplish this by swearing a false affidavit as to his or her marital status.) Martland J. concluded that after registration the property would "cease to be a homestead"[248] and the non-owning spouse would be entitled to pursue an action in damages under the Dower Act.

This analysis raises a question about the meaning of the current Dower Act: does a parcel invariably lose its 'homestead' status immediately on the transfer of that property to a third party (as Martland J. suggests)? Subsection 3(2) of the Act provides that property "ceases to be a homestead" when:

> (1) a transfer of land by the married person is registered in the proper land titles office,
>
> (2) a release of dower rights is registered, or
>
> (3) when a judgment of damages is obtained and registered.[249]

Subsection 16(2) of the Act adds a fourth terminating event: land ceases to be homestead when an order for payment out of the assurance fund has been made.

Leaving aside event (2), which is not relevant to this discussion, one can plot the remaining events along a time continuum: first there is a wrongful sale and registration (event 1); which in turn is followed by a successful action in damages and the registration of that judgment (event 3); which in turn is followed by payment out of the assurance fund (the fourth terminating event). At each of these stages, the property is supposed to cease being a homestead according to the Act.

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[248] *Supra*, note 206 at 169.

[249] See also section 12(2).

The statement of Martland J. fixes on event (1) as the point at which the transaction can no longer be set aside because the land ceases to be homestead. However, if that were so, it is hard to see when, if ever, events (3) or (4) would apply as the event terminating the homestead status of a property. How can we make sense of these provisions? Perhaps one should read event (1) as contemplating only the registration of a **valid** transfer, and event (3) would apply in the case of an improper transfer. However, this would still not explain when event (4) would be relevant.

Furthermore, whether or not a property remains a homestead within the meaning of the Act may not resolve the question of when an invalid transaction may no longer be set aside. The ability to impugn the sale of a homestead, once a transfer is registered, may fall to be considered under general principles of registration under the Land Titles Act,[250] and not the definitions of a homestead under the Dower Act.

The compatibility of dower with the Alberta version of Torrens registration has been a recurring issue in this province. In the movement for dower reform in the beginning of this century, it was understood that the policies of dower and Torrens had to be reconciled with each other. In 1909, proponents of dower reform complained that "the big obstacle to a dower law ... [was] the Torrens title ... The average legislator thinks he has offered the final word on the subject, when he has uttered that one word".[251] That position did not, of course, prevail, but the impact of land registration on dower has remained a source of debate and litigation.

The land titles system is designed to create an efficient and inexpensive means of title registration. The register is supposed to provide a 'mirror' of all interests affecting a given tract of land. This is why common law dower, which ran with the land, was regarded as being inconsistent with Torrens.[252] In addition, the land titles system allows a 'curtain' to be drawn on past transactions so that, in theory, an historical search of title is not necessary. A purchaser is thus able to rely on the register without

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[250] R.S.A. 1980, c. L-5.

[251] *Grain Growers Guide* (1909), quoted in C.A. Cavanaugh, "The Women's Movement as Seen Through the Campaign for Dower Rights 1909-1928" (Unpublished Masters Thesis, Dept. of History, University of Alberta (1986)) at 45.

[252] See Part B(4), Chapter 1.

concern for the existence of an antecedent defect in the title of the vendor. In this way, the purchaser acquires a title that is indefeasible.

A key question within the realm of the general principles of land titles concerns the precise point in time when the purchaser acquires an indefeasible title. At what point is the curtain drawn? One approach suggests that as soon as a *bona fide* purchaser acquires a registered interest, that title should be treated as **immediately** indefeasible.[253] Under an alternative approach, indefeasibility is **deferred** until a second *bona fide* purchaser acquires title from the first.[254] Although the matter is not free from doubt, immediate defeasibility is regarded as the current Alberta position.[255]

Issues concerning the timing of indefeasibility under the land titles system arise typically in relation to a forged transfer, but the same reasoning applies, at least by analogy, to a sale by a spouse, accompanied by a forged consent or false affidavit. The following example illustrates how the rules governing registration and indefeasibility relate to dower. Assume that a homestead is sold under a forged dower consent. Under a rule of immediate indefeasibility, the right to impeach the transaction would be lost on the first sale to a *bona fide* purchaser. Application of a deferred rule would allow the transaction to be set aside until such time as there was a second transfer for value.

Essery v. *Essery*,[256] decided in 1947, provides a further illustration. There, E sold the homestead to P, who, in turn, transferred it to S. Following this, S mortgaged the property to R. In the sale to P, E swore an affidavit stating that he had no wife. The court applied a rule of deferred indefeasibility.[257] This meant that once the land had been transferred from P to S, the original defect was of no further consequence. S had relied

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[253] The leading authority endorsing this approach is *Frazer* v. *Walker*, [1967] A.C. 569 (P.C.).

[254] See *Gibbs* v. *Messer et al.*, [1891] A.C. 248 (P.C.).

[255] This was the conclusion we reached in Alberta Law Reform Institute, *Towards a New Alberta Land Titles Act* (Report for Discussion No. 8, 1990) at 16. See also *Registrar, Regina Land Registration District* v. *Hermanson*, [1987] 1 W.W.R. 439 (Sask. C.A.).

[256] *Essery* v. *Essery; Tatko* v. *Liefke et al.*, *supra*, note 247.

[257] Citing *Gibbs* v. *Messer*, *supra*, note 254.

on the register, showing P as the unimpeachable owner. The court concluded:

> The provision of The Dower Act which prohibits a married man from disposing of his homestead without his wife's consent and renders invalid any instrument purporting to do so, while it makes such instrument invalid, does not make it completely ineffective, for the Act expressly permits the registration of such an instrument accompanied by the prescribed affidavit, the truthfulness of which the registrar has no means of ascertaining, and **even if the certificate of title issued on it might be open to attack anyone who in good faith and for value purchases the land relying on the registered title acquires an indefeasible title** unless there is some provision in our Land Titles Act that qualifies that right.[258]

By contrast, the reforms of 1948 have been treated as creating a rule of immediate indefeasibility.[259] This is reflected in the explanatory notes that accompanied the 1948 Act:[260]

> The Land Titles Act was passed to give certainty [of] title to estates in land and to facilitate the proof thereof. The former Dower Act partially defeats the purpose of The Land Titles Act by giving rise to uncertainty to title by creating an unregistered interest in land which frequently cannot be discovered and which may override a title obtained on reliance upon the register. The courts have had to deal with numerous cases on The Dower Act many of which arose due to the conflict between it and The Land Titles Act.
>
> The reason for the conflict between the two Acts was the provision that a transfer of a homestead made without the wife's consent was null and void for all purposes. The principal change made in the new Act is that the section making the transaction

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[258] *Id.* at 1050 (per Harvey C.J.A.) (emphasis added).

[259] But see *Shopsky et al.* v. *Danyliuk*, *supra*, note 240.

[260] Reproduced in Bowker, *supra*, note 240 at 505 (emphasis added).

> null and void for all purposes is removed, thereby removing the conflict with The Land Titles Act.
>
> **In lieu of making such a transfer null and void for all purposes such a transfer is prohibited under penalty.**
>
> Under the old Act the wife had a right to have the land taken away from the first purchaser under such a transfer and revested in the husband, and the first purchaser had a right of action against the Assurance Fund for damages for the loss of the property purchased by him.
>
> **Under this Act the first purchaser obtains a valid title. Accordingly, the wife has no right of action to have the land revested in her husband.** Instead of this the wife is given a right of action against her husband for the loss which is fixed at one-half of the value of the property transferred without her consent. If the judgment against her is unsatisfied she may cover the amount of the judgment from the Assurance Fund.

The *obiter* statements of Martland J. in *Senstad* v. *Makus*[261] are consistent, in the main, with these stated intentions to create a rule of immediate indefeasibility in relation to dower claims. However, under principles of land titles in Alberta, only a *bona fide* purchaser for value, and not a donee (or volunteer), can enjoy the full protection of the indefeasibility rules. The statement in *Senstad* does not address that distinction.

The comments in *Senstad* concern a situation in which the freehold is transferred. Where there is a mortgage or a long-term lease the reasoning in that case may not apply. In the earlier case of *B.A. Oil* v. *Kos*,[262] the effect of a mortgage made without a valid dower consent was at issue. Although registered, the mortgage was found to be void. Martland J., for the Supreme Court of Canada, stated:

> It must be noted that, although the apparent purpose of The Dower Act of 1948 was to bring the law as to dower into basic principles of The Land

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[261] *Supra*, note 248 and accompanying text.

[262] *Supra*, note 216.

> Titles Act, the provisions of s. 4(2)(a) and of s. 12(1) are limited to the situation which occurs where a transfer is registered under the provisions of The Land Titles Act, thus resulting in the creation of a new title in the name of the transferee. These provisions of The Dower Act, which contemplate that legal consequences may result in some instances from a disposition by a married person of a homestead made in breach of s. 3, have no application where the disposition is not by way of transfer, but is a disposition by agreement for sale, lease, mortgage, encumbrance or other instrument that does not finally dispose of the interest of the married person in the homestead. Dispositions of this kind are expressly forbidden and there are no provisions in the Act which accord to them any validity, nor which would afford the non-consenting spouse any remedy in damages.[263]

It is not clear from this passage, when, if ever, the non-consenting spouse would have been prevented from challenging the validity of the mortgage. Presumably, a transfer of the mortgagee's interest to a *bona fide* purchaser for value would have placed it behind the Land Titles Act curtain and preserved it against a challenge on the grounds of lack of compliance with the Dower Act.

The protections afforded by Torrens registration are available to a *bona fide* purchaser of the land without notice. By definition, that purchaser must not be a party to fraud. Under Alberta law, mere knowledge by the purchaser of a prior unregistered interest is not equated with fraud.[264] Some additional element of dishonesty must be shown.[265] Accordingly, a purchaser who acquired the homestead knowing that it was subject to occupancy rights would not be acting fraudulently. However, in order to secure registration of the transfer it would be necessary for the vendor to swear an affidavit stating that he or she is not married, or that the property

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[263] *Id.* at 174. See also *Nicholson* v. *Nicholson* (1994), 4 R.F.L. (4th) 69 (Alta. Q.B.).

[264] Land Titles Act, R.S.A. 1980, c. L-5, s. 195.

[265] See further *Holt Renfrew* v. *Henry Singer et al.* (1982), 135 D.L.R. (3d) 391 (Alta. C.A.), leave to appeal to the S.C.C. refused: 22 Alta. L.R. (2d) xxxvi. But see *Alta. (Min. of Forestry, Lands & Wildlife* v. *McCulloch*, [1991] 3 W.W.R. 662 (Q.B.) aff'd (1991) 83 Alta. L.R. (2d) 156 (C.A.).

in question was not a homestead. A purchaser who is aware that the affidavit is false should be tainted by fraud within the meaning of the Land Titles Act.[266] So should a purchaser who is aware that the consent was coerced.

In summary, uncertainty exists in relation to the point at which the ability to set aside an invalid disposition lost. The language of the Dower Act is confusing; general land titles law suggests two possibilities; and the case law sheds little light.

C. The Rules for Consent Under Part 2 of the Matrimonial Property Act

The detailed nature of the rules for consent under the Dower Act stands in marked contrast to the lack of guidance found in Part 2 of the MPA. The latter can perhaps be explained by the fact that the dower rules do double service: the dower veto-power also preserves occupancy rights under Part 2, so that there is no need for a reiteration of these protections in Part 2.

Although the Matrimonial Property Act does not require that every disposition of the home be consented to by the non-owning spouse, once an order for exclusive possession has been made and registered the owning-spouse "may only dispose of or encumber his estate or interest with the consent in writing of the spouse in possession or under an order of the court".[267] Unlike the Dower Act, the formal requirements for the granting of a consent are minimal (it need only be in writing), and no acknowledgment is required. This lack of concern with informed consent is perhaps understandable. It is possible that many spouses are unaware that they hold a power of veto over transfers by virtue of the Dower Act. The rules for dower seem to assume that many spouses will not be aware of this power. Under the MPA, the consent provisions are relevant only after a court application for exclusive possession has been sought and granted. A spouse, having gone to that length, is likely to understand the nature of his or her possessory rights, and therefore is likely to appreciate the

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[266] Accord *Shopsky* v. *Danyliuk*, *supra*, note 240 at 652. See also *Migas* v. *Migas* (1990), 64 Man. L.R. (2d) 276 (Q.B.).

[267] Section 22(3).

implications of consenting to a transfer. At that stage, the spouse may also have retained counsel.

Two other provisions of the MPA are germane to the preservation of occupancy rights. Section 10 of the Act allows the court to recapture property that has been transferred to a person who is not a *bona fide* purchaser for value. This provision applies to transactions occurring within a year of an application for a division of property brought under Part 1 of the Matrimonial Property Act that are intended to defeat a claim under that Part. Section 10 applies only where the recipient had actual or constructive notice of this intention. In addition, when a Part 2 application has been launched, a spouse who knows or has reason to believe that proceedings have been commenced cannot dispose of household goods or remove them from the home (except in an emergency) without an order of the court or the consent of the other spouse.[268] A contravention of this provision renders a spouse liable to a fine of not more than $1,000.00.

D. Reform of the Consent Rules

(1) The basic policy considerations

As we have seen, the current consent rules serve several complementary functions. First, they provide a check on the ability of an owner to dispose of the home in a way which will frustrate the purposes of the dower protections, principally, the right to a homestead for the life of the surviving spouse. Second, indirectly, they preserve occupancy rights under Part 2 of the MPA. Third, the use of a standard consent form, together with the acknowledgment, seek to ensure that the consent is given by a spouse voluntarily with knowledge of the effect of the transfer on the rights contained in the Dower Act.

These objectives remain important, and we are of the view that the basic approach presently taken is sound. The Alberta Dower Act creates a 'passive' protection for the non-owning spouse. No active steps are required by the non-owning spouse to invoke the protections of the Act; instead, the non-owning spouse must be approached and consent requested. A passive approach makes no assumptions about the state of knowledge of married couples as to the rights conferred under law. It also means that a land titles

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[268] Section 33(1).

registration is not needed to invoke the Act. The requirement of an acknowledgment, like the creation of a passive protection, also assumes that spouses may not be fully aware of their legal entitlements. By contrast, an 'active' approach was introduced in the Homestead Exemption Act of 1878,[269] and in the Married Women's Home Protection Act of 1915.[270] Under the former, the property had to be registered as a homestead before the Act applied. Under the latter, the wife was given the opportunity to place a caveat on title.[271] Similarly, in British Columbia, a system requiring active protection is in place.[272]

Although the present Alberta approach is passive, it is not cost-free. Presently, the issue of dower arises every time a parcel of land is sold in Alberta by an individual. In each instance it must be determined whether or not the property to be sold is a homestead. In addition, a passive rule may adversely affect the legitimate expectations of parties attempting to purchase the home. These factors suggest, among other things, that the law should contain clear and fair rules concerning both the effect of a failure to obtain a proper dower consent, and also the time at which non-compliance is no longer operative. Finally, in accordance with an objective of this Report to simplify and rationalize governing principles affecting the home, we believe that the law should strive to harmonize the protection of rights now contained in the Dower Act and the Matrimonial Property Act. The law should try to protect both sets of rights as fully as possible.

(2) Reform of the meaning of a 'disposition'

To be most effective, the power of veto should regulate any dealing with the home that can undermine the rights being protected; in this case, Part 2 rights of occupation, and rights on death now found in the Dower Act. The current definition of a 'disposition' as now found in the Dower Act

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[269] S.C. 1878, c. 31.

[270] S.A. 1915, c. 4.

[271] These two statutes are discussed in Part B(4), Chapter 1.

[272] The Land (Spouse Protection) Act, R.S.B.C. 1979, c. 223, s. 2(1) provides that "[a] spouse or a person's spouse on the spouse's behalf may make application to the registrar fro an entry on the register that a homestead is subject to this Act ... and the registrar shall make the entry if satisfied that this Act has been complied with." Section 3 provides that once an entry has been made in accordance with section 2, the consent of the non-owning spouse must be obtained for a disposition.

is broad. Hence, with one exception discussed immediately below, we recommend no change to the substance of that definition.[273]

The one change that we do recommend concerns short-term leases. Presently, the Dower Act does not require a consent to a lease for less than three years. This appears anomalous, given that a short-term lease can have a significant impact on occupancy and dower rights. The inability of a spouse to gain access to the home for even a short time can create difficulties. It is cold comfort for a non-owning spouse to be told that the right to remain in the home has been lost to a tenant holding, say, a one-year lease. Each such lease could be followed by another of the same duration without offending the current Dower Act protections. Likewise, the granting of a periodic lease is not prevented by the Act.

The rationale of this exemption is that the costs involved in requiring a consent to a short-term lease outweigh the benefits of mandating that protection.[274] The danger is that a tenant might acquire a lease without being aware of the dower requirements. In the sale of the home, where real estate agents and lawyers are normally involved, this problem is less likely to arise. Moreover, once registration of the sale is sought, the failure to satisfy the dower requirements would become known. In this way, the Land Titles Office polices the operation of the Dower Act. But short-term leases are frequently arranged by the parties without resort to lawyers. In addition, leases of less than three years are overriding interests under the land titles system, that is, they are binding on purchasers of the land even without registration. Absent the land titles mechanisms to regulate transfers of the homestead, there is a serious danger that an unwitting short-term tenant would be prejudiced if the spouse of the landlord could set aside the lease by showing that there had not been compliance with the rules requiring spousal consent to a disposition.

In response to these issues, we see three possible options. One would be to retain the present law, leaving short-term leases outside of the ambit of our protections altogether. This approach would, of course, fully favour

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[273] Dower Act, R.S.A. 1980, c. D-38, s. 1(c).

[274] This conforms with the status of leases of less than three years as overriding interests under the Land Titles Act, R.S.A. 1980, L-5, s. 65(1)(d).

the tenant. Another would be to treat all leases in the same way as any other disposition; this would protect the non-owning spouse.

A third option, and the one which we prefer, would be to apply the rules for consent to all leases,[275] but adopt a special approach as to the effects of non-compliance where a short-term lease is involved. In this instance, we feel that the best approach would be to allow the tenant to remain in occupation of the home, unless it can be shown that such a person knew that consent was required, and had no reason to believe that it had been provided, but acted nonetheless. In cases where the tenant is innocent, the court should nevertheless be empowered to direct that the rental payments be made to the non-owning spouse. The court should also be given the power to direct that the lease be terminated at the earliest opportunity allowable under the tenancy. This approach will deprive the non-owning spouse of the home, for a period, but it will also provide for recompense and deprive the owning spouse of the fruits of this wrongful conduct.

RECOMMENDATION 11

The current definition of a 'disposition' should be amended to include leases of less than three years. When a lease of less than three years is granted without compliance with the consent provisions, the lease is valid, unless it can be shown that the tenant was aware that consent was required and had no reason to believe that the consent was given. If the lease cannot be set aside, a court should have the power to order that all or part of the rents should be paid to the spouse whose consent was not obtained. The court should also have the power to direct that the lease be terminated at the earliest opportunity allowable under the terms of the lease.

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[275] In Saskatchewan, leases fall within the definition of a disposition: Homesteads Act 1989, S.S. 1989-90, c. H-5.1, s. 2(b)(i)(C). The exception for short term leases has been retained in the new Manitoba Homesteads Act, S.M. 1992, c. 46, s. 1 (definition of 'disposition').

(3) Reform of the formalities

To some extent, the rules requiring consent and acknowledgment appear to mandate the performance of an empty ritual. The law expresses a desire to promote informed consent, but it is by no means certain that this goal is accomplished. To strive for voluntary consent, while salutary in principle, is often unrealistic. When spouses decide to sell a home, financial circumstances dominate their actions and they are often in no position to exercise an independent judgment about the effect of their actions on their individual rights, especially those that may or may not be needed at some future time.

Despite the sense of futility reflected in these concerns, we do not recommend that fundamental changes be made to the consent rules now in place. It cannot be overemphasized that the power of veto is essential to preserve present and future rights of occupation. Given this, the current procedures provide a rational means of advancing the goal of protecting the non-owning spouse without unduly complicating sale transactions. If a non-owning spouse is able to exercise independent judgment, the provisions should work. If not, the consent process may at least raise awareness about the protections the law affords in relation to the **next** home acquired.

Using a standard form should reduce the likelihood of careless conveyancing and inadequate knowledge on the part of the spouse consenting. In Alberta, the dower forms are incorporated into the standard transfer documents and are readily known to real estate agents and lawyers practising in that field. A new form should be drafted which contains both the consent and the acknowledgment. This should minimize the possibility that one would be signed but not the other.[276]

The consent rules can be improved in several other respects. Presently, the consent and acknowledgment forms advise the spouses only that the transfer will affect dower rights in that property. In fact, the transfer will have a far greater effect. Occupancy rights under Part 2 of the MPA will also be surrendered. This should be set out in the consent form. Moreover, the form should describe the effect of non-compliance. It will be recommended below that a transaction is ineffective until consent is

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[276] When the property is not a matrimonial home, the transferor should be required to swear an affidavit to that effect, as under the current Dower Act.

properly obtained. (The rationale for that rule is discussed in the next section).

Here is how the form might read:

CONSENT AND ACKNOWLEDGMENT

NOTICE TO ALL PARTIES: This document must be completed if the property being disposed of is a home lived in by a husband and wife and owned by one of them. **IF THIS IS THE CASE, THIS DISPOSITION OF PROPERTY IS NOT VALID UNTIL THIS DOCUMENT HAS BEEN COMPLETED.** A lawyer or a notary public must complete the Acknowledgment.

CONSENT

1. I, _____ , am married to the vendor and I have lived in this home.

2. I am voluntarily consenting to the disposition of our home.

3. I am aware that I am entitled to:

   (a) occupy this home, even though I am not the owner or a part-owner of it.

   (b) apply to a court to obtain a right of exclusive occupation of this home.

   (c) occupy this home should I become widowed.

   (d) withhold my consent to this disposition.

   (e) seek monetary compensation if this home is disposed of without my consent.

continued ...

ACKNOWLEDGMENT

This part of the form must be completed by a lawyer or a notary public. **To be valid, it must be signed separate from the spouse making the disposition**.

1. I, _____, am a lawyer or a notary public licensed to practice in the Province of Alberta.

2. I have explained the contents of this form to _____, and I am satisfied that (s)he understands what it means, and has signed it voluntarily.

3. I have explained this form in a place that is apart from the spouse making the disposition.

* * *

RECOMMENDATION 12

The law should continue to require a consent and acknowledgment; the use of a standard form should be continued. That form should include both the consent and acknowledgment. It should clearly state that the rights being surrendered are those contained in Part 2 of the Matrimonial Property Act, as reformed, and that a given transaction is not effective until the document is completed.

(4) Formally defective consent

In framing the principles governing the effect of non-compliance, we return to a dynamic discussed earlier — the need for a balance between flexibility and certainty in the law. This was described in Chapter 3 as a contrast between 'mud' and 'crystal' rules.[277] In the present context, our concern is to delineate clearly the results of an imperfect consent, while also recognizing that rigid adherence to a standard of formal compliance that is

[277] See Part C(2), Chapter 3. See further C.M. Rose, "Crystals and Mud in Property Law" 40 Stanf. L. Rev. 577 (1988).

too demanding can defeat an otherwise lawful transaction on purely formalistic grounds.

Determining the proper effect of a failure to comply with formal requirements is not an issue without precedent. This problem is merely a variation on resulting from the introduction of contractual formalities under the Statute of Frauds, 1677.[278] That Statute provides, among other things, that a contract for the sale of land must be evidenced in writing and that the writing must be signed by the party against whom enforcement is sought. The purpose of the Statute was to avoid fraud and uncertainty in transactions by requiring a written record of the agreement. Therefore, as with all formal requirements, including those now mandated for dower, the Statute channelled conduct by requiring a written document to serve evidential and cautionary functions.

However, it was soon realized that the Statute could itself be used as an instrument of fraud by a party seeking to resile from an oral agreement that was in all respects valid, except for the failure to meet these formal requirements. In response, courts of equity enforced agreements that failed to satisfy the Statute, provided that sufficient acts of performance of the contract could be demonstrated. In other words, under the equitable doctrine of 'part performance', an oral agreement for the sale of land could be enforced. The proof of acts of performance could replace the written proof required by the Statute.[279]

This same problem has arisen in relation to the failure to comply with the consent elements of the Dower Act, that is, there has been a concern that the Act has been used as an escape route from fair deals. In *De Jong* v. *Gechter*,[280] McDermid J.A. lamented:

> There have recently been a number of cases coming into the courts where non-compliance with The Dower Act is the defence for refusal by the vendor to perform. One is usually left with the

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[278] 29 Cha. 2, c. 3.

[279] See further G.H.L. Fridman, *The Law of Contract in Canada* (2nd ed. 1986) c. 6.

[280] [1976] 5 W.W.R. 739 (Alta. S.C.A.D.) at 748, rev'd [1977] 6 W.W.R. 192 (S.C.C.). See also *Vandermeulem* v. *Wieler et al.*, *supra*, note 240 at 172; *Rose* v. *Drever*, [1972] 2 W.W.R. 431 (Man. C.A.) at 439, aff'd [1973] 6 W.W.R. 672 (S.C.C.).

> feeling that the real reason [for invoking the absence of a dower consent] is that on a rising market for real estate the vendor's wife with perhaps the encouragement of the vendor feels that a higher price may be obtained and that the vendor and his wife are [reneging] on the deal.

We believe that there is a need to provide rules that stress the importance of informed consent in a way that places some of the responsibility on that spouse, and that also considers the interests of third parties dealing with the spouses. A crystal rule might favour one interest over another too heavily. However, the value of a crystal rule lies in its ability to avoid transaction costs (including the costs of litigation) expended in an effort to determine whether or not a given consent meets the minimum standard set by law.

A wide variety of solutions are possible to establish the correct blend of certainty and flexibility. As to some of the elements we have no real doubt as to the way the law should be modelled. The governing legislation should continue to require that a consent be signed in proper form. Minor defects in execution should not in any way invalidate the agreement. The absence of a signature would, of course, not be a minor defect.

Beyond these starting points, the search for the proper balance becomes more difficult. What should the law's response be where there is inadequate compliance with the formalities? This raises a series of subsidiary questions:

1. Who should be able to raise the absence of formal compliance?

2. Should such a defect render the agreement void, voidable, or unenforceable?

3. Should a party be able to show, even in the absence of a valid written consent, that the non-owning spouse did in fact knowingly consent?

4. Should different rules apply depending on whether the acknowledgment or the consent is defective?

5. What role, if any, should the doctrine of estoppel play?

6. Should the signing of a consent be treated as conclusive proof of the truth of its contents?

These issues have recently been considered in Manitoba, where a flexible approach has been adopted. The Homesteads Act in Manitoba now provides that no action performed under the Act is invalid by reason only of a defect in form, a technical irregularity, or a lack of formality. The Act also provides that a court may make an order validating a document that lacks any formality if the court is satisfied that (a) the document was executed voluntarily; and (b) the spouse was aware of the nature and effect of the document.[281]

In our view, the importance of the formalities as a cautionary and protective device should be promoted. Such an approach also promotes certainty. Using this rigorous position as the crucible, the choice of variables among those raised by the six listed questions would be as follows. A transaction should be ineffective — that is, void — until the necessary consent and acknowledgment form is properly signed. As suggested in the preceding section, this rule should be clearly and prominently described in the consent and acknowledgment form. Nothing short of compliance should suffice.

Under this proposal, any person, including the purchaser, would be able to assert the absence of formal compliance. A purchaser would be in a precarious position if he or she were not permitted to assert that the transaction is ineffective due to the absence of a dower consent, knowing that the vendor (or at least the vendor's spouse) could raise this defect at a later time. Our concern for a crystal rule leads also to the conclusion that there is no room for the concept of estoppel as a means of evading the effect of non-compliance.

Consider next the situation in which the documents are properly signed, but the consenting spouse alleges that the consent was in fact coerced, or was given without a real appreciation of the nature of the rights being surrendered. To treat the signature as conclusive would create certainty, but it might do so at the expense of fairness.

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[281] Homesteads Act, S.M. 1992, c. 46, s. 26(2).

To allow a spouse, the vendor, or the purchaser to contest the legitimacy of the written consent could create opportunities for evasion. Once the consent is given, a reliance interest develops. A purchaser buying a house from the spouses, and receiving the appropriate consent, will undoubtedly assume that dower and occupancy rights cease to be an issue. The search for a home will end; financing may be arranged; and the property currently owned by that purchaser may then be placed on the market. A party dealing with a married couple should be able to rely on the validity of the consent if it is formally perfect or substantially so.

One response, adopted in Manitoba's recent homestead reforms, is to treat the signed forms as conclusive. In Manitoba, the consent form includes an acknowledgment that the spouse is aware of the rights given under the Homesteads Act; that the spouse is aware of the effect of the disposition; and that this is being done voluntarily. It is also provided that

> A consent made in accordance with this section is **conclusive proof** of the truth of the statements contained in it and of the fact that the spouse who executed it was at the date of execution the spouse of the owner named in it, **except against a person acquiring an interest under the disposition who has actual knowledge to the contrary or who has participated or colluded in fraud** in respect of this disposition.[282]

Our preference for a crystal rule would lead to an acceptance of a similar stance. A spouse who is subjected to extreme pressures to sign a consent should be able to raise this allegation. Otherwise, the law would preclude a party from alleging coercion because of the existence of a document that was the very result of that coercion. The law should make it clear that to succeed on this claim, the pressure to sign must have been great.

Where the assertion is that the spouse did not appreciate the nature of the transaction, we feel that the ease with which this claim might be made must be taken into account. Therefore, here we would place an obligation on the spouse to become apprised, at his or her peril, of the rights being affected. As a result, our balance between that spouse and the

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[282] Homesteads Act, S.M. 1992, c. 46, s. 9(6) (emphasis added).

purchaser would be different; here we would treat the signed documents as conclusive, as in Manitoba. The principle that distinguishes the case of coercion from that of lack of knowledge relates to the assumption of responsibility by the non-owning spouse. It is unrealistic to expect that spouse to assume the loss arising from coercion. But it is not unrealistic to regard a spouse who has signed a form in ignorance of its contents as being the author of his or her own misfortune. The acknowledgment procedure is intended to catch those cases where there is true misunderstanding, owing for example, to illiteracy, mental incompetence or lack of familiarity with the English language.

RECOMMENDATION 13

(1) The law should require that the consent and acknowledgment form be properly completed. Minor defects should be ignored; the absence of a signature should not be treated as a minor defect.

(2) Where the formalities are not complied with properly, the law should provide that the transaction is void for all purposes. The law should also provide that the doctrine of estoppel does not apply to prevent any party from relying on the absence of a spousal consent.

(3) When the form is properly completed, the voluntariness of the consent can still be challenged by demonstrating that the consent was in fact given under duress.

(5) When should the effect of non-compliance be spent?

In the review of the current law, we saw that the question as to when non-compliance is no longer operative involves a consideration of the impact of land titles registration on dower. It was also suggested that the precise

time at which an agreement or transfer may no longer be set aside for non-compliance is unclear.[283]

In assessing the correct approach for reform, our starting point is to consider whether the protection of possessory rights should be that which is available in analogous situations under the Land Titles Act. Consider the following problem, arising outside of the context of the family home. Assume that A, a rogue, forges the signature of O, the true owner of Blackacre, and sells that property to B. The principles of indefeasibility will determine O's right to recover the land.[284]

The general question of land titles reform has recently been considered by the Joint Land Titles Committee, composed of representatives from the common law provinces and territories of Canada.[285] The Committee recommended that in the case of invalid transfers, as in the example above, a 'qualified' deferred rule of indefeasibility should be adopted. This means that in the case of a void transfer, the title of the displaced registered owner would normally be restored, and the purchaser compensated through the assurance fund.[286] The rule is 'qualified' because it would not apply in all circumstances. Under the Model Land Registration and Recording Act, a court would be able to permit the purchaser to remain on title where it is fair and equitable to do so, having regard to a number of considerations. These include such factors as: the nature of the property, special circumstances of the property, and the circumstances of the invalid transaction.[287] In a 1993 Report, we endorsed this approach for Alberta.[288]

In relation to occupancy rights, the non-owning spouse is in a position similar to O in the above example. If O sells the property to B, and falsifies

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[283] See Part B(3)(c), *supra*.

[284] *Supra*, notes 251 to 255, and accompanying discussion.

[285] Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1990).

[286] *Id.* at 25-26.

[287] *Joint Land Titles Committee*, *supra*, note 285 at 105-11; *Model Code*, ss 5.5, 5.6.

[288] Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No. 69) at 46-48; Model Code, s. 5(6).

the consent documents, the spouse of O is deprived of any claim to the home. If the Model Act rule is applied here, the spouse of O will not normally be deprived of his or her rights in the home, unless one of the stated exceptions to the deferred rule of indefeasibility is invoked.

A deferred rule imposes a substantial risk on the purchaser of property. In effect, that person is required to ascertain that the putative seller is actually the person on title. Where occupancy rights are involved, the purchaser will also have to be satisfied either that the vendor is **not** married, or that the property being sold is **not** a homestead requiring spousal consent. This involves the purchaser attempting to prove or inquire about the **non**-existence of certain facts; the purchaser must prove a negative. How can the purchaser determine conclusively that the vendor is not married, or that the house on offer is not a matrimonial home? The difficulties associated with answering these questions may justify a different and less protective approach to indefeasibility when occupancy rights are at issue. One might provide, that these rights are lost immediately if the property is transferred to a *bona fide* purchaser. That was the aim of the 1948 amendments.[289] The response in 1948 was to bolster the other remedies of the spouse, but allow an improper transfer to stand, at least if it became registered.[290] Moreover, a non-owning spouse can, in theory, file a caveat to protect the statutory rights in the home to prevent the issue from arising in the first place.

Of course, establishing a rule to determine when the right of occupancy is lost need not be limited to a choice between deferred and immediate indefeasibility. Indeed, in protecting possessory rights, one might go even further and create a system in which dower rights receive greater protection than that normally available to interests in land under the Land Titles Act. The Alberta version of Torrens allows for some unregistered rights in land to be binding on purchasers as 'overriding interests'. Presently, these include reservations in the Crown grant, a claim for unpaid

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[289] *Supra*, note 260 and accompanying text.

[290] In some provinces, this basic approach has been adopted. For example, in Ontario, a spouse enjoys a veto power over the transfer of the home as a means of preserving occupancy rights. The Ontario Act prohibits a spouse from disposing or encumbering the matrimonial home unless the other spouse joins in or consents to the transaction. An improper disposition may be set aside, unless the transferee is a *bona fide* purchaser for value without notice. That person may rely on statements made by the transferor that the property is not a matrimonial home: Family Law Act, R.S.O 1990, c. F.3, s. 23.

taxes, public easements, leases for 3 years or less (if the tenant is in actual occupation), properly registered orders and executions, rights of expropriation, and a limited range of private easements.[291] Under the Model Land Recording and Registration Act, the basic list would be reduced to these: reservations in the Crown grant, tax liens in favour of a municipality, leases of 3 years or less (as above), and certain utility interests.[292] The proposals provide that further exceptions could be added to advance other policy objectives. Occupancy rights could be added to the list of overriding interests.

We are of the view that the protection accorded to the right of occupancy should be governed by general principles of land titles registration: whatever rule is applied generally concerning the effect of the registration of void transfers should also apply here, in relation to a spouse's right of occupation. Therefore, at the moment, the law governing indefeasibility under the Land Titles Act would apply. As we have suggested above, a rule of immediate indefeasibility would probably govern.[293] Occupancy rights would be lost on the registration of a transfer of the property to a *bona fide* purchaser for value. If the Model Land Recording and Registration Act were to become law, it would apply to occupancy rights by preserving them following a wrongful transfer; this is because indefeasibility under the new Torrens regime would (generally) be deferred. However, it must be remembered that the qualified deferred rule recommended under the Model Land Recording and Registration Act is a flexible one. It assumes, in case such of the type we are considering, that where the loss caused to a spouse is outweighed by the harm that would be visited on the purchaser, the Model Act can provide protection for the purchaser by allowing the transaction to stand.

It follows from this approach that we do not feel that it would be appropriate to classify occupancy rights as overriding interests. Within the context of land titles, this would be a major step, given that the recognition of overriding interests constitutes a serious derogation from the principles of

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[291] Land Titles Act, R.S.A. 1980, c. L-5, s. 65.

[292] Model Act, s. 6.1. Compare the list found in *Proposals for a Land Recording and Registration Act for Alberta*, *supra*, note 288, s. 6.1. There, the protection for utility interests is absent, but irrigation and drainage district rates, and decrees, orders or executions registered in the general register are included as overriding interests.

[293] *Supra*, note 255 and accompanying text.

Torrens. To bind all future owners of what was once a matrimonial home — in essence, a return to the common law[294] — would in our view place an excessive burden on innocent purchasers.

RECOMMENDATION 14

The law governing the time at which a wrongful disposition of the matrimonial home can be set aside should conform with the general law governing land titles registration. Occupancy rights should not be classified as overriding interests under the land titles system.

E. Ancillary Remedies for Wrongful Transfers

(1) Introduction

In the preceding section of this chapter, the effect of a failure to comply with the consent provisions was considered only in relation to the validity of the transaction itself. This is not the only legal result that flows from non-compliance with the rules for transfer contained in the Dower Act. The owning spouse may be liable to an action for damages for some wrongful dispositions. In those cases, an unsatisfied judgment for damages gives rise to a claim against the Land Titles Assurance Fund. The wrongdoing spouse may also be liable to criminal and quasi-criminal charges.

(2) The action for damages

In Alberta, an action for damages can be launched by a spouse in relation to certain wrongful dispositions. Section 11 of the Dower Act provides that

> A married person who without obtaining
>
> (a) the consent in writing of the spouse of the married person, or

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[294] See Part B(2), Chapter 1.

> (b) an order dispensing with the consent of the spouse,
>
> makes a disposition that results in the registration of title in the name of any other person, is liable to an action for damages.

The disposition must result in the registration of title in the name of another person. However, it has been held that it is not necessary that there be a direct dealing between the spouse and the person who is ultimately registered on title. For example, in *Krikken* v. *Krikken Estate*,[295] the husband had purchased land from the Alberta Agricultural Development Corporation (AADC) under an agreement for sale. The husband paid the purchase price in instalments, and during that time AADC remained registered as the owner. When the husband became entitled to call for the transfer of the property, he directed that title be registered in the name of his son. No dower consent was sought. This transaction was found to fall within the purview of the damages action:

> There was an act inter vivos executed by the owner of the land disposed of in this case. It was not the transfer itself but rather the preceding written direction by the deceased to AADC which led to it providing a land transfer in the name of the son. Without that the transfer would not have taken place.
>
> Such actions are caught by the clear wording of s. 1(c) of the Dower Act ... Indeed, if they were not it would be relatively easy for an owner of land being purchased under an agreement for sale to improperly avoid the requirements of that Act by directing ultimate registration in the name of a third party. The legislation does not in any express way exempt land purchased under agreement for sale, a common alternative to a mortgage. Therefore, the legislation should not be interpreted to give effect to an implicit exemption where the Legislature clearly did not intend one.[296]

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[295] (1992), 129 A.R. 397 (Q.B.).

[296] *Id.* at 399 (per Bielby J.). See also *Clark* v. *Clark*, *supra*, note 185.

Despite the expansive reading given to the definition of a disposition in this case, and the readiness to find that this gives rise to an action under section 11, it is clear that not all dispositions fall within the scope of that section. For example, in Alberta, a mortgage is a charge on land,[297] and it does not result in the "registration of the property in the name of another", as required by section 11. So, too, a lease or an easement would not likely be caught by the section.[298]

The measure of damages for a wrongful disposition is set out in subsection 11(2) of the Dower Act. The owning spouse is liable to the higher of (a) one-half of the consideration for the disposition, if this is of a value substantially equivalent to that of the property transferred; or (b) one-half of the value of the property at the date of the disposition. The measure of 'value' must mean the equity held by the owning spouse, that is, the value of the land to the owner after subtracting charges on the property. The reason why damages are set at one-half the value of the house is not self-evident. Presumably, it is designed as a rough measure of the value of a life interest.[299]

It has been held that the action for damages does not survive divorce, since once the parties have divorced, the opportunity for the enjoyment of the life estate is lost.[300] This underscores the fact that the harm caused by a wrongful disposition is the loss of the future life estate. Under present law, circumventing the requirements for consent creates no other direct harm under the Dower Act to the non-owning spouse while the owner is alive.

(3) Claims against the assurance fund

The Dower Act provides for a claim to be made against the Land Titles Assurance Fund following the recovery of damages by one spouse against the other. A claim against the Fund will succeed only if the

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[297] Land Titles Act, R.S.A. 1980, c. L-5, s. 106.

[298] Accord Bowker, *supra*, notes 240 at 505.

[299] Compare *Henderson et al.* v. *Minister of Tourism* (1983), 43 N.B.R. (3d) 360 (N.B.C.A.). There the dower rights of a 64 year-old woman were set at 4.3% of the value of the land owned by her 62 year-old husband. Dower rights in New Brunswick were based on the common law; a widow would therefore receive one third of the lands of her deceased husband.

[300] *Krikken* v. *Krikken Estate*, *supra*, note 295; *Clark* v. *Clark*, *supra*, note 185.

judgment is not paid, and the exigible assets of the judgment debtor are insufficient to satisfy the award. Additionally, a court must find that diligent efforts have been made to find sufficient assets and that there are good reasons to believe that the available assets are insufficient. The sections of the Land Titles Act pertaining to the recovery from the debtor of money paid out from the fund apply to damages awards made under the Dower Act. But aside from those, the Dower Act procedures are to be used in lieu of a claim that might be made against the Assurance Fund under the general claims provisions of Land Titles Act.[301]

(4) The quasi-criminal offence

The wrongful spouse may be prosecuted under a quasi-criminal provision contained within the Dower Act.[302] A married person who makes a disposition of a homestead in contravention of the consent provisions is guilty of an offence and is liable to a fine of not more than $1,000, or to imprisonment for a term of not more than 2 years.

(5) Remedies under the Matrimonial Property Act

As we have seen, the MPA does not prevent a transfer of the home or household goods until an order for possession has been granted and registered.[303] At that time, the owning spouse is precluded from transferring the property. No remedy is provided in response to a transfer that is contrary to the Act. However, the transferee would take subject to the prior right of possession, as contained in the registered order. Moreover, the transferor would be in contempt of court, at least where the order reiterates the prohibition against transfer of the home. Apart from this there is no stated penalty for a wrongful transfer of the home under the Act. Under section 33, a spouse who knows or has reason to believe that an application has been commenced under the MPA, and who nevertheless sells or disposes of household goods, is liable to a fine of up to $1,000.[304]

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[301] R.S.A. 1980, c. L-5, s. 159.

[302] Section 2(3).

[303] See Part C, *supra*.

[304] Section 33(2).

(6) Reform of the ancillary remedies for a wrongful transfer

Several policies influence the structuring of the ancillary remedies. These remedies should inhibit wrongful dealings. They should be comprehensive, endeavouring to capture all forms of wrongful conduct. At the same time, the remedies and sanctions should also be consistent with the seriousness of the harm caused. The objective observer should regard the law's response as firm but fair. With these considerations in mind, the remedies can now be assessed.

(a) The action for damages

The action for damages was at one time a unique Alberta feature among the homestead laws in existence in Canada. The Manitoba Law Reform Commission saw the Alberta action as providing a worthwhile remedy. Accordingly, the Commission recommended that a non-consenting spouse should have a cause of action against the owning-spouse where a disposition of the home is made without consent through the fraud or wrongful act of the owning-spouse. The amount of damages would be left to the discretion of the court. The Manitoba Legislature has adopted this proposal. Under section 16 of the Homesteads Act:[305]

> An owner who makes a fraudulent or wrongful disposition of the homestead by failing to obtain
>
> (a) the consent of his or her spouse as required by the Act; or
>
> (b) an order dispensing with the spouses's consent
> ...
>
> is liable to an action for damages.

With regard to the computation of damages, Manitoba law now provides that

> The court may, in its discretion, determine the amount of a spouses's damages ..., subject to such terms and conditions as the court considers appropriate.[306]

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[305] S.M. 1992, c. 46, s. 16(1).

[306] Section 16(5).

Despite this recent endorsement, it must be conceded that the action in damages in Alberta is of limited value. Under the present law, the right to seek damages ends on divorce. In 1948, when this cause of action was introduced, the divorce rate In Alberta was much lower than it is today. Moreover, modern divorce law allows for expeditious action, and most petitions proceed on the basis of a period of one year's separation. It is hard to conceive of spouses engaging in litigation over dower rights and yet remaining married. The only situations in which that might occur is where the parties choose not to divorce, or where the owning spouse dies before a divorce is obtained. Given the delays normally associated with civil litigation, coupled with the expedited processes now available on divorce, it is quite likely that spouses would be divorced before the damages action was fully resolved. This is what occurred in the *Krikken* case, discussed above.[307] Moreover, even if the action were to proceed to trial and a judgment rendered, it is possible that the parties would later divorce, or that the plaintiff-spouse would predecease the defendant. Under these circumstances the successful spouse would have received compensation for the dower life estate, even though the right to enjoy that estate in possession would not have arisen.

In view of these considerations, three responses are possible. One would be to abolish the action altogether. After all, it seems destined to promote pointless litigation. A second approach would be to retain the right as it is, in the hope that it might occasionally prove useful. Perhaps the possibility of a claim in damages can create a disincentive to wrongful dealings in some instances. A third option, and the one which we favour, is to improve the remedy.

We think that this can be accomplished in three ways. First, in keeping with the major theme advanced in this Report, a claim should be available not only where the potential to enjoy the property on death is infringed, but also where present rights of occupation are prejudiced. After all, the wrongful act of a spouse can produce an immediate harm — the loss of shelter. Where this occurs, the dispossessed spouse should be able to sue for compensation, based on the expenses associated with the loss of occupation. Because the cause of action would be extended, and would no longer only serve to compensate a widow for the loss of a life estate in the

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[307] *Supra*, note 295.

property of a deceased spouse, it should no longer be extinguished by divorce.

Second, the types of actions that invoke the right to damages should be expanded to include a wider range of conduct that interferes with possessory rights before or after death. In this respect, we endorse the Manitoba proposals which adopt an embracing definition of actionable conduct, and which cover "every wrongful and fraudulent disposition of the home".[308]

The third proposed change concerns the assessment of damages. The computation of damages, and the terms and conditions that may be imposed, should be at the discretion of the court, as in Manitoba. The current law attempts to simplify the question of damages, eliminating the need to consider actuarial and other evidence to compute the value of a lost life estate. However, the present law still raises a justiciable issue: one must determine whether the consideration for the sale of the home is equivalent to its value. Therefore, uncertainty can still surround the correct assessment of damages.

Under our recommendations, which expand the types of actionable conduct, the creation of a judicial discretion is warranted. Conferring a discretion is necessary because under proposed damages remedy there are a variety of factors that will come into play that are not relevant to the current provision, with its limited compass. The granting of a lease may give rise to a certain level of recovery than a sale. Our approach, one adopted in most areas of private law, is to empower the court to exercise a discretion in fixing the amount of damages.

The law can provide guidance to the courts to assist in the assessment of damages. For example, in the case of a wrongful sale, the court should be directed to assess the damages associated with the loss of the right of occupation. This might include the costs of comparable accommodation, and relocation expenses. General damages for the disruption and inconvenience to the deprived spouse or any children affected by the disposition should also be recoverable. In the case of an improper mortgage, the court should be empowered to order damages at an

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[308] *Supra*, note 306.

amount equivalent to the monies advanced, plus any incidental costs associated with the administration of the mortgage. In the case of an improper lease, we have already proposed that the court be empowered to terminate the tenancy at the earliest opportunity under the lease and to direct that rental payments be paid to the non-consenting spouse.[309]

In the case of a claim based on the loss of occupancy rights on death, we would recommend that any amount received should be paid into court, or secured as a charge on other property. These monies would only be paid out if, on the death of the owning spouse, the other spouse would otherwise have been entitled to indefinite occupancy of the home. While this might tie up money indefinitely, it would at least prevent a windfall from being enjoyed by the non-owning spouse. A spouse should not be entitled to receive a payment where, at the end of the day, there is no identifiable loss.

While these reforms seek to expand the occasions in which damages can be claimed, we realize that there are at least two situations that fall outside of the scope of the proposed damages remedy. One involves indirect action that can deprive a spouse of occupancy rights — the intentional defalcation under a mortgage. It is conceivable that an owning spouse would allow a foreclosure action to be commenced, leading to a sale of the home, out of spite to the spouse in possession. In such a case the mortgagor (i.e., the owning spouse) might be able to recover the surplus of the proceeds of sale, after the mortgage debt is repaid. The other spouse would be left without the use of the home.

The second situation occurs where one spouse has ousted the other from the home (such as by the changing of the locks). A spouse may also be ousted from the property less directly, that is, by conduct that has the effect of rendering continued cohabitation impossible, and which results in the departure of the affected spouse. Under the law of co-ownership, this is known as 'constructive ouster', and in that context the excluded party is given a right to seek an occupation rent against the other co-owner.[310] We have in mind here an instance where one spouse, fearing abuse, leaves the home and moves to a shelter or some other temporary accommodation.

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[309] See Part D(2), *supra*.

[310] See e.g., *Baker* v. *Baker*, [1976] 3 W.W.R. 492 (B.C.S.C.). It is also reminiscent of the law of constructive desertion: see C. Davies, *Family Law in Canada* (1984) at 407-09.

While we acknowledge the logic of extending a claim to damages to these two cases, we do not make that recommendation. As to the matter of mortgage defalcation, we believe that proof that the purpose of the default was to prejudice the other spouse would often be difficult. We also believe that some of the consequences of default for the mortgagor might serve to discourage such action. It might be imprudent: it is a costly means of liquidating property, and it would likely tarnish the credit rating of the mortgagor.

Cases involving ouster are fundamentally different from the others contemplated by the damages remedy. In these other instances, the effect of the wrongful action is to confer an interest on a third party. In the case of actual or constructive ouster this is not the result. The primary remedy in this instance should be to seek a possession order under Part 2 of the MPA.[311]

RECOMMENDATION 15

(1) An action for damages should be available as a remedy for a wrongful disposition of any kind. This cause of action should not be extinguished by divorce.

(2) 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.

(3) Damages awarded to compensate for the loss of occupancy rights on death should be ordered to be secured against property, or paid

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[311] See Chapter 2.

into court, to be paid to the plaintiff-spouse only if that spouse survives the defendant.

(b) The claim against the assurance fund

Earlier in this chapter, we recommended that the general principles of land titles should apply to determine the point at which occupancy rights no longer apply to a property. A natural corollary of this position is that the general law concerning claims against the assurance fund should apply when a spouse deprived of an interest through a wrongful registration.

Presently, the rights accorded to a spouse under the Dower Act are roughly similar to those applicable under the general law. The Dower Act specifies that an action be prosecuted against the spouse who has disposed of the property. Once judgment has been obtained, reasonable efforts must be made to collect on that judgment. If this proves to be fruitless, a claim against the assurance fund may be launched.

Under the Land Titles Act, if an action is brought for loss or damage caused by the fraud or wrongful act of some person other than the Registrar, or where the claim is based partly on the actions of such a party and the maladministration of the Registrar, the action must be brought against the Registrar and that other person.[312] Furthermore, where damages are recovered based on the misconduct of that other party, the judgment cannot be entered against the Registrar until an unsuccessful attempt is made to collect against that other party.[313]

In our view, there is no compelling need to retain these two very similar processes. Consequently, we recommend that the general principles governing claims against the assurance fund should apply to claims to the loss of occupancy rights in the home. This means that, as under the general law, the Registrar should be made a party to the action, at least where the wrongful act complained of involves a loss arising out of the operation of the land titles system.[314]

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[312] Section 161.

[313] Section 162.

[314] This approach seems equally feasible under the Model Land Recording and Registration Act, *supra*, note 285, Part 7.

RECOMMENDATION 16

A spouse who suffers a loss of occupancy rights owing, at least in part, to the operation of the land titles system, should be able to seek compensation from the assurance fund in accordance with the general law governing that fund.

(c) The quasi-criminal offence

The offence contained in the Dower Act demonstrates the importance of the consent provisions. Apart from this, however, this provision is of limited utility. It is only able to function as a deterrent if it is known to a spouse. Moreover, the gist of the wrongful conduct is not the making of the disposition *per se*, but rather doing so knowing that certain rights will be lost or prejudiced. But such knowledge is not a relevant factor under this section. A spouse who is unaware of the law requiring consent, and who enters into an agreement for sale without seeking spousal consent, will fall within the penal provision. It is applicable in any instance in which "[a] married person ... makes a disposition in contravention of [the consent requirements]".[315] As a general rule of criminal law, mistake or ignorance of the law is no excuse to a charge. However here, without that knowledge, a spouse who sells his or her property is doing no more than an owner of land is entitled to do. For this reason, the provision as presently worded is too harsh. In addition, one may question whether the potential for the imposition of a term of imprisonment is appropriate.[316] While one may assume that courts would not grant a term of imprisonment except in highly unusual circumstance, one strains to consider a situation that would warrant that response.

The law could be amended to provide that a wrongful disposition gives rise to a fine, but not imprisonment. While this is a more measured response, it is our view that such a provision is unwise and unnecessary. It

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[315] Section 2(3).

[316] It is also probable that this provision, which can give rise to a jail term even in a case where the accused lacks any intention to evade the Dower Act, is contrary to section 7 of the Canadian Charter of Rights and Freedoms, Part 1, of the Constitution Act, 1982. See further *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486.

may be unwise to invite the imposition of a penalty that could deprive the innocent spouse of funds that might otherwise be available for support. Furthermore, provincial quasi-criminal sanctions are superfluous. For egregious conduct there remains the possibility of a prosecution under the Criminal Code, based on the swearing of a false affidavit,[317] forgery,[318] uttering a false document,[319] or fraud.[320] Consequently, we recommend that there be no quasi-criminal offence for a wrongful disposition.

RECOMMENDATION 17

A wrongful disposition of the matrimonial home should not give rise to quasi-criminal liability under provincial law.

F. Dispensing With Consent

(1) The current dower law

The right to withhold consent is potentially a powerful one. To ensure that the veto-power is not used inappropriately, a married person may apply to dispense with the need to obtain spousal consent.

An application to dispense with dower consent may be made if the following circumstances are present:

(a) the spouses are separated

(b) they have not lived as a married couple in Alberta

(c) the whereabouts of the spouse are unknown

(d) the married person has more than one homestead

(e) a spouse has agreed to release a claim

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[317] Criminal Code, R.S.C. 1985, c. C-46, s. 131.

[318] Section 366.

[319] Sections 368, 374(b).

[320] Section 380.

(f) the non-owning spouse is mentally incompetent or of unsound mind.

There are, in essence, two organizing principles influencing the listed grounds. An application may be made when: (i) the spouse is unable, owing to disappearance or illness, to grant a consent; or (ii) under the circumstances, the right is unnecessary or excessive. However, the presence of one or more of these grounds does not in itself entitle the applicant to an order dispensing with consent. The court must also be satisfied that it is "fair and reasonable under the circumstances to do so".[321] In granting the order, it may attach terms and conditions,[322] including a requirement that monies be paid into court.

(2) Dispensing with consent under Part 2 of the Matrimonial Property Act

Under the Matrimonial Property Act, once an order of exclusive possession has been granted, the property cannot be transferred without the consent of the party in whose favour the order has been granted, unless the court orders otherwise. No criteria are listed as to how the court should exercise that discretion.

(3) Reform of the rules for dispensing with consent

It is appropriate that the courts have a power to override the veto of a non-owning spouse, and that this judicial power be exercised on the basis of the special circumstances of individual cases. Since the disposal of the home may have implications for rights of occupancy before and after death, the rules should take account of both situations.

In our view, the current law does just that. The requirement that a court assess the fairness of each case allows an assessment of the reasonableness of the refusal. The ability to attach conditions enables a court to strive to ensure that the rights lost by the proposed transfer are taken into account. Therefore, we make no recommendations for change to the present law.[323]

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[321] Section 10(5).

[322] See e.g., *Cebuliak* v. *Cebuliak* (1978), 29 R.F.L. 338 (Alta. Dist. Ct.).

[323] In Chapter 8, we develop a definition of the 'matrimonial home' that will replace the definition of 'homestead' that is now found in the Dower Act. Under the new definition, a

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RECOMMENDATION 18

The provisions governing dispensing with consent under the Dower Act should be incorporated into the consent rules under Part 2 of the Matrimonial Property Act.

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[323](...continued)
property will not become a matrimonial home unless both spouses have resided in it. If that definition becomes law, it will never be necessary to seek an order dispensing with consent on the ground that the non-consenting spouse has not lived in Alberta since the marriage (presently a ground under section 10(1)(b)). In that situation, the property cannot have become a matrimonial home. See Part E(4), Chapter 8.

CHAPTER 5 — CONTRACTS RELATING TO RIGHTS IN THE HOME

A. Introduction

In this chapter, the extent to which spouses should be free to surrender rights in relation to the home by contract is considered. In particular, we will examine the question of whether spouses should be permitted to 'contract out' of (i) rights of occupancy, before and after death, and (ii) the veto power over transfers.

B. The Policy Blend

(1) Introduction

The law confers a host of entitlements on family members, and in each instance establishes rules that define the extent to which those rights may be altered by contract. The ability of spouses to contract out of the rights described in this Report must be placed within the context of these various contract rules. This comparison permits the policy issues to be raised and weighed.

The ambit of spousal contractual freedom has varied greatly over time. Until 1848 it was unsettled as to whether a simple separation agreement was valid.[324] Before that time, the courts grappled with the question of whether spouses could release each other from the marital obligation to cohabit in instances where no matrimonial offence had been committed. Even after this issue was resolved (in favour of validity), contracts that contemplated a future separation were still regarded as contrary to public policy, because they could have the effect of promoting marriage breakdown.[325]

In the modern era, spouses enjoy a far greater autonomy. The 'private ordering' of marital duties is seen as beneficial, especially in comparison to litigation. It also provides a means of allowing spouses to create obligations

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[324] See *Wilson* v. *Wilson* (1848), 1 H.L.C. 538, 9 E.R. 870. See also *Hunt* v. *Hunt* (1861), 4 De G.F. & J. 221, 45 E.R. 1168.

[325] *H.* v. *W.* (1857), 3 K. & J. 383, 69 E.R. 1157.

suited to their specific needs, and which conform with their own views as to the responsibilities that their marital relationship should involve.

Limits on contractual freedom are imposed in response to countervailing considerations. It must be recognised, for example, that the process of bargaining is not always a fair one, even when the parties are represented by counsel. An agreement may not always be best for the parties in the long run. This is especially so where it attempts to resolve issues (such as support) which involve predictions or expectations about future events and circumstances.

The present rules concerning the validity and finality of agreements differ depending on the specific issue involved. Contractual freedom is severely curtailed when the rights of children may be affected. In Alberta, an agreement concerning the custody of children is not valid unless the parents are living separate and apart.[326] Moreover, the courts have been willing to respect those agreements only in so far as they are not contrary to the best interests of children.[327] Rights concerning custody and child maintenance belong to the child. Therefore, parents cannot bargain those entitlements away.

Where property is involved, the range of autonomy is broader. Generally speaking, spouses may enter into a contract concerning the division of property on breakdown, or at any stage before or during marriage.[328] Such an agreement may then be rendered invalid only under the general law of contract. But even here some limits may be necessary. In 1990, the Institute considered whether it was appropriate to allow spouses to contract out of the right to apply for a division of Canada Pension Plan credits on divorce; our recommendations were that this not be permitted. Our concern was that spouses may too readily discard these rights in the course of negotiating a settlement on divorce, receiving little in return.[329]

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[326] Domestic Relations Act, R.S.A. 1980, c. D-37, s. 55(1).

[327] See *Richardson* v. *Richardson*, *infra*, note 337.

[328] Matrimonial Property Act, R.S.A. 1980, M-9, ss 37, 38.

[329] Alberta Law Reform Institute, *Division of Canada Pension Plan Credits in Alberta* (Report No. 58, 1990).

Where spousal support on divorce is at issue, it is well established that spouses may not, by contract, completely oust the jurisdiction of a court to make an award.[330] Any attempt to do so is contrary to public policy. The court has a statutory duty to grant an order where appropriate.[331] At the same time, the courts attach great weight to an agreement fixing the level of support, especially one intended as a final settlement.[332] The underlying rationale is that the spouses should be encouraged to resolve their differences by contract, and so such contracts should be respected as far as is possible.

Traditionally, in cases of support, the courts have refused to override the terms of an agreement unless (a) there has been some element of unfairness in the bargaining process;[333] (b) the agreement would render one of the parties a charge on the public purse;[334] (c) a change of circumstances has undermined the agreed terms; or (d) the interests of children are adversely affected.[335] These grounds for intervention were examined extensively in a trilogy of Supreme Court of Canada cases, *Pelech*,[336] *Richardson*,[337] and *Caron*.[338] There, the Supreme Court of Canada narrowed the grounds for judicial intervention. Individual responsibility and the importance of finality were treated as the dominant values:

> where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs should be settled on the

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[330] *Hyman* v. *Hyman*, [1929] A.C. 601 (H.L.), endorsed in *Pelech* v. *Pelech*, *infra*, note 336.

[331] Divorce Act, R.S.C. 1985, 2nd. Supp., c. 3, s. 15.

[332] In making an order, the court must have regard to an agreement relating to support: Divorce Act, s. 15(3).

[333] See e.g., *Carroll* v. *Carroll* (1974), 13 R.F.L. 357 (Ont. H.C.).

[334] See e.g., *Kalesky* v. *Kalesky* (1973), 10 R.F.L. 298 (Ont. H.C.); cf. *Jull* v. *Jull* (1984), 42 R.F.L. (2d) 113 (Alta. C.A.).

[335] See e.g., *Buryniuk* v. *Buryniuk* (1977), 2 R.F.L. (2d) 188 (B.C.S.C.).

[336] [1987] 1 S.C.R. 801.

[337] [1987] 1 S.C.R. 857.

[338] [1987] 1 S.C.R. 892.

> breakdown of their marriage, and the agreement in not unconscionable in the substantive law sense, it should be respected. People should be encouraged to take responsibility for their own lives and their own decisions. This should be the overriding policy consideration.[339]

The Supreme Court recognized that an agreement governing support might be invalid under the general law of contract. But if otherwise valid, the Court held that an agreement should not be overridden unless there was a radical change of circumstances that undermined the contract. Such a radical change must relate to a pattern of dependency arising out of the roles assumed during the marriage.[340] An agreement can also be overridden where enforcement is not in the best interests of any children of the marriage. Importantly, the concern that an agreement might force one or both of the parties to become eligible for public assistance was not treated as a sufficient reason to alter or override a support agreement.

Comparable issues can arise in relation to family relief claims, where the courts have taken an approach that is similar to that applicable to support claims on divorce. Spouses may not contract out of the right to seek family relief. The courts will take such a contract into account, but it is not binding or conclusive.[341] While it has been suggested that the trilogy test

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[339] *Pelech* v. *Pelech*, *supra*, note 336 at 676 (*per* Wilson J.).

[340] Subsequent cases have held that this causal connection test applies to a subsequent application made on the basis of a change of circumstances affecting the recipient under the agreement, not the payer: see *Ritchie* v. *Ritchie* (1988), 16 R.F.L. (3d) 163 (B.C.S.C.); but see *Fleming* v. *Fleming* (1989), 20 R.F.L. (3d) 416 (N.S.C.A.). It has been questioned whether the trilogy applies to proceedings under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). The trilogy cases were decided under the Divorce Act, R.S.C. 1970, c. D-8, even though the judgments were rendered one year after the Divorce Act, 1985 had come into force came. In *Debacker* v. *Debacker* (1993), 49 R.F.L. (3d) 106 (Alta. Q.B.), it was held that the trilogy did not apply; see contra *Tully* v. *Tully* (1993), 49 R.F.L. (3d) 31 (Ont. Gen. Div.) In *Masters* v. *Masters* (1994), 4 R.F.L. (4th) 1 (S.C.C.), the Supreme Court declined to address the issue. The applicant had not demonstrated that a radical or unforeseen change in circumstances had occurred. Therefore, it was unnecessary for the Court to consider the issue of whether a change of circumstances must be causally connected to the circumstances of the marriage.

[341] *Re Berube*, [1973] 3 W.W.R. 180 (Alta. S.C.A.D.); *Re Edwards Estate* (1961-62), 36 W.W.R. 605 (Alta. S.C.A.D.); *Schaefer* v. *Schumann*, [1972] A.C. 572 (P.C.).

should be applied in the area of family relief, there is no evidence that this is the case at present.[342]

In short, the question of contractual freedom involves a composite of policies. Even if there is a modern tendency to allow spouses to enjoy considerable control, there are still significant limitations. Furthermore, it can be seen that the degree of control varies depending on the issue at hand. Each matter must be considered independently.

What is the best approach for contracts affecting occupancy rights and controls over the transfer of the home? This is considered below, by reviewing the current law and the options for reform.

(2) The current law governing dower

The Dower Act allows the spouses to contract out of the rights conferred by the Act completely. Three provisions are relevant to this power.

Section 7 allows a spouse to execute a 'release' of dower rights, with a view to its registration on title. The release must be executed and sworn apart from the other spouse, and in front of a lawyer. On the registration of the release, the land described ceases to be a homestead and the releasing party no longer has dower rights in that property.

By virtue of section 8, a release is revocable through the unilateral act of the party initially granting it. If that party registers a caveat at any time before the registration of a transfer of that land, the Registrar must cancel the release. Following this, the releasing spouse is entitled to dower rights in the land to the same extent as if the release had never been registered, subject only to prior interests on title (such as mortgages) registered while the release was still in place. It would appear that the release must be removed by the Registrar once the caveat is filed, even though the release was entered into in accordance with a binding contract. Presumably, if a release is removed contrary to a spousal agreement, the innocent party would have an action for breach of contract.

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[342] The trilogy was applied in *Wagner* v. *Wagner Estate* (1989), 39 E.T.R. 5 (B.C.S.C.), but on appeal the court of Appeal preferred a less narrow test: (1991), 85 D.L.R. (4th) 699 (C.A.). See further K.B. Farquhar, "Spousal Agreements and Statutory Succession Rights — Comment on Wagner v. Wagner Estate" (1992) 11 Can. J. Fam. L. 151.

Section 9 of the Act provides that the spouses may enter into a written agreement concerning dower. The agreement must be made for valuable consideration, which must be set out in the document. The contract must be acknowledged in the same way as a consent to a disposition. It may be of a general character, or it may refer only to specific homesteads. Unlike a release, an agreement under section 9 does not take the property outside of the definition of a 'homestead'. Indeed, even in the face of a valid agreement, it is still necessary for a spouse to obtain a consent to a disposition from the other spouse. This is implicit in section 10 of the Act, which provides that an agreement under section 9 furnishes a ground for seeking an order dispensing with the consent of a spouse.[343] However, in practice, a section 9 agreements often require the non-owning spouse to execute a release under section 7, which is then registered on the title. To reiterate, the filing of a release takes the property outside of the scope of the Dower Act.

Even though rights to dower may be surrendered completely by contract, nevertheless, when the owning spouse dies, a widowed spouse may still be able to seek an order — under the Family Relief Act — that would entitle that spouse to remain in the home.[344] Although one may 'contract out' of the rights under the Dower Act, this is not true for rights under the Family Relief Act.[345] So, in these instances, a surviving spouse may attempt to circumvent an agreement concerning dower by means of an application for family relief.

(3) The current law governing possession of the matrimonial home under Part 2 of the MPA

The Matrimonial Property Act is silent on the ability of the spouses to contract out of the right to seek possession of the matrimonial home.[346] No reported judgment has addressed the question of whether such a contract is valid.

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[343] Section 10(1)(e).

[344] Of course, under a family relief application, the house need not fall within the Dower Act definition of a homestead.

[345] *Supra*, note 341.

[346] This issue was not addressed in our Report on *Matrimonial Property* (No. 18, 1975).

While there is no provision of the Act enabling the parties to contract out of the Part, neither is there an express restriction. First principles of contract law suggest the right of contractual autonomy should therefore prevail. Moreover, once an order has been made, it is possible for the spouse in possession to consent to a transfer of the property. If rights under the Act can be waived at this stage, why not before an order has been obtained?

On the other hand, a claim of invalidity can be made on the view that an agreement restricting the right to seek an order of exclusive possession contravenes public policy. Perhaps, as in the case of support on divorce, the parties are not be able to oust fully the court's power to order possession, even if an agreement has been signed. Moreover, a right to contract out of Part 1 of the Act is expressly conferred.[347] This raises the question of whether the absence of such a right in Part 2 should lead to the implication that it was not the intention of the legislature to confer such a right in relation to Part 2 orders.

(4) Reform of the rules governing contracts

(a) Possessory rights on death

The contractual right to deal with dower resembles those given in relation to matrimonial property. This consideration suggests that a broad freedom, as now exists under dower law, is appropriate. Part 1 of the MPA, which allows for contracting out, is consistent with the idea that spouses are free to do with their property as they wish, before or after breakdown.

However, the function of dower, as noted before, is different. The dower life estate, and the right of occupation under Part 2 of the MPA, are support devices. They serve as a fall-back in the cases of need. As we have seen, in relation to support, the rules governing contractual freedom are not as plenary as in the case of property division.

One response would be to provide that the right to apply for family relief should continue to serve as the backstop where dower rights are surrendered by contract. Presently, none of the three other provinces that retain homestead laws (Manitoba, Saskatchewan and British Columbia) have established a special rule for contracts governing dower. In all three

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[347] Section 37.

cases, these contracts are treated as fully binding, subject, again, to the right to make a claim for family relief.

Alternatively, a rule for possession of the home on death could be enacted that adopts an approach similar to that applicable in the case of family relief. Here, a couple would remain free to enter into an agreement concerning the home. The agreement might be fully respected by the courts, as is the case in family relief claims, but it would not necessarily be controlling in all cases.

In our ongoing study of the Domestic Relations Act we have considered the broader issue of the ability of the court to review 'domestic contracts'. This term refers to contracts that attempt to resolve issues such as support, custody, and property. Our provisional recommendations there favour the definition of specific circumstances in which a court may set aside a domestic contract. That proposal was undertaken in relation to terms affecting monetary support and does not address the question of occupancy rights. However, we believe that a comparable approach can be adopted here: the policy foundations are similar. Spouses should be able to enjoy control of their future obligations by contract. Yet, holding parties to a contract at all costs can sometimes produce calamitous results. In fact, this rigidity can itself be a disincentive for some, who might be relieved to know that the courts retain a residual supervisory jurisdiction to override an agreement. When spouses sign away their future rights they may not fully appreciate the possibility of a future change of circumstances. Together with this concern is the fear that a contract governing the home might turn out to affect children in a detrimental way.

Our concern for these factors leads to the following proposals. Where there has been a radical change of circumstances that undermines the initial contract, and this imposes a hardship on a spouse, the courts should be free to depart from the terms of an agreement and grant possessory rights. Additionally, a contract governing possession of the home should not prevail if the interests of children may be adversely affected.

Even where a valid contract has been entered into, and there is no clear case for a variation of the agreement, the death of the owner may leave the surviving spouse in a difficult position. One of the virtues of the current law of dower is its ability to provide continuity for the widowed

spouse. In view of this, it would be appropriate to allow the surviving spouse to remain in the home for a limited transitional period, even where occupancy rights have been surrendered by contract. We recommend that a three-month period be allowed for this purpose. This period would allow the widowed spouse time to either (a) find alternative accommodation, or (b) bring an application to vary the agreement (on the basis of the grounds specified above).

Finally, there is a danger that the judicial alteration of contractual terms might adversely affect a third party. That might occur for example, if after a valid spousal contract is entered into, an interest in that property is transferred to a purchaser for value. Under these circumstances, a concern for the fair treatment of that third party requires that his or her interest not be disturbed.

RECOMMENDATION 19

(1) Spouses should be free to enter into a contract releasing their rights to occupancy of the matrimonial home on the death of the owning spouse. When such a contract is validly entered into the court should not be empowered to grant an order conferring possession on death unless it can be shown (i) that there has been a substantial change of circumstance since the entering into of the agreement that imposes a hardship on a spouse, or (ii) that the agreement would not be in the best interests of any children of the marriage.

(2) When a contract releasing rights of occupancy on death has been entered into and the owning spouse subsequently dies, the surviving spouse should be able to remain in the home for a transitional period. That period should be three months.

(3) An order that overrides the terms of a contract releasing occupancy rights should not be granted where to do so would affect the rights of a third party who acquired an interest in the home under a valid disposition of the home.

(b) Possessory rights before death

At present, there is uncertainty as to the validity of agreements concerning the right to seek an order for possession under Part 2 of the MPA. Our view is that the Act should be amended to provide for the validity of these agreements. There is no basis upon which we feel that a complete prohibition is justified.

The treatment of the right to contract out of the right to apply for possessory rights under Part 2 of the MPA raises the same issues addressed in relation to rights on death — how can the rights of adults to bargain in good faith be balanced against other important values? Our view is that the law governing the contractual surrender of possessory rights during the currency of the relationship should be consistent, as far as is possible, with the rules governing rights on death. This means, as the starting point, that the same grounds for overriding the agreement should apply. Therefore, a contract governing rights of possession should be binding unless there has been a radical change of circumstances, or where the agreement is not in accordance with the best interests of children.

If it were possible to contract out of the rights under Part 2 at any time, this might leave the non-owning spouse in a perilous position. A spouse who has waived the right to occupation would have no right to remain in the home in the event of breakdown. That spouse could be asked to leave at any time. The automatic right of occupancy accorded to the non-owning spouse, proposed in Chapter 2 of this Report,[348] was designed to remedy such a lack of security. We believe that a postponing rule should be adopted to prevent a spouse from being asked to leave the home on a moment's notice.

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[348] Part C(1), Chapter 2.

One response is to provide for a transitional period (for example, three months), as we have proposed above in relation to the surrendering of rights on death. However, whereas the death of the owner automatically triggers the three-month transition period in that instance, here there would be no equivalent event. Instead, the law might provide that where one spouse has agreed to abandon rights to possession of the home, the other's ability to exclude would not be effective until a notice is served on the spouse who has agreed to surrender possession. The notice would start the running of the stated period. During that time, the spouse would have an opportunity to find alternative accommodation or to seek an order overriding the agreement.

Another option is to provide that the right to contract out of the right to possession is available only after the spouses have separated.[349] This approach is adopted in several Canadian provinces. For example, the Ontario Family Law Act provides that the parties may resolve issues concerning possession of the home in a separation agreement. However, in a 'marriage contract' — one entered into in contemplation of marriage, or before breakdown — a provision purporting to limit a spouse's rights concerning possession of the home is unenforceable.[350]

This provides a simple and effective rule. On breakdown, the spouses should be able to contract out of the right to possession. At that time, the spouse surrendering those rights would naturally take into account the need for a proper transition from the present home to a new one. That contract would be variable only on the grounds available for contracts releasing rights on death — it would have to be shown that the interests of children would be affected adversely, or a that a radical change of circumstances has occurred which has undermined the foundation of the contract. As in the case of contracts to take effect on death, third parties acting on basis of an enforceable contract would be protected.

Under the present Dower Act, a spouse may release property completely from its designation as a homestead. Once this is accomplished, the property may be disposed of without regard to the consent provisions of

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[349] Other rights, including the right to deal with issues of financial support, may be contained in a marriage contract.

[350] Family Law Act, R.S.O. 1990, c. F.3, s. 52(2).

the Act. Adopting a postponing rule would mean that the spouses could not release the family home from the operation of the governing statutes before breakdown had occurred.

RECOMMENDATION 20

Spouses should be allowed to contract out of their rights of occupation arising prior to death. However, a contract entered into prior to separation should be unenforceable. Such a contract would be variable on the same grounds as contracts affecting occupancy rights on death. Third parties acting on the faith of a valid contract should not be prejudiced by a judicial alteration of the contract.

We appreciate that there might be one instance in which a release could be registered before breakdown, namely, where there is more than one home. At present, it is possible for two or more properties to fall within the statutory definition of a 'homestead' under the Dower Act, or a 'matrimonial home' under the MPA. The issues relating to potential for multiple homes will be examined in Chapter 8, in relation to the definition of the home.

CHAPTER 6 — DIVISION OF THE MATRIMONIAL HOME UNDER PART 1 OF THE MATRIMONIAL PROPERTY ACT

A. Introduction

In Chapters 1 to 5, we have dealt with the allocation of temporary possessory rights in the matrimonial home. At present these rights are contained in Part 2 of the Matrimonial Property Act. In this chapter, we consider the law governing title to the home, a matter dealt with under general principles of the law of property and in Part 1 of the MPA. Our concern is whether the rules which govern the allocation of marital property adequately resolve questions concerning the ultimate ownership of the home.

B. The Present Law

The central features of Part 1 of the MPA were briefly described earlier in this Report.[351] Part 1 introduces a system for the deferred equal sharing of accumulated marital assets. The system is one of 'deferred' sharing because until some event denoting marriage breakdown occurs the general rules governing property ownership prevail. On breakdown, Part 1 provides that a presumption of equal sharing of marital accumulations applies, which may be rebutted in appropriate circumstances having regard to 13 discretion-structuring factors.[352] These rules apply to all types of property, whether these are business or family assets. Importantly, under Part 1 the matrimonial home is not accorded special status; there is no explicit mention of the home in that Part.

Where a finding of entitlement is made under Part 1 of the MPA, the court possesses broad powers to give effect to the award. In general, a court may: (i) order one spouse to pay money or transfer an interest in property to another; (ii) order that property be sold and the proceeds divided; or (iii) declare that a spouse holds an interest in property.[353] As a means of implementing any of these measures the court may order payments over

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[351] Part C(2), Chapter 1.

[352] Section 8.

[353] Section 9(2).

time, order that security be given, require a spouse to surrender claims (including rights under the Dower Act), impose a trust or conditions, and sever existing joint tenancies. The court may also make any other order that it regards as necessary.[354]

No criteria are set out in the Act to guide the courts in granting any of these orders. But the factors that might influence the award are manifold. They might include such concerns as the tax consequences of certain orders, and the effect of an order on the continuing viability of farming or other business assets. Where the house and household goods are concerned, the needs of children may be a factor, as well as the particular attachment that a spouse may attach to the home: this we have described above as a 'personhood' interest.[355]

C. Reform: Special Division Rules for the Home?

In the other common law provinces of Canada, the home is generally governed by the basic or standard allocational rules, as in Alberta. However, there are exceptions:

> (i) In Newfoundland, the spouses are treated as joint tenants of the home.[356] Claims for exemptions that are generally available in relation to property owned by the spouses are not available in relation to the home.[357]
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> (ii) In Manitoba,[358] Prince Edward Island,[359] New Brunswick[360] and Nova Scotia[361] the matrimonial home is deemed to be a 'family asset'.

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[354] Section 9(3).

[355] See Part A(2), Chapter 1.

[356] Family Law Act, R.S.N. 1990, c. F-2, s. 8.

[357] Section 18(2).

[358] Marital Property Act, R.S.M. 1987, c. M45, s. 1(1) (definition of 'family asset').

[359] Family Law Reform Act, R.S.P.E.I., c. F.3, s. 2(a).

[360] Marital Property Act, S.N.B. 1980, c. M-1.1, s. 1 (definition of 'family assets').

[361] Matrimonial Property Act, R.S.S. 1989, c. 275, s. 4(1).

(iii) In Ontario, property exempt from sharing may be traced into later-acquired assets.[362] This general rule is qualified in one instance: No tracing of excluded property is permitted where the later-acquired asset is the matrimonial home.[363]

(iv) In Saskatchewan, special rules governing deviation from the norm of equal division apply. For general property, deviation is permitted where an equal division would be unfair and inequitable, having regard to an extensive list of factors. For the home, an equal division applies unless to do so would be "unfair and inequitable ... having regard **only** to any extraordinary circumstances, or unfair and inequitable to the spouse who has custody of the children".[364] In addition, as in Ontario, exemptions from sharing available to general property are not available in relation to the home.[365]

We have considered each of these special rules. In our view, none would improve Alberta law. The Newfoundland approach (item i) was considered in Chapter 3 of this Report and rejected as a reform option.[366] The description of the home as a family asset, as in Manitoba and several other provinces (item ii), is irrelevant to the general Alberta scheme, which does not contain a basic division between family and non-family assets.

In Ontario, the rule preventing a tracing of excluded property into the home (item iii) is intended to assure that the home is available for sharing. Such a response is not needed in Alberta. Under Part 1 of the MPA, the exemptions from sharing under Part 1 are 'value' exemptions.[367] They do not preclude the division of the asset which is holding that exempt value. Assume, for example, that the home is acquired by H through the will of his

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[362] Family Law Act, R.S.O. 199, c. F.3, s. 4(2)4.

[363] Section 4(2)5.

[364] Matrimonial Property Act, S.S. 1979, c. M-6.1, s. 22(1) (emphasis added).

[365] Section 23.

[366] Part C(5), Chapter 3.

[367] See further B. Ziff, "Tracing of Matrimonial Property: A Preliminary Analysis" in D. Pask & M. Hughes, *National Themes in Family Law* (1988) 55.

father. At that time it is worth $100,000: that value is exempt because the property was acquired by gift from a third party.[368] Assume further that at the time of breakdown it has not appreciated in value. H retains the full exemption, but an interest in the home may still be awarded to W, if she is otherwise entitled to some of her husband's accumulated wealth.

The Saskatchewan rules (item iv) are also intended to assure that the home is shared by the spouses and is available to meet the needs of children. Our Report is premised on the value of home as a means of support for spouses and children, so there is merit in this approach, which is also directed to that end. (Indeed, a California study found that an equal division of marital property often results in the forced sale of the couple's family home, which compounds the financial dislocation and impoverishment of women and children generated by divorce.)[369] Still, in Alberta, occupation of the home can be dealt with apart from the question of the ultimate state of title — if Part 2 of the MPA is invoked. Moreover, the rules in Part 2 provide a very flexible means of providing for the special circumstances contemplated by the Ontario and Saskatchewan statutes without disrupting the simplicity of the current Part 1 rules.[370]

The objective of Part 1 is the fair recognition of contributions to the economic welfare of the marriage: it is a backward-looking process under which it is presumed that the contributions of the spouses are roughly equivalent to each other. We can see no reason — under Part 1 — to treat the home differently from any other accumulated marital asset in the accounting of earned entitlements. By contrast, the purpose of Part 2 is support: this is a forward-looking matter. In our view, it is here that the court can best respond to needs relating to the actual use of the home. Our law effectively allows this important consideration to be dealt with separately from questions of ownership.

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[368] Section 7(2)(a).

[369] L. Weitzman, *The Divorce Revolution* (1985) at 30 and 81.

[370] The Ontario Law Reform Commission has recommended that its special rule for the home be repealed, and that the home be treated as any other asset for the purposes of division. They concluded that "the provisions in Part II of the Act will continue to recognize the special nature of the home": Ontario Law Reform Commission, *Report on Family Property Law* (1993) at 85. This accords with the approach taken in this Chapter.

Although we do not propose to affect the fundamental approach under Part 1, we do make one minor recommendation: that the interrelationship between the two parts of the Act be strengthened. Part 2 of the MPA provides that an order made under that part enjoys priority over an order under Part 1.[371] We would go one short step further. Under Part 1 the court is empowered to make a number of specific orders, and, as we have seen, it may also make any other order that in the opinion of the court is necessary.[372] This could include an award that parallels an order under Part 2. We recommend that the court be given the power to grant an order under Part 2 explicitly, even where no separate application under that Part has been launched. In other words, where appropriate the court can declare ownership rights in the home, while postponing a sale or disposition in favour of an occupation order. The duration of that order can be tied to the needs of a former spouse or to those of the children of the marriage.

We consider this to be a prudent reform. In Chapter 2 we recognized that there was an educational function served by alerting counsel and the courts to the types of orders that might accompany an order for possession of the home.[373] That reasoning applies here with equal force.

RECOMMENDATION 21

Part 1 of the Matrimonial Property Act should be amended to provide explicitly that an order under Part 2 can be made, even where no separate application under that Part has been launched.

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[371] Section 21. See *Gardner* v. *Gardner*, [1994] A.J. 995 (C.A.), where an order under Part 1 of the MPA was suspended during the period of occupancy under Part 2.

[372] Section 9(3)(j).

[373] See Part C, Chapter 2.

CHAPTER 7 — EXEMPTION FROM SEIZURE

A. Introduction

The exemption of the home from seizure by judgment creditors was an integral feature of the original American homestead reforms upon which the Alberta Dower Act is based. As we have seen, this element was present in the earliest homestead protections in force in the Northwest Territories.[374]

The rules governing seizure of the homestead are now dealt with as part of the general framework of debtor-creditor law. In a Report entitled *Enforcement of Money Judgments*, released in 1991, the Alberta Law Reform Institute undertook an extensive review of the general law, including those principles governing execution against homes.[375] The 1991 Report addressed some questions concerning the dower homestead, deferring others which it considered more germane to a review of the policies governing dower rights.[376] In this chapter, we deal with those issues.

B. The Current Law

The present exemption rules, now found in the Exemptions Act,[377] set out three basic situations:

> (i) The homestead actually occupied by the execution debtor is fully exempt if it is not larger than one quarter section. Lands beyond that may be sold.

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[374] See Part B(4), Chapter 1.

[375] Alberta Law Reform Institute, *Enforcement of Money Judgments* (Report No. 61, 1991).

[376] *Id.* at 177-78.

[377] R.S.A. 1980, c. E-15, ss 1(j), 1(k). The Civil Enforcement Act, R.S.A. 1980, c. C-10.5, has been enacted to replace, among other things, the Exemptions Act. Under the Civil Enforcement Act, the broader exemption would be retained for a debtor who is a bona fide farmer, whose principal residence is located on the farm. In other cases, the extent of the exemption for a home would be fixed by regulation: see sections 88(f), 88(g). The new Act received royal assent on Nov. 10, 1994, but as of Mar. 1, 1995 has not been declared in force.

> (ii) The house actually occupied by the execution debtor and the buildings used in connection with it and the lot or lots on which the house and buildings are situated are fully exempt if the value of the house, building, or lot does not exceed $40,000.00.
>
> (iii) Where the property is worth more than $40,000, and if a sale bid is received which would yield a net return of more than $40,000, the house may be sold. The first $40,000 is then paid "at once" to the debtor, and is "until then exempt from seizure under any other process".[378] The sale is not to be carried out, nor may possession be given to any person, until the execution debtor has received $40,000.

The purport of these exemptions is not clear; the rights seem to overlap. Item (i) seems to create a complete exemption for all homes. If so, this would make item (ii) superfluous; and item (iii) would be inconsistent with the full exemption.

These provisions can be reconciled by treating item (i) as applying only to rural land and those in (ii) and (iii) as relevant to urban homes. This explanation can be understood by returning to the definition of a homestead as found in the Dower Act. Under that Act, a homestead means a parcel of land on which the dwelling house occupied by the owner of the parcel as his or her residence is situated and consists of:

> (A) not more than 4 adjoining lots in one block in a city, town or village ..., or
>
> (B) not more than one quarter section of land other than land in a city, town or village.

With these definitions in mind, one can see that the full exemption in item (i) applies only to quarter-sections as in paragraph B of the Dower Act, and that items (ii) and (iii) apply to paragraph A of the homestead definition found in that Act.

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[378] Section 1(k).

Where a homestead is not fully exempt, and is seized and offered for sale, that sale may be undertaken by the sheriff without the dower consents having first been obtained. In *McNeil* v. *Martin et al.*,[379] the husband and wife were joint owners of a home. A judgment having been obtained against the husband, execution against the land was pursued by the creditor. The wife claimed that the sale by the sheriff amounted to a 'disposition' of the homestead for which her consent was required. The position was rejected, the Court of Appeal holding that the restraints on alienation contained in the Dower Act applied only to a spouse, and not the sheriff when executing against a spouse's interest in the home. Were it otherwise, the right of a spouse to withhold consent would, in effect, render all homesteads fully exempt. As we have seen above, this would be inconsistent with the scheme contemplated by the Exemptions Act. In dissent, Belzil J.A. argued that the majority ruling would lead to an illogical result, since the contingent dower life estate would run with the land, encumbering the title of the purchaser under a sheriff's sale.[380] That would reduce the value of the property considerably, perhaps to the point of destroying any market for that land.

It is not certain whether the dower life estate would survive the sheriff's sale; all of the members of the Court in *McNeil* thought that it would. True, at common law the dower life estate would survive a transfer by the husband, but this may not be the case for the statutory life estate. Section 18 of the Dower Act provides as follows:

> A disposition by a will of a married person and a devolution on the death of a married person is, as regards the homestead of the married person, subject and postponed to an estate for the life of the spouse of the married person, which is hereby declared to be vested in the surviving spouse.[381]

This provision implies that the life estate arises only where the property forms part of the deceased person's estate. If so, it is lost once the property is sold by the sheriff.

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[379] (1983), 23 Alta. L.R. (2d) 318 (C.A.). See further C.R.B. Dunlop, Annot: *McNeil* v. *Martin et al.* (1983), 23 Alta. L.R. (2d) 318.

[380] See also *Bank of Montreal* v. *Pawluk et al.*, *infra*, note 394.

[381] Section 18.

C. The Recommendations of the Report on the Enforcement of Money Judgments (1991)[382]

The 1991 Report addressed two issues affecting dower homesteads. One concerned the conduct of a sale of the land, and in particular, the issues raised by the *McNeil* case. The Report considered that the main holding in the case was sound and recommended accordingly that the consent of the debtor's spouse should not be required for an enforcement sale of a homestead.[383] In response to the concerns raised by Belzil J.A. that a contingent life estate of a spouse would run with the lands into the hands of a purchaser at the sheriff's sale, it was recommended that the contingent life interest created by the Dower Act should not survive an enforcement sale.[384]

The recommendations of the present Report modify but do not conflict with these ideas. There is nothing in this Report that suggests that the proceedings commenced by a sheriff to seize land of a debtor would be affected by our recommendations. The present Report calls for the abolition of the dower life estate, which would be replaced by a right of occupancy. When the conclusions of the 1991 Report are coupled with the proposals advanced here, the result is that spousal possessory rights do not survive a sheriff's sale of the premises.

The second aspect of the 1991 Report affecting the homestead concerned the availability of exemptions. That Report recommended that the overall structure of the current exemptions system be retained, including exemptions for basic shelter. The dichotomy between rural and urban homes would be retained, although it was recognized that the actual monetary limit for urban homes (presently $40,000) should be increased and revised from time to time. When the home is sold, the exempt portion would be exempt from further seizure for six months.[385] The full rural exemption would be continued, but only for those debtors who obtain the primary portion of their livelihood from farming land that includes the land on

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[382] See also D. Litman Seiden, "There's No Place Like Home(stead) in Florida — Should it Stay that Way?" 18 Nova L. Rev. 801 (1994).

[383] *Supra*, note 375 at 179.

[384] *Id.*

[385] *Id.* at 273-74.

which the home is situated; otherwise the homes in rural areas would be treated in the same way as urban homes.

It is not the function of this Report to revisit the question of whether these exemptions properly recognize the interests of debtors and creditors as against each other; that was the central goal of the 1991 Report. However, even accepting this, there remains one outstanding matter. Where a house is sold the exempt portion of the proceeds of sale (up to $40,000) represents all that remains of the homestead. In what way, if any, should this property be regulated in the interests of the non-owning spouse? As the 1991 Report recognized, this is "a question of the extent of dower rights",[386] and so falls within the purview of the present discussion.

D. The Unresolved Issue — Rights to the Proceeds of Sale

One response, raised in the 1991 Report, was to pay the $40,000 exemption to the debtor and the debtor's spouse jointly. This was viewed as presenting procedural difficulties, for example, in relation to locating that spouse. We were also concerned about the danger of the fund being tied up if the spouses refused to co-operate with each other. This would defeat the object of the exemption, which was to create a fund to allow the debtor to secure new accommodations. One might add a further concern. If the exempt funds were held in a joint bank account, a danger arises that one spouse might deplete the account. Another approach would be to impose a trust on the exempt monies in the hands of the judgment debtor, with a view to requiring that the money be used for shelter. This, too, is an unwieldy response. It would tie up the money in the trust; the monies would have to be segregated from other funds; and in the end would not necessarily produce the desired result.

Another solution would be to pay each spouse $20,000.00 directly. However, to take this step would constitute a marked departure from the general law governing matrimonial property. Under Part 1 of the Matrimonial Property Act, a spouse enjoys a **deferred** right to share in the property holdings of the other spouse, not an immediate right. The direct payment of monies to the non-owning spouse would be inconsistent with that basic principle.

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[386] *Id.* at 178. This problem has not been addressed in the Civil Enforcement Act, R.S.A. 1980, c. C-10.5, referred to *supra*, note 377.

The law might be amended to provide that following the seizure and sale of the matrimonial home any new residence acquired by the judgment debtor should be treated as a home within the meaning of our reforms, even if this property has never been used as the matrimonial home. While this is an attractive possibility, we are concerned that such a measure might inadvertently affect third parties. This might occur, for example, where the judgment debtor has begun to live with some other person.

Our preferred approach derives from our basic notion that the home provides a useful means of support. It is a supplement to the other means of support available under provincial and federal law. Where the home has been seized under lawful execution, what remains of this family law obligation is the right to seek an order of support. In support proceedings, the exempt funds in the hands of the debtor spouse become a resource available to the parties, a factor that a court can take into consideration in granting support.[387] Once a support order is granted, creditors' remedies are available for its enforcement in accordance with general principles.

RECOMMENDATION 22

Where the homestead is seized and sold under execution, the exempt portion of the proceeds of sale should be placed in the hands of the judgment debtor in accordance with general principles of exemptions law.

[387] In Chapter 8 of this Report we again address the question of whether a spouse should have a right to seek possession of a dwelling that has never served as the matrimonial home. There, consistent with our proposal here, we recommend that such an order should not be possible following a wrongful disposition of the matrimonial home, or where the home is lost through enforcement proceedings following a default on a mortgage. See Part E(4), Chapter 8.

CHAPTER 8 — DEFINING THE MATRIMONIAL HOME

A. Introduction

In this Report we have been discussing the 'matrimonial home' in general terms without providing a detailed definition. Having considered the main issues, policies and reforms relating to the home, it is now possible to examine the manner in which the home should be defined for the purposes of our recommendations.

B. The Meaning of 'Homestead' Under the Present Dower Act

Under the Dower Act,[388] a homestead means a parcel of land

> (i) on which the dwelling house occupied by the owner of the parcel as his 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.

This basic definition is supplemented by the Condominium Property Act, which provides that for the purposes of the Dower Act, one unit, together with the common property, constitutes the homestead.[389]

The Dower Act applies to property whether or not the interest of the owning spouse is legal or equitable (as would be the case, for example, where the property was held under an agreement for sale).[390] There is less

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[388] Section 1(e).

[389] Condominium Property Act, R.S.A. 1980, c. C-22, s. 67.

[390] *Clark* v. *Clark* (1965), 54 W.W.R. 744 (Alta. C.A.); *Krikken* v. *Krikken* (1992), 129 A.R. 397 (Q.B.). A spouse holding property under the Veteran's Land Act, is likely to be

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certainty as to the type of **estate** required to render the property a homestead. The definition in the current Act is essentially the same as that found in the Dower Act of 1917.[391] That Act was introduced in the context of the settlement policy of the federal government, and the legislators almost certainly had the fee simple homesteader in mind when the definition was formulated. Indeed, the Act speaks of land occupied by the 'owner', and this implies the holder of a freehold estate.[392]

The position under the Dower Act of a person holding a life estate in the property is less certain, as is that of a leaseholder. Of course, even assuming that some homesteads are held under life interests,[393] the death of a life tenant brings that estate to an end. No additional estate can then be added to it, so that the dower life estate cannot arise. In effect, this means that the main dower right in such a case would be the right to prevent a disposition of the property.

Life interests are not common; the applicability of the Act to leases is more important. The context in which dower was introduced into the province suggests that leases were not meant to be included. However, the Act, by referring to a homestead as that which is occupied by an **owner**, can arguably be taken to contemplate a tenant: a leaseholder 'owns' an estate, just as a freeholder does. Although this reading of the Act is questionable, it was recently adopted by Rooke J. in *Bank of Montreal* v.

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[390](...continued)
regarded as having a sufficient interest in the homestead to count as the owner: *Menrad* v. *Blowers et al.* (1982), 28 R.F.L. (2d) 289 (Man. Q.B.). See also *Powell* v. *Powell* (1984), 37 R.F.L. (2d) 431 (Ont. Co. Ct.).

[391] The Dower Act, S.A. 1917, c. 14, ss 2(a) & 2(b) provided as follows:

> In this Act, unless the context otherwise requires, the expression "homestead" shall mean -
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> > (a) land in a city, town, village, consisting of not more than 4 adjoining lots in one block, as shown on [a] plan duly registered in the property registry office in that behalf, on which the house occupied by the owner thereof as his residence is situated;
> > (b) Lands, other than referred to in clause (a) of this section on which the house occupied by the owner thereof is situated, consisting of not more than one quarter section.

[392] See *Re Bereton*, [1945] 3 W.W.R. 24 (Man. Co. Ct.).

[393] See contra *Re Bereton*, *id.*

Pawluk et al.,[394] where it was held that the Dower Act applied to leasehold interests of three years or more. The court concluded that this view was consistent with the philosophy of the homestead regime, which was "to protect the 'home' of a spouse that is contemplated to be in existence for a not insignificant duration".[395] On this reading, a widowed spouse would be entitled to a life estate in a leasehold. This would be a unique interest. If the *Pawluk* view is correct,[396] the value, if any, of applying the current Dower Act to leases would be to control dispositions of the home.[397]

The original Dower Act (of 1915) did not impose limits on the physical dimensions of the homestead. This was, however, dealt with in the 1917 Act, which restricted the homestead to an area of not more than one quarter section.[398] The 1948 Act added that the homestead was to consist of a "parcel of land" of not more than one quarter section.[399] This is the present law. As a result, if, for example, only a small portion of a parcel is used as the home, with the rest being devoted to farming, the entire parcel is treated as the homestead.[400]

The meaning of the phrase "parcel of land" was considered by the Court of Appeal in *Ost* v. *Turnbull*.[401] At trial, it was held that where the dower homestead straddled two quarter sections, both thereby counted as homesteads under the Dower Act. This was so, according to the trial judge,

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[394] (1994), 40 R.P.R. (2d) 18 (Alta. Q.B.), relying on the *dicta* of McNeill D.C.J. in *In re Scott Estate*, [1935] 1 W.W.R. 325 (Alta. Dist. Ct.) at 330, in which it was said that dower could apply to long-term leases. See also the authorities canvassed in *Pawluk*.

[395] *Id.* at 35 (per Rooke J.).

[396] See contra *Re Bereton*, *supra*, note 392. See also the critique of *Pawluk* in B. Ziff, "Whatever Happened to the Law of Dower? It's Alive and Unwell and Living on the Prairies" (1994) 40 R.P.R. (2d) 44.

[397] But since the Dower Act does not regard leases of less than three years as 'dispositions', the Act would have little practical effect in any event.

[398] The Dower Act, S.A. 1917, c. 14, s. 2(b), set out *supra*, note 391.

[399] Dower Act, S.A. 1948, c. 7, s. 2(c).

[400] *In re Cherniak Estate* (1930), 25 Alta. L.R. 44 (S.C.), aff'd 25 Alta. L.R. 48 (C.A.).

[401] (1977), 4 Alta. L.R. (2d) 358 (C.A.).

even though the house was entirely located on one of the quarter sections, with a garden and other lands connected with the home on the other.

This delineation of the area of the homestead was reversed on appeal. Drawing on dictionary definitions of the terms parcel (in the absence of statutory guidance), the Court of Appeal concluded that the term meant "a tract or plot of land whose boundaries are readily ascertainable".[402] It concluded that the reference to a parcel was added (in 1948) to give greater certainty as to the area of land comprising the homestead. Moreover, the Court said that a definition of parcel that focuses on ascertainability was appropriate in Alberta, where land is generally defined in quarter sections, or parts of quarter sections, and where the boundaries are normally ascertainable from a search of title.[403] In consequence, only the land in the quarter section on which the home was located constituted the homestead, and the boundaries of that quarter section represented the boundaries of that homestead.

The court in *Ost* recognized that problems would arise under the Act where the parcel was larger than the maximum size of one quarter section, such as where the home was located on an undivided section. In this case, some method would be needed to determine the limits of the homestead. That designation would have to conform with the relevant restrictions on the creation of subdivisions found in planning law. Access to the homestead following the designation of the appropriate area would also have to be provided.[404] As the court in *Ost* observed, these problems are not addressed in the current legislation.

C. The 'Matrimonial Home' Under the Matrimonial Property Act

The Matrimonial Property Act[405] defines the 'matrimonial home' as property

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[402] *Id.* at 364 (per Moir J.A.).

[403] *Id.*

[404] A similar problem was recognised in *Ost* in relation to urban homesteads, in a case where the home is on one of **more than** four consecutive lots. The Court of Appeal raised, but did not answer, the question of who chooses the lots covered by the Dower Act.

[405] Section 1(c).

(i) that is leased or owned by one or both of the spouses;

(ii) that is or has been occupied by the spouses as their family home, and

(iii) that is

(A) a house, or part of a house, that is a self-contained dwelling unit,

(B) part of a business premises used as living accommodation,

(C) a mobile home,

(D) a residential unit as defined by the Condominium Property Act, or

(E) a suite.

Additionally, under Part 2 of the MPA, when an order for exclusive possession is granted, the court may give a spouse possession of as much of the property surrounding the matrimonial home that is considered necessary for the use and enjoyment of the home.[406]

D. Reform

(1) General: a single definition

Our proposed reforms seek to blend the concept of dower with the rights of occupation contained in Part 2 of the MPA. The new approach allows the home to be used as a form of support in cases of need arising on separation, divorce or death. It would then follow that a single definition of the home should be adopted.

The meanings of 'homestead' in the Dower Act and 'matrimonial home' in the MPA share an important element: both adopt a 'user test' to determine whether a property falls within the scope of the respective Acts. However, more significant are the differences between these statutes:

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[406] Section 19(2).

(i) The MPA applies to rental premises; the Dower Act may not.

(ii) The Dower Act distinguishes between urban and rural land; the MPA does not.

(iii) Under the Dower Act, a property becomes a homestead, even if only occupied by the owning spouse;[407] under the MPA only properties occupied by both spouses are covered.[408]

(iv) Under the Dower Act, the fundamental unit for the homestead is a parcel of land. Under the MPA, there is no equivalent limitation, and the matrimonial home may include part of a house, or part of business premises used as living quarters.

(v) In general, the physical extent of the homestead is fixed under the Dower Act; under the MPA, some additional lands can be added by court order.

These disparities arise because the two statutes were created at different times to pursue somewhat different purposes. In all jurisdictions in which homesteading and possession rights co-exist, two definitions are used, as under the present Alberta law.[409]

The Manitoba Law Reform Commission considered the question of whether a single definition should be adopted for the purposes of the Marital Property Act and dower legislation. It recommended that the separate definitions be retained; this recommendation has been accepted by the Manitoba legislature.[410] Under Manitoba law, the definition of

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[407] Section 1(e). See also section 10(1)(b), which provides as a ground for dispensing with consent the fact that one spouse has not lived in Alberta since the marriage. This implies that consent would otherwise be required in this situation.

[408] Section 1(c)(ii).

[409] For Saskatchewan, see: The Homesteads Act, S.S. 1989, c. H-5.1, s. 2(c) and the Matrimonial Property Act, R.S.S. 1979, para. 2(g); for Manitoba, see The Homesteads Act, S.M. 1992, c. 46, s. 1 (definition of 'homestead') and the Marital Property Act, R.S.M. 1987, c. M45, s. 1 (definition of 'marital home'); for British Columbia, see the Land (Spouse Protection) Act, R.S.B.C. 1979, c. 223, s. 1 (definition of 'homestead'), and the general definition of family assets found in the Family Relations Act, R.S.B.C. 1979, c. 121, s. 45.

[410] The Homesteads Act, C.C.S.M. c. H80, s. 1 (definition of 'homestead').

homestead is comparable to that contained in the Alberta Dower Act: it contains different descriptions for rural and non-rural property, and contemplates freehold ownership.[411] Under Manitoba's Marital Property Act, the 'marital home' means:

> property in which a spouse has an interest and that is or has been occupied by the spouses as their family residence and, where the property that included the family residence is normally used for a purpose other than residential only, includes only the portion of the property that may reasonably be regarded as necessary to the use and enjoyment of the residence, and where the property is owned by a corporation in which a spouse owns shares that entitle the spouse to occupy the property that spouse has an interest in the property.[412]

This definition is comparable to that found in the Alberta MPA (although it is not identical in all respects).[413]

The Manitoba Law Reform Commission's decision to retain distinct definitions was based on two main reasons. First, they were unaware of any problems arising from the retention of two definitions.[414] Second, they saw the conflation of definitions as raising "difficulties of some magnitude both in terms of general policy and concrete application in particular cases".[415] The Commission was concerned that under Manitoba's land registration system there would "be virtually insurmountable problems in attempting to attach a life estate to only a portion of the premises",[416] a result that would flow from adopting the definition of the home under the Manitoba Marital Property Act. It could create a life estate in a multi-use dwelling, even if parts of those premises were leased to others or used for business

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[411] The Homesteads Act, C.C.S.M. c. H80, s. 1 (definition of "homestead).

[412] Marital Property Act, R.S.M. 1987, c. M45, s. 1(1).

[413] For Alberta's definition, see *supra*, note 405 and accompanying text.

[414] Manitoba Law Reform Commission, *Report on an Examination of 'The Dower Act'* (1984) at 190.

[415] *Id.*

[416] *Id.* at 191.

purposes. Moreover, with respect to large parcels of farm property, if the life estate were to be restricted to the dwelling house and one or two contiguous acres, problems relating to unlawful subdivisions under planning law could arise.[417] More generally, they were concerned about the lack of certainty that might occur if the Marital Property Act definition were adopted.

These are not insurmountable hurdles. Under our reforms, the dower life estate would be abandoned and would be replaced by a possessory right under Part 2 of the MPA. An order for exclusive possession of the home can presently be registered under the Land Titles Act.[418] We are not aware of any logistical difficulties relating to the land titles system caused by the registration of these orders. Second, an over-broad definition is not an inevitable result of adopting a single concept of the home. Care must be taken so that, as far as possible, the definition adopted conforms with the goal of providing basic shelter as a fall-back protection, while leaving other property unaffected. Certainty is also an important criterion. Spouses should be able to know in advance whether a given transaction requires a spousal consent. This involves, among other things, as clear a definition of the meaning of 'the home' as the law can create.

It is not necessary to consider whether the MPA definition should be preferred over that found in the Dower Act (or *vice versa*). Rather, our task is to design a definition that conforms with the policies of the law described in the preceding chapters. This involves a consideration of the interplay of those policies with the forms of home ownership found in the province.

RECOMMENDATION 23

The current definitions of 'homestead' under the Dower Act and 'matrimonial home' under the Matrimonial Property Act should be replaced by a single definition.

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[417] See Planning Act, R.S.A. 1980, c. P-9. See further F. A. Laux, *Planning Law and Practice in Alberta* (1990), c. 11.

[418] Matrimonial Property Act, R.S.A. 1980, c. M-9, s. 22.

(2) Freehold residential lots and condominium units

Under the Dower Act, a lot in a plan of subdivision can constitute a homestead. In contrast, it is arguable (at least) that only the dwelling itself falls within the definition of a matrimonial home under the MPA; the court can add the garden, yard, driveway and garage by order under the MPA.[419] Indeed, it is hard to conceive of circumstances in which that would not be done as a matter of course. With this in mind, we are of the view that the basic Dower Act definition should be adopted in relation to the common situation of a simple urban residential lot, so that as a general matter the home includes all property comprising the lot.

But the current Dower Act goes further. It provides that the homestead should consist of "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".[420] It is not clear why this indulgence is given; even less certain is how often these circumstances exist. Our view is that this broader right is inconsistent with the notion of the use of the home as a form of basic support. As a result, we recommend that this special provision be discontinued.

Our general approach to urban lots applies also to condominium units. The MPA currently applies to a 'residential unit', as defined by the Condominium Property Act. This is similar to the definition of homestead applicable to the Dower Act, as applied to condominiums, although under the Dower Act, the homestead includes the owner's interest in the common areas of the condominium.[421] Since ownership in the unit is integrally connected to rights over the common area, the Dower Act approach seems more appropriate. We therefore recommend that it be adopted.[422]

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[419] Section 19(2).

[420] Section 1(e)(ii)(A).

[421] Condominium Property Act, R.S.A. 1980, c. C-22, s. 67.

[422] Included within this proposal would be a home located in a 'strata space', created pursuant to section 87 of the Land Titles Act, R.S.A. 1980, c. L-5.

RECOMMENDATION 24

The 'matrimonial home' should be defined to include (a) lot in a subdivision, and (b) a 'residential unit' as defined by the Condominium Property Act together with the owner's interest in the common areas of the condominium.

(3) Quarter sections and rural homesteads

The current Dower Act applies to parcels of up to one quarter section for land not located in a city, town or village — i.e., rural properties.[423] The MPA draws no distinction between urban and rural land.

The Dower Act definition, covering as it does an entire quarter section, appears to be over-broad, encompassing property that may be used for farming or other commercial purposes. At the same time, that definition has the virtue of certainty. This was highlighted in the case of *Ost v. Turnbull*, discussed above, which held that the reference to a parcel of land referred to a parcel with identifiable boundaries.[424] This can become important where a disposition of adjacent lands is sought. For this reason, we recommend that the current definition be retained. Further, the approach of the court in *Ost* should be confirmed: for the sake of clarity, the Act should refer to an 'ascertainable' parcel of land, so as to make it clear that the parcel is determining by reference to pre-existing boundaries.

RECOMMENDATION 25

The 'matrimonial home' should be defined to include an ascertainable parcel of land of not more than one quarter section of land on which the home is situated.

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[423] Section 1(e)(ii)(B).

[424] See *supra*, notes 401 to 404 and accompanying text.

The current Dower Act definition contains three omissions. One is identified in the *Ost* case: no account is taken of the possibility that a parcel on which the home is situated is larger than one quarter section. In this rare instance, the court should be empowered to make a delineation of a parcel of not more than 160 acres (the standard size of a quarter section). The second situation not dealt with under the current law concerns the house which actually straddles two or more parcels. In this case (which we assume will also rarely arise), it seems sensible to treat all the properties as the home, at least presumptively. To avoid unfairness arising from this expansion of the normal dimensions of the home, the court should be granted the power to either delineate the portion of the lands which can be enjoyed as the home, or to order compensation in lieu of occupancy rights in cases where a delineation would not be appropriate.[425] The third omission concerns the situation of a quarter-section located within the corporate limits of a municipality. In this case, the current 'rural rule' should be applied.

RECOMMENDATION 26

(1) Where the matrimonial home is situated on a parcel of greater than a quarter section, the court should be empowered to delineate an area as the home of not more than 160 acres.

(2) Where the home straddles two or more parcels, each of these parcels should be treated as the home, unless a court orders a delineation, or orders compensation in lieu of occupancy rights.

(3) Where the parcel of land on which the home is located is a quarter section, that area should constitute the home, whether contained within a municipal area or otherwise.

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[425] This proposal assumes that the considerations governing the subdivision of property under the Planning Act, R.S.A. 1980, c. P-9, would apply.

(4) Leaseholds

The Dower Act **may** apply to leasehold interests; as we have seen, it has recently been decided that the Act applies to leases of more than three years.[426] The present MPA applies to rental premises, allowing for an order of exclusive occupation to be made in relation to a residential suite. Under our recommendations this will continue. Additionally, a spouse will be able to remain (presumptively) in the suite on the death of the owning spouse. These rights would be subject to a court order of variation.[427]

The application of possessory rights on marriage breakdown or death can affect the rights of the landlord of residential premises. Under the current MPA, where the one or both spouses are leasing the matrimonial home, and an order is made giving one spouse possession of the home, that spouse is "deemed to be the tenant for the purpose of the lease".[428] This limits a landlord's right to select his or her tenant; the landlord's economic interest in the venture is thereby threatened. Nevertheless, the present law, and our recommendations here, are premised on the view that these legitimate concerns are overridden by the 'personhood' interests of the spouses, for whom the suite serves as a home.[429] The potential for dislocation of a divorced or surviving spouse, and the needs of their children, outweigh the risks assumed by the landlord that the spouse in possession might turn out to be a poor tenant. After all, the landlord still retains the normal array of remedies for breaches of the terms of the lease.

However, there are two minor ambiguities in the current MPA deeming provision. First, by deeming that a spouse assumes the role of a tenant a question emerges: does this section purport to make all of the terms of a lease agreement applicable to the new tenant? This is the probable intention of the Act, although it leads to a result that would not occur under the general rules governing the transmission of a leasehold interest. Where the original tenant has assigned a leasehold interest in full, privity of estate between the old landlord and new tenant would be created, but not privity of contract. As a result, only the so-called 'real covenants'

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[426] See *Bank of Montreal* v. *Pawluk*, *supra*, note 394.

[427] See Part C(7), Chapter 3.

[428] Section 24.

[429] This idea is briefly explained in Part A(2), Chapter 1.

would bind that new tenant. These include terms that are integral to the landlord and tenant relationship, such as covenants for rent and repair. The assignment would exclude purely personal arrangements, which are collateral to the demise of the property, but which were nonetheless contained in the original tenancy agreement.[430] This might include, for example, arrangements for personal services. There is no reason to deem that a spouse has assumed collateral terms of this nature. In our view, the law should be clarified by providing that the tenant be deemed to be an **assignee** of the interest of the other spouse in the lease.

Second, there is also room for debate about the position of the original tenant under the MPA: does that person remain liable under the lease? The current law, by providing that the spouse shall be deemed to be **the** tenant, may work to destroy the privity of contract originally created. This might be fair to the excluded (original) tenant, who otherwise might be in the position of being denied the benefits of the tenancy, while remaining responsible for the burdens. On the other hand, to release that tenant from his or her contractual obligations derogates from the rights of the landlord. Accordingly, we feel that a fair balancing of these concerns would be to specify that the original tenant should remain liable, but only for a limited period of time. That time should be fixed by determining the earliest time at which the excluded tenant could have lawfully terminated the tenancy, had he or she wished to do so following the granting of the occupancy order. Even before that time, the excluded tenant should be accorded a right of indemnity against the 'deemed' tenant, where a breach by that person renders the original tenant liable under the lease. We also feel that the law should provide that the landlord be advised of the order and the effects of the order on the landlords rights. At present, this is not required when a deemed tenancy occurs.

RECOMMENDATION 27

(1) The 'matrimonial home' should be defined to include a suite.

(2) When an order of exclusive possession is made under Part 2 of the Matrimonial

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[430] See Law of Property Act, R.S.A. 1980, s. 59.2. See further B. Ziff, *Principles of Property Law* (1993) at 217 *et seq.*

Property Act in relation to a rental suite, excluding the original tenant, that spouse in whose favour the order has been made should be deemed to be an assignee of the interest of the other spouse in the lease.

(3) When an order of exclusive possession is made excluding the original tenant, the obligations of that tenant to the landlord will continue only until the earliest time at which the tenant could have terminated the lease following the granting of the order.

(4) The Matrimonial Property Act should provide for notice to the landlord of an order made under Part 2, and the effects of that order on the rights of the landlord that are affected by the order.

(5) Mobile homes

The current MPA applies to mobile homes.[431] The position under the Dower Act is more complex. The mobile home may be located on a rented site. If so, the applicability of the Act turns on the question of whether it applies to leaseholds as well as freeholds; we have doubted that it does.[432] Where the home is situated on a freehold property belonging to one of the spouses, that parcel is a homestead, but the mobile home is not necessarily regulated by the Dower Act: this falls to be determined by the law of fixtures. If the mobile home (as opposed to the parcel) is treated in law as a fixture, it is regarded as part of the realty and therefore forms part of the homestead. If it is a chattel, it does not constitute part of the homestead. The correct classification depends on the application of a fixtures 'test', under which the 'degree' and 'purpose' of the annexation are examined.[433] In the context of mobile homes, the case law demonstrates that either characterization is possible, given the right set of factual

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[431] Section 1(c)(iii)(D).

[432] See *supra*, note 394 and accompanying text. But see *Pawluk*, *supra*, note 394.

[433] See further Ziff, *supra*, note 430 at 78-80.

circumstances.[434] Of course, even if a mobile home is treated as a fixture, the owner may still be in a position to restore the mobile home to its chattel state, and sell it without regard to the consent provisions of the present Dower Act.

In our view, the law protecting possession of the matrimonial home should not depend on the niceties of the law of fixtures. As a result, we recommend that the MPA definition be adopted. This has two primary practical results. First, where the home is situated on a rented site, the entitlement to remain on the site must be regulated. In such a situation, the tenancy created is governed by the Mobile Home Sites Tenancies Act,[435] which establishes landlord and tenant rules somewhat analogous to those contained in the Residential Tenancies Act.[436] In these circumstances, where the non-tenant spouse is entitled to exclusive possession of the home, a deeming provision, similar to that applicable to residential tenancies, should apply: the spouse granted possession should be treated as an assignee of the original tenant; the original tenant should remain liable under the lease until the time at which the tenancy could have been terminated by notice; and the landlord should be notified of the order.

The second practical effect of adopting the MPA definition concerns dispositions of a mobile home. Presently, under Part 2 of the MPA, where an order is made for possession of a mobile home, a financing statement may be registered in the Personal Property Register created under the Personal Property Security Act.[437] The effect of this is to put third parties wishing to deal with the chattels on notice of the possession order. Our recommendations would go further and require a spouse who wishes to sell a mobile home to obtain the necessary spousal consent (or an order dispensing with that requirement). A sale without consent would be invalid, as in the case of an ordinary house sale.

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[434] See e.g., *Plaza Equities Ltd.* v. *Bank of Nova Scotia*, [1978] 3 W.W.R. 385 (Alta. S.C.) (held: fixture); *cf. C.I.B.C.* v. *Nault* (1985), 66 A.R. 313 (Master) (held: chattel). For additional examples, see Ziff, *supra,* note 430 at 80, n.83.

[435] R.S.A. 1980, c. M-18.5.

[436] R.S.A. 1980, c. R-15.3.

[437] R.S.A. 1980, c. P-4.05 (referred to below as the PPSA).

However, it is more difficult to police the sale of a chattel such as a mobile home, than it is to regulate the sale of a parcel of land. A sale of a mobile home need not be registered. So, unlike the case of real property, there is no opportunity for a government official (such as the Registrar of Land Titles) to police or monitor transfers to ensure that the required spousal consents have been given. Additionally, whereas it is common for a house sale to be conducted through both real estate agents and lawyers, mobile home sales are more often be undertaken less formally. This increases the chances that parties to a sale will be unaware of the consent requirements.

Despite these concerns, we believe that the law should require a spousal consent for the sale of a mobile home. At the same time, third party purchasers should be protected from innocent errors. To accommodate both of these concerns, we feel it would be appropriate to protect a purchaser who acts in ignorance of the consent requirements, either because it was not appreciated that the property was a home, or because it was not appreciated that a consent was required. A non-owning spouse should still be in a position to file a notice under the PPSA, indicating that the property is a home within the meaning of Part 2 of the MPA, even before an order is made, and this would bind subsequent purchasers. We appreciate that many spouses may not know about, or care to take, this preventive step. Nevertheless, this option should be made available for those who wish to preserve their rights of occupation.

By definition, mobile homes can be relocated. In view of this, should the law impose controls on the ability of the owning spouse to move a mobile home to another site unilaterally? Put another way, one may ask whether the relocation should be treated as a 'disposition' that would require consent. We have resisted this approach as being too invasive for the couple living in amity. As with the case of the ouster of one spouse by another, we feel that the appropriate approach is to treat the situation as giving rise to a claim occupation of the home.[438] Only where an order for possession is granted should the law provide that relocation requires consent. Once an order has been made, we feel that the danger of one spouse or the other moving the home is a realistic one, and therefore merits a firm rule.

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[438] See Part E(6)(a), Chapter 4.

RECOMMENDATION 28

(1) The 'matrimonial home' should be defined to include a mobile home.

(2) When a mobile home is located on a rented site, the recommendations concerning tenant liability and notice to the landlord that apply to residential tenancies should apply in relation to the mobile home site tenancy.

(3) As a general rule, the provisions governing the disposition of the matrimonial home should apply to a mobile home. However, a disposition of a mobile home is valid, unless it can be shown that the transferee was aware that consent was required and had no reason to believe that the consent was given.

(4) A spouse should be able to file a notice in the Personal Property Register, identifying a mobile home as a matrimonial home. That notice should specify that the consent requirements that apply. As under the present law, a spouse should also be able to file an order for possession.

(5) Once an order for possession of a mobile home has been made, neither spouse should be allowed to relocate the home without either a consent or a court order having first been obtained.

(6) Properties with both residential and commercial uses

Where a given property is used partly for residential purposes and partly for commercial purposes, difficulties can emerge as to the precise delineation of the home. Consider, for example, a small apartment building containing 8 suites, owned by one of the spouses. Assume in this example that the spouses live in one of the units and serve as caretaker-managers. Under the present Dower Act, it is probable that the entire property would

be treated as the homestead. A similar situation might arise where part of a house is used as a suite rented to third parties by the owning spouse. In contrast, under the MPA, a matrimonial home can consist of "**part** of business premises used as living accommodation".[439] Likewise, under the MPA a house or part of a house can constitute the matrimonial home.

Several policies come into conflict in these situations. Describing the home as comprising only that part of business premises used as living accommodation (as under the MPA) may fail to identify the home clearly and this would render uncertain whether a consent must be obtained for a given disposition. However, to adopt the current dower approach could produce absurd results. Returning to the example of the small apartment, the application of our reforms to the entire complex would mean, in theory, that every rental of the every suite would require spousal consent.

In our view, a practical response is called for in these circumstances. Where the property is primarily used as business premises, only the area used as living accommodation should be covered by the proposed regime, as under the current MPA. This is a potentially problematic approach, since it may not always be certain whether a property is being used primarily for business purposes.[440] To reduce the instances in which this problem of mixed uses arises, we would exclude farm properties from this proposal. In the case of farm land, the 'ascertainable parcel' rule[441] would apply, even though this may occasionally prove to be over-broad.

In the case of a house, part of which is leased to a third party, we would embrace the whole property. This is based on the assumption that any part of the house that is rented out may equally be suitable for use by one of the spouses. As a result, it is sensible to require that a non-owning spouse agree to a transfer.

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[439] Section 1(c)(iii)(B) (emphasis added).

[440] In addition, problems may arise where, for example, the entire premises are sold, including the living quarters. If spousal consent is not obtained, the transfer of the home is void. But if the rest of the sale remains valid (because it concerns only business premises), the effect of the transfer would be to effect a subdivision of the property. Accordingly, this transfer would have to comply with the principles governing the subdivision of land under the Planning Act, R.S.A. 1980, c. P-9.

[441] See Part D(3), *supra*.

RECOMMENDATION 29

The 'matrimonial home' should be defined to include a part of business premises (other than a farm) used as living accommodation.

(7) Summary of the basic definition

We recommend that the family home be defined to mean the following:

> (i) an 'identifiable' or 'ascertainable' parcel of land of not more than one quarter section on which the home is situated
>
> (ii) a 'residential unit', as defined by the Condominium Property Act, including the owner's interest in the common areas of the condominium
>
> (iii) a suite
>
> (iv) a mobile home
>
> (v) part of business premises (other than a farm) used as living accommodation.

While this describes the basic concept, an array of subsidiary issues must also be considered. These are addressed immediately below.

E. Special Issues

(1) Mines and minerals

At present, the right of dower extends to some mineral estates owned by a spouse.[442] When this is so, a disposition of mines and minerals must be made in accordance with the Dower Act.[443] However, no consent is required if the right to mines and minerals is not contained in the certificate of title to the homestead, but is registered under a separate

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[442] Section 24(1).

[443] See e.g., *Champagne* v. *Aljean Construction Ltd.* (1979), 11 Alta. L.R. (2d) 1 (Q.B.).

certificate of title (which is most often the case).[444] Moreover, no dower claim may be made against the Assurance Fund for an unsatisfied judgment for damages made to the extent that the damages award relates to a wrongful disposition of mines and minerals.[445]

Presumably, the life tenant widower can exploit the mines and minerals on the death of the owner (when these are included in the same certificate of title). Since no stipulation is contained in the Act as to the degree of exploitation, the rights of a life tenant under the common law should apply. Accordingly, a person enjoying a dower estate in possession cannot open new mines but can continue extraction from those already being worked.[446]

The merit of the current law is that it provides a potential means of income to the widowed spouse; and where there is a right to minerals, the income produced of course can be considerable. At the same time, that right is conferred unevenly, since its existence depends on whether or not the home and the mines and minerals are registered on separate titles; whether this is so in a given case may result from fortuitous circumstances. Likewise, the surviving spouse's right to exploit the minerals probably does not arise unless they happen to have been previously worked.

Our operating premise in this Report is that under the modern law of dower and under Part 2 of the MPA, the home serves as a means of providing basic support. Allowing a widowed spouse to remain in the home minimizes disruption and promotes continuity. At all times, this must be balanced against the legitimate use of property owned by the other spouse. Our view is that this balance is best struck by excluding mines and minerals from the definition of the home. Under this proposal, no consent would be required to convey an interest in mines and minerals below the surface of a homestead. Additional needs of a spouse can then be dealt with through the other sources of marital support available under Alberta law.

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[444] Section 24(2).

[445] Section 24(3).

[446] See further R.E. Megarry & H.W.R. Wade, *The Law of Real Property* (5th ed. 1984) at 100-01.

RECOMMENDATION 30

Rights over mines and minerals should not be considered to be part of the matrimonial home.

(2) Co-ownership with a third party

The current Dower Act excludes from its operation homes which are co-owned by a spouse and some other person:

> 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.[447]

The purpose of this provision is clear — the rights of non-spouses should not be affected by the Dower Act.

In the context of leasehold premises, we have shown a willingness to allow one spouse to step into the shoes of the other and assume the position of tenant. This is currently possible under Part 2 of the MPA. When this occurs the spouse acquires no greater rights to possession than that enjoyed by the original tenant-spouse (though this does incidentally affect the rights of the landlord of the premises, who must now deal with a new tenant). An analogous approach can be taken here. When the spouse is a co-owner with some other person, rights of possession as proposed in this Report should apply. Of course, the spouse granted a right of occupation by court order should not be able to acquire any greater rights of possession that those held by the owning spouse, for otherwise the rights of a third party would be unduly affected. Therefore, consents should be required and possession orders can be granted. The fact that a third party has an interest in the premises can be a consideration when an order excluding a spouse is sought, although it may not be determinative.[448] It is possible that in some of these circumstances the third party would be willing to enter into

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[447] Section 25(1) (emphasis added).

[448] See Part C(2), Chapter 2.

an arrangement that would not frustrate the protections offered by our recommendations. If the property is held in joint tenancy, and the owning spouse dies, the property would pass in the ordinary way to the non-spouse, and the possession order would then come to an end. Again, the rights of the non-spouse are not diminished in any way by this proposed rule, and the rights of a spouse in possession of the property by court order remain limited to the rights that could otherwise have been enjoyed by the owning spouse.

RECOMMENDATION 31

A home owned by a third party and one of the spouses should fall within the definition of the matrimonial home. The rights conferred on the other spouse under a possession order should be no greater than those held by the owning spouse. The interests of the third party should be a consideration when an order for possession is sought.

(3) Ownership by a corporation

Both the current Dower Act and the MPA apply only to homes owned (and in the case of the MPA, leased) by one of the spouses. Neither Act is directly concerned with the situation in which the home is 'owned' through the interposition of a corporation. It may be possible, for example, for a spouse to place title to the home in the name of a corporation which is wholly owned by that spouse. At common law, this arrangement would avoid the operation of the law of dower; it would be equally effective under current Alberta dower law.

When title to a home is registered in the name of a corporation, the occupation of the spouses must be referrable to some type of entitlement. For example, where the arrangement is, in substance, a lease of the premises (i.e., the spouses are treated as tenants of the corporation), the present MPA will apply; so, too, will our proposed reforms. However, in most cases it is likely that no precise form of tenancy would be explicitly established. At best, the spouses are likely to be treated as tenants at will of the corporation. Moreover, where the arrangement is a mere licence to occupy, the current and proposed regimes would not be applicable. A licence,

strictly speaking, is merely a permission to do that which would otherwise amount to a trespass. The weight of authority holds that a licence, even a contractual licence, does not constitute an interest in land.[449]

Our concern is that the practice of placing title in the name of a corporation can be used — with relative ease — to circumvent the protections conferred under law in favour of a non-owning spouse. Is there an appropriate and feasible response?

One approach would be to leave the law as it presently stands, which would mean that general principles of company law would apply. The cardinal principal of this area of the law is that the corporation enjoys a separate legal status and identity, distinct from that of its shareholders. However, in exceptional circumstances, the courts have been willing to 'lift' or 'pierce' the corporate veil and thereby regard the corporation as a mere conduit, functionary, or agent of its controlling member(s). In other words, within the present setting, the effect of lifting the veil would be to treat a spouse as owner of the house, although title is registered in the name of a corporation owned by that spouse.

Within the context of the family home, this may not be a satisfactory solution. The common law principles governing when a court should lift the corporate veil are notoriously complex and "inherently contradictory",[450] and it is by no means certain that they would be invoked simply because the family home is purchased by a corporation. The doctrine can be invoked where there is fraud or improper conduct.[451] To direct that title to property to be taken in the corporate name is not fraudulent *per se*. Nor is it necessarily improper: a spouse who acts in this ways avoids no obligation imposed by law. Moreover, the difficulty involved in invoking this protection militates against its use in cases involving the home. Similarly, by the time any action based on these rules is taken, the property may already have passed to an innocent third party.

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[449] See further *Ashburn* v. *Anstalt & W.J. Arnold & Co.*, [1989] c. 1 (C.A.), petition to appeal to the House of Lords refused.

[450] B. Welling, *Corporate Law in Canada: the Governing Principles* (2nd ed. 1991) at 125. See also *Clarkson Co. Ltd.* v. *Zhelka* (1967), 64 D.L.R. (2d) 457 (Ont. H.C.) at 469-70.

[451] See further *Pioneer Laundry* v. *M.N.R.*, [1939] 4 All E.R. 254 (P.C.).

A second tack is to adopt special rules to cover the case in which the home is registered in the name of a corporation. In several provinces, including Manitoba, the law provides that

> where the property is owned by a corporation in which a spouse owns shares that entitles the spouse to occupy the property, that spouse has an interest in the property.[452]

The intention of this provision is to lift the corporate veil, but it does so in an awkward fashion. The section applies only where the ownership of shares entitles a spouse to the occupation of a company-owned house. Shares normally confer no such rights. Where the property is owned by the corporation, it alone is entitled to occupation. The ownership of shares gives the holders a portion of an interest in the corporation itself, and does not confers rights over corporate assets **directly**.

A third approach can be adopted which attempts to improve on the type of provision employed in Manitoba. Part 2 of the Alberta MPA could be amended so as to make it applicable whenever the home is owned by a corporation in which a spouse holds shares. Where this is the case the owning spouse should be prevented by law from transferring **those shares** without consent. In addition, the law could also require that there be a consent given to any proposed sale by the corporation of its asset (the home).

This approach raises significant practical problems. First, the transaction costs involved in attempting to regulate corporate transfers of property can be extensive. In Alberta, the Land Titles office assists in the policing of dispositions under the Dower Act. If corporations can own a home within the meaning of our reforms, how is the Registrar of Land Titles to know in any transfer by a corporation whether a home is involved in that transaction (and, therefore, whether spousal consent is required)? Presently, in transfers by individuals an affidavit must be sworn, indicating whether or not the property is a homestead to which the Dower Act applies. To demand this in the case of every corporate transaction involving land, including sales, long leases and mortgages, imposes an additional burden,

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[452] Marital Property Act, R.S.M. 1987, c. M45, s. 1(1), quoted above in *supra*, note 412 and accompanying text. See also Marital Property Act, S.N.B. 1980, c. M-1.1, s. 17(2); Family Law Act, R.S.O. 1990, c. F.3, s. 18(2).

with a cumulative effect for all such transactions that would be considerable. The same would be true if controls were imposed on share transfers.

Second, while the situation contemplated above is that of a one-person company owning the home, there are other ways in which a spouse wishing to avoid the operation of Part 2 of the MPA may seek to do so. What rule should apply where the spouse is not the only shareholder, or a minority shareholder, the remaining shares being reposed in another family member? It is possible to adopt a rule that not only prohibits a spouse from acting on their own shares, but also seeks to prevent a spouse from influencing other shareholders. From a practical point of view, such an approach offers little protection. Additionally, it does not begin to deal with the problems arising when title is simply placed in the name of some other person and not a corporation. In short, the recalcitrant and determined spouse can often find some loophole to exploit.

It is not known how often the matrimonial home is held in the name of a corporation. This may be a rare occurrence: the interests at stake may not make such action worthwhile. Even though such an arrangement avoids the operation of the Dower Act and Part 2 of the MPA, it is less effective in relation to division orders under Part 1. Under that Part, permanent orders can be made which radically alter the property holdings of divorced spouses. If the home is owned by a corporation, it is not matrimonial property within Part 1 of the Act. But the shares of the corporation **are** covered by Part 1, so there is little to be gained in this realm by interposing a corporation. Moreover, the financing of a sale of a home can be complicated if a corporation is used. The spouse purchasing the property may be required to furnish a guarantee which would impose personal liability on default that would otherwise not attach under a mortgage. Moreover, there are adverse tax consequences that can arise when the principal residence is in the name of a corporation. These factors may serve as a disincentive to the use of a holding company. For these reasons, we believe that our decision not to include homes owned by corporations within our proposals does not amount to a serious deficiency.

RECOMMENDATION 32

The definition of the matrimonial home should not include property owned by a corporation.

(4) Must both spouses occupy the home?

The Dower Act applies once the owner is in occupation of the home; the MPA applies only if both spouses have lived on the premises as their family home. Which approach is best?

There are situations in which there might be value in a rule which treats a property occupied by only one spouse as the matrimonial home. Where, for example, a wrongful disposition has occurred, one remedy would be to attach occupation rights to a second home owned by the spouse guilty of the improper disposition. This adds a further deterrent to prodigal action by a spouse. In two other instances, such a response might be appropriate. One concerns a situation in which a spouse defaults under a mortgage leading to a foreclosure or sale of the matrimonial home in mortgage proceedings. The other could arise in relation to the seizure of a home to satisfy a judgment against a spouse. In both situations this may result from the failure of the spouse to satisfy an obligation to a third party, or it may arise out of an attempt to subvert the possessory rights of a spouse.

Our Report stresses the use of the home as a basis of support, identifying the home as a special place because of the attachments which people may develop in relation to it. Some of the rights conferred recognize the importance of continuity. That being so, there is little reason to capture within the regime a property in which both spouses have not lived. For example, it would seem wrong to dispossess a spouse who, after having separated, has moved into another residence. In addition, there is a concern about the interests of third parties, who might have an interest in this other property. In sum, it is our view that a spouse who is deprived of rights in the home owing to default under a mortgage by the owning spouse, or in similar circumstances, should look to the law of spousal support for assistance.

RECOMMENDATION 33

The current requirement under the Matrimonial Property Act that a property falls within the definition of the matrimonial home only if lived in by both spouses should be retained.

(5) More than one home

Under the present law, it is possible for more than one property to be a homestead within the meaning of the Dower Act. This can occur because under the Act a property does not cease to be a homestead merely because the parties have obtained another home and no longer use the first property as a place of residence.[453] As a result, on the death of the owning spouse the survivor may have a claim to more than one property. If this occurs, the surviving spouse must make an election in writing as to the property in which a life estate is claimed. Until this election is forwarded to the Registrar of the Land Titles Office, the personal representative of the deceased must not dispose of any of the homesteads. If the surviving spouse neglects or refuses to make the election, the personal representative may seek an order designating the property to be used as the homestead. This order cannot be sought until three months after the death of the owning spouse.[454]

Part 2 of the MPA also appears to contemplate the possibility of more than one matrimonial home existing at a given time. There, the matrimonial home is defined to mean a property that is leased or owned by the spouses and "that is or **has been** occupied by the spouses as their family home".[455]

There is a practical reason for permitting the accumulation of homesteads: there may be cases where it is not clear if a property has ceased to be used as a homestead. That will not be apparent merely from a search of title. Hence, the Act takes a cautionary approach, fixing dower

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[453] Section 3(1).

[454] Section 19.

[455] Section 1(c) (emphasis added).

rights to a homestead and allowing these to be altered only in four circumstances: (i) where a spouse dies owning a homestead, the surviving spouse is put to an election, as described above; (ii) the sale of a second homestead may be undertaken in accordance with the general consent rules; (iii) the existence of more than one homestead provides a ground on which a spouse may seek an order dispensing with consent; (iv) a release may be signed, excluding any property, including a second home, from the ambit of the Dower Act.

Our proposals contemplate the use of the home as a basic form of support. That being so, it is sensible to make the election procedures applicable on the death of the owning spouse (item (i)), so that only one home is used for that purpose. In addition, our recommendations governing spousal consent seem applicable to all homesteads (item (ii)). Similarly, in Chapter 4 we endorsed the current rule that the existence of more than one homestead constitutes a ground for seeking an order dispensing with spousal consent (item (iii)). In short, none of these three circumstances seem controversial; none require additional attention. It is the fourth situation — the release of the homestead — that requires further consideration.

In Chapter 5 of this Report we reviewed the rules governing the 'contracting out' of the protections in the Dower Act and Part 2 of the Matrimonial Property Act. We recommended that this power arise only on marriage breakdown,[456] a position adopted in other provinces. Should this limitation apply where a release is sought in relation to a second homestead?

In some jurisdictions a pre-separation release is not permitted. For example, in Ontario, the parties cannot contract out of rights to occupation until separation.[457] As in Alberta, more than one property can count as the matrimonial home at a given time. However, under the Ontario Family Law Act,[458] one or both spouses may designate a property as a matrimonial home. On registration, any other property that is a matrimonial home ceases to be so described. The designation may be

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[456] Part 4(b), Chapter 5.

[457] Family Law Act, R.S.O. 1990, c. F.3, s. 52(2).

[458] Section 20.

cancelled by the person making it, at which time the previously released property is once again treated as a home.

We have considered adopting a form of release of this nature. It would provide convenience to the owner of the second property. Once a property is released from the purview of the rules governing the home, it may be sold without the need to obtain spousal consent. At the same time, conferring this right entails some element of risk. In particular, the law must somehow seek to ensure that there are in fact two or more homes before the release of one is to be permitted. In Alberta, this is not currently a concern, since any property may be released under the Dower Act at any time.[459]

Additionally, the Ontario Act seems to permit the very property in which the spouses are presently living to be excluded from the Act, if some other home is available. Does this provide adequate protection for the non-owning spouse? In Chapter 5 we recommended that spouses not be permitted to waive occupancy rights before separation so as to ensure against a spouse being **rightfully** ousted from the home, pursuant to a valid contract in which occupancy rights had been surrendered. That being so, it seems to follow that this protection is undermined if a spouse may release that home from the operation of the Act, for any reason, before breakdown. Hence, any right of release would have to be confined to a home which the spouses are not presently using as their residence. Some means would have to be developed to ensure that this is so.

These practical concerns could be overcome. Nevertheless we feel that the inconvenience caused by precluding pre-separation releases where there are multiple homesteads is itself not great. In the absence of a provision allowing for a release of a second home, the owning spouse must seek the consent of the other spouse for any planned disposition. This is an important protection. In our view, there is little need to develop rules, forms and safeguards to deal with the possibility of a pre-separation release given that the basic consent system is available in any event. As a result, we recommend that no special rules for release be adopted in relation to the case where the parties own more than one home.

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[459] Section 7.

It is possible, of course, that both spouses might own a property that falls within the definition of the matrimonial home. Should a special rule apply here? We do not believe so. In this eventuality, there would be no means of determining which of these properties should be treated as **the** home. There would be no means of knowing which of these homes would be most suitable for a possession order should the need arise. Sometimes this might lead to a curious result: a surviving spouse could enjoy his or her own freehold, and assume occupancy rights in the other.[460] Under our proposals, this might well provide a circumstance under which the presumptive right to occupancy on death is varied by court order.

RECOMMENDATION 34

A property should not cease to be a matrimonial home because a subsequent matrimonial home has been acquired. The election procedures currently contained in the Dower Act where a spouse dies owning more than one homestead should apply. The general rules governing releases and contracts should apply to all matrimonial homes.

[460] A similar result could occur under the present Dower Act.

CHAPTER 9 — TRANSITIONAL PROVISIONS

In this Report we have recommended a number of changes to the law. What rules should govern the transition from the old law to the new?

Generally, new enactments should not be interpreted so as to have retroactive effect. This principle is reflected in the Interpretation Act.[461] Subsection 31(1) provides, in part, as follows:

> When an enactment is repealed in whole or in part, the repeal does not
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> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed
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> ...
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> (e) affect any ... proceeding or remedy in respect of the right, privilege, obligation, lability, penalty, forfeiture or punishment.[462]

The non-retroactivity principle is based on fairness to those who have acted on the basis of the law as it stood at the relevant time. In exceptional cases, such as where an injustice would result, a departure from this basic approach might be acceptable.

In our view, there is no apparent reason for a retroactive application of the laws which we propose. They should take effect from the date determined by the Legislature. However, while this may be a simple position to adopt in the abstract, it requires further elaboration. To avoid uncertainty, it is necessary to return to those major proposals about which the timing of implementation might produce confusion.

In Chapter 2, we recommended changes to the manner in which the powers of the court should be described under Part 2 of the Matrimonial Property Act. These provisions are primarily declaratory and do not alter existing rights. They should apply to new proceedings under that Part and

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[461] R.S.A. 1980, c. I-7.

[462] See also section 32.

to applications to vary existing orders. The presumptive right to equal possession of the home should come into existence on the date the reforms become law.

In Chapter 3, we have recommended the replacement of the dower life estate with a right of occupation under Part 2 of the MPA. Application of the principle of non-retroactivity means that those spouses currently entitled to a dower life estate in possession should not be affected by the reforms. In other words, these life estates (both of realty and personalty) should not be transformed into occupancy rights under Part 2; otherwise the implementation of the reforms would alter the nature of the estate already granted under law to a widowed spouse.

In Chapter 4, we dealt with the rules governing spousal consent. The new formalities would apply only to transactions taking effect after the reforms are implemented. Generally, the old remedies should continue to apply, in accordance with paragraph 31(1)(e) of the Interpretation Act (quoted above). Paragraph 32(1)(d) provides that an accused should receive the benefit of the reduction or mitigation of a penalty or punishment. In keeping with the spirit of this provision, the abolition of the quasi-criminal offence for the perpetration of a wrongful disposition should mean that once the reforms become law, prior unprosecuted acts should not be amenable to prosecution.

Chapter 5 was devoted to a consideration of contracts concerning the home. It is here that issues of retroactivity are most significant, since spouses may have bargained in the shadow of the law as it stood when the agreement was made. Here, a prospective application of the reforms would allow those agreements to remain fully effective.

Consider a situation where the spouses have agreed to release all rights under the Dower Act. In so far as the proposed right of occupancy on death is concerned, such a contract would be valid under our proposals, but would be qualified in two ways. First, on death, a spouse would be entitled, despite an agreement, to remain in the home for three months. Second, the agreement could be varied if it could be shown that a radical change of circumstance had occurred, or if the interests of children are affected. In the case of an agreement surrendering rights under Part 2 of the MPA, we have

seen that the law is silent on the validity of such a waiver.[463] Under our proposals, the same two grounds for variation would apply. Moreover, the agreement would be unenforceable if made before the parties had separated.

These changes will improve the law, so it would be unfortunate if they could not be available to all spouses in the province. Despite this, we believe that it would be wrong to impose these new rules on spouses who had bargained on the assumption that they were free to do so under the law that existed at the time that the agreement was struck. The consideration that moves between the spouses in marriage and separation agreements is often deeply interconnected. Altering the rights by legislative intervention may diminish the consideration received by one of the parties while leaving the benefits received by the other intact. We might feel differently if the changes we were introducing were designed to undo serious hardships. Here, however, our proposals endeavour to create a better balance of freedom and protection than the previous law provided.

In Chapter 6, we reviewed Part 1 of the Matrimonial Property Act. Here we have recommended only that the interrelationship between Parts 1 and 2 of the MPA be clarified. This does not raise any concerns about retroactivity.

In Chapter 7, the current law governing exemptions of the matrimonial home from seizure was examined. We have recommended only that the current law should be maintained and clarified.

In Chapter 8, we developed a definition of the family home that applies to occupancy rights during marriage and on death. These reforms will effectuate change by making some rights applicable to homes that would not have been affected under the prior law. However, these rights (such as the requirement of consent) will only apply to future transactions.

We have also recommended that the rules concerning consent no longer apply to dispositions of mines and minerals. In keeping with our approach to vested rights in the dower life estate, in the unlikely event that a widowed spouse is entitled to mines and minerals by virtue of the Dower

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[463] See Part B(3), Chapter 5.

Act, those entitlements should not be divested by the implementation of our reforms.

RECOMMENDATION 35

(1) The reforms proposed in the Report should be given prospective application.

(2) Reform of the law should not affect dower life estates that have vested in possession.

(3) The new provisions governing consent and the remedies for wrongful dispositions should apply only to dispositions occurring after the reforms become law. However, conduct giving rise to a quasi-criminal offence under the present Dower Act should not be amenable to prosecution after the new law takes effect.

(4) Agreements made under the Dower Act and Part 2 of the Matrimonial Property Act prior to the coming into force of these reforms should remain binding on the spouses.

PART III — LIST OF RECOMMENDATIONS

RECOMMENDATION 1

Spouses should be entitled to equal possession of the matrimonial home, regardless of the state of title, and without the need to obtain a court order. Spouses may therefore not expel each other from the home. This right of possession should be capable of being protected by the filing of a caveat in the Land Titles Office. (p. 29)

RECOMMENDATION 2

When granting an order under Part 2 of the Matrimonial Property Act, a court should have regard to the following factors:

(a) The interests of any dependent children, taking into account such factors as (ii) the health of the children and their need for continued stability , and (ii) the impact that a move might have on the ability of the children to attend school or participate in extra-curricular activities.

(b) The financial position of the spouses, including their ability to continue to maintain the property as well as to continue to dwell under separate roofs.

(c) Any existing orders pertaining to property or support.

(d) The health and safety of the family, including the apprehension of violence.

(e) The special character of the neighbourhood, including such considerations as the presence of friends, relatives, members of a specific ethnic community.

(f) The date when the property was acquired.

(g) The historical ties of the parties to the property in question.

(h) The extent to which the property was acquired by one of the spouses by gift or special effort.

(i) The effect of an order on any other person who holds an interest in the home.

(j) Any informal agreement between the parties as to the home.

(k) Any other fact or circumstance that is relevant. (p. 34)

RECOMMENDATION 3

An order for possession of the home can be made to cover the whole or any part of the premises. However, an order should not be made granting possession of part of the premises to one of the spouses, and part to the other, where there is an apprehension of violence. (p. 35)

RECOMMENDATION 4

Children should not be entitled to seek orders for possession under Part 2 of the Matrimonial Property Act. (p. 36)

RECOMMENDATION 5

When granting an order of possession under Part 2, a court should continue to be able to grant orders allowing for the possession of household goods. (p. 37)

RECOMMENDATION 6

When granting an order for possession under Part 2 of the Matrimonial Property Act, the court may also:

(a) determine any rights of spouses that may arise as a result of the occupancy of a matrimonial home and postpone any rights of the spouse who is the owner or lessee, including the right to apply for partition and sale or to dispose of or encumber the matrimonial home

(b) authorize the disposition or encumbrance of the interest of the spouse in a matrimonial home subject to the right of exclusive possession contained in the order

(c) fix the obligation to repair and maintain a matrimonial home

(d) fix the obligation to pay, and the responsibility for, any liabilities whatsoever that may arise out of the occupation of the matrimonial home

(e) direct a spouse to whom exclusive possession of a matrimonial home is given to make any payment to the other spouse that is prescribed in the order.

(f) grant such other orders as are necessary for the proper management or maintenance of the property covered by the order. (p. 39)

RECOMMENDATION 7

The right to a life estate under the Dower Act should be replaced with a right of occupancy governed by Part 2 of the Matrimonial Property Act. The right should arise automatically on the death of the owning spouse and should continue until the surviving spouse dies, or until a court orders otherwise. 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. (p. 60)

RECOMMENDATION 8

The powers of a court to grant ancillary orders under Part 2 of the Matrimonial Property Act should be applicable to situations in which a widowed spouse remains in the home on the death of the owning spouse. Unless varied by court order, the surviving spouse should be responsible for all current expenses and repairs. (p. 61)

RECOMMENDATION 9

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). This right should arise automatically on the death of the owning spouse and should continue until the surviving spouse dies, or until a court orders otherwise. Such an order should not be granted unless a court is convinced that the benefits of to the widowed spouse in relation to the personal property are substantially outweighed by the benefits that would accrue to those entitled to make a claim. A court may also grant an order of possession in favour of the widowed spouse in relation to other 'household goods' (as that term is defined in the Matrimonial Property Act). (p. 66)

RECOMMENDATION 10

Matrimonial misconduct should not constitute a bar to the enjoyment of any of the rights contained in Part 2 of the Matrimonial Property Act. (p. 69)

RECOMMENDATION 11

The current definition of a 'disposition' should be amended to include leases of less than three years. When a lease of less than three years is granted without compliance with the consent provisions, the lease is valid, unless it can be shown that the tenant was aware that consent was required and had no reason to believe that the consent was given. If the lease cannot be set

aside, a court should have the power to order that all or part of the rents should be paid to the spouse whose consent was not obtained. The court should also have the power to direct that the lease be terminated at the earliest opportunity allowable under the terms of the lease. (p. 95)

RECOMMENDATION 12

The law should continue to require a consent and acknowledgment; the use of a standard form should be continued. That form should include both the consent and acknowledgment. It should clearly state that the rights being surrendered are those contained in Part 2 of the Matrimonial Property Act, as reformed, and that a given transaction is not effective until the document is completed. (p. 98)

RECOMMENDATION 13

(1) The law should require that the consent and acknowledgment form be properly completed. Minor defects should be ignored; the absence of a signature should not be treated as a minor defect.

(2) Where the formalities are not complied with properly, the law should provide that the transaction is void for all purposes. The law should also provide that the doctrine of estoppel does not apply to prevent any party from relying on the absence of a spousal consent.

(3) When the form is properly completed, the voluntariness of the consent can still be challenged by demonstrating that the consent was in fact given under duress. (p. 103)

RECOMMENDATION 14

The law governing the time at which a wrongful disposition of the matrimonial home can be set aside should conform with the general law governing land titles registration. Occupancy rights should not be classified as overriding interests under the land titles system. (p. 107)

RECOMMENDATION 15

(1) An action for damages should be available as a remedy for a wrongful disposition of any kind. This cause of action should not be extinguished by divorce.

(2) 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.

(3) Damages awarded to compensate for the loss of occupancy rights on death should be ordered to be secured against property, or paid into court, to be paid to the plaintiff-spouse only if that spouse survives the defendant. (p. 116)

RECOMMENDATION 16

A spouse who suffers a loss of occupancy rights owing, at least in part, to the operation of the land titles system, should be able to seek compensation from the assurance fund in accordance with the general law governing that fund. (p. 117)

RECOMMENDATION 17

A wrongful disposition of the matrimonial home should not give rise to quasi-criminal liability under provincial law. (p. 118)

RECOMMENDATION 18

The provisions governing dispensing with consent under the Dower Act should be incorporated into the consent rules under Part 2 of the Matrimonial Property Act. (p. 120)

RECOMMENDATION 19

(1) Spouses should be free to enter into a contract releasing their rights to occupancy of the matrimonial home on the death of the owning spouse. When such a contract is validly entered into the court should not be empowered to grant an order conferring possession on death unless it can be shown (i) that there has been a substantial change of circumstance since the entering into of the agreement that imposes a hardship on a spouse, or (ii) that the agreement would not be in the best interests of any children of the marriage.

(2) When a contract releasing rights of occupancy on death has been entered into and the owning spouse subsequently dies, the surviving spouse should be able to remain in the home for a transitional period. That period should be three months.

(3) An order that overrides the terms of a contract releasing occupancy rights should not be granted where to do so would affect the rights of a third party who acquired an interest in the home under a valid disposition of the home. (p. 130)

RECOMMENDATION 20

Spouses should be allowed to contract out of their rights of occupation arising prior to death. However, a contract entered into prior to separation should be unenforceable. Such a contract would be variable on the same grounds as contracts affecting occupancy rights on death. Third parties acting on the faith of a valid contract should not be prejudiced by a judicial alteration of the contract. (p. 132)

RECOMMENDATION 21

Part 1 of the Matrimonial Property Act should be amended to provide explicitly that an order under Part 2 can be made, even where no separate application under that Part has been launched. (p. 137)

RECOMMENDATION 22

Where the homestead is seized and sold under execution, the exempt portion of the proceeds of sale should be placed in the hands of the judgment debtor in accordance with general principles of exemptions law. (p. 144)

RECOMMENDATION 23

The current definitions of 'homestead' under the Dower Act and 'matrimonial home' under the Matrimonial Property Act should be replaced by a single definition. (p. 152)

RECOMMENDATION 24

The 'matrimonial home' should be defined to include (a) lot in a subdivision, and (b) a 'residential unit' as defined by the Condominium Property Act together with the owner's interest in the common areas of the condominium. (p. 154)

RECOMMENDATION 25

The 'matrimonial home' should be defined to include an ascertainable parcel of land of not more than one quarter section of land on which the home is situated. (p. 154)

RECOMMENDATION 26

(1) Where the matrimonial home is situated on a parcel of greater than a quarter section, the court should be empowered to delineate an area as the home of not more than 160 acres.

(2) Where the home straddles two or more parcels, each of these parcels should be treated as the home, unless a court orders a delineation, or orders compensation in lieu of occupancy rights.

(3) Where the parcel of land on which the home is located is a quarter section, that area should constitute the home, whether contained within a municipal area or otherwise. (p. 155)

RECOMMENDATION 27

(1) The 'matrimonial home' should be defined to include a suite.

(2) When an order of exclusive possession is made under Part 2 of the Matrimonial Property Act in relation to a rental suite, excluding the original tenant, that spouse in whose favour the order has been made should be deemed to be an assignee of the interest of the other spouse in the lease.

(3) When an order of exclusive possession is made excluding the original tenant, the obligations of that tenant to the landlord will continue only until the earliest time at which the tenant could have terminated the lease following the granting of the order.

(4) The Matrimonial Property Act should provide for notice to the landlord of an order made under Part 2, and the effects of that order on the rights of the landlord that are affected by the order. (p. 158)

RECOMMENDATION 28

(1) The 'matrimonial home' should be defined to include a mobile home.

(2) When a mobile home is located on a rented site, the recommendations concerning tenant liability and notice to the landlord that apply to residential tenancies should apply in relation to the mobile home site tenancy.

(3) As a general rule, the provisions governing the disposition of the matrimonial home should apply to a mobile home. However, a disposition of a mobile home is valid, unless it can be shown that the transferee was aware that consent was required and had no reason to believe that the consent was given.

(4) A spouse should be able to file a notice in the Personal Property Register, identifying a mobile home as a matrimonial home. That notice should specify that the consent requirements that apply. As under the present law, a spouse should also be able to file an order for possession.

(5) Once an order for possession of a mobile home has been made, neither spouse should be allowed to relocate the home without either a consent or a court order having first been obtained. (p. 161)

RECOMMENDATION 29

The 'matrimonial home' should be defined to include a part of business premises (other than a farm) used as living accommodation. (p. 163)

RECOMMENDATION 30

Rights over mines and minerals should not be considered to be part of the matrimonial home. (p. 165)

RECOMMENDATION 31

A home owned by a third party and one of the spouses should fall within the definition of the matrimonial home. The rights conferred on the other spouse under a possession order should be no greater than those held by the owning spouse. The interests of the third party should be a consideration when an order for possession is sought. (p. 166)

RECOMMENDATION 32

The definition of the matrimonial home should not include property owned by a corporation. (p. 170)

RECOMMENDATION 33

The current requirement under the Matrimonial Property Act that a property falls within the definition of the matrimonial home only if lived in by both spouses should be retained. (p. 171)

RECOMMENDATION 34

A property should not cease to be a matrimonial home because a subsequent matrimonial home has been acquired. The election procedures currently contained in the Dower Act where a spouse dies owning more than one homestead should apply. The general rules governing releases and contracts should apply to all matrimonial homes. (p. 174)

RECOMMENDATION 35

(1) The reforms proposed in the Report should be given prospective application.

(2) Reform of the law should not affect dower life estates that have vested in possession.

(3) The new provisions governing consent and the remedies for wrongful dispositions should apply only to dispositions occurring after the reforms become law. However, conduct giving rise to a quasi-criminal offence under the present Dower Act should not be amenable to prosecution after the new law takes effect.

(4) Agreements made under the Dower Act and Part 2 of the Matrimonial Property Act prior to the coming into force of these reforms should remain binding on the spouses. (p. 178)

APPENDIX A

DOWER ACT, R.S.A. 1980, C. D-38

Table of Contents

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) repealed 1994 c31 s5;

(b) "Court" means the Court of Queen's Bench;

(c) "disposition"

(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;

(d) "dower rights" means all rights given by this Act to the spouse of a married person in respect of the homestead and property of the married person, and without restricting the generality of the foregoing, includes

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

(ii) the right of action for damages against the married person if a disposition of the homestead that results in the registration of the title in the name of any other person is made without consent,

(iii) the right to obtain payment from the General Revenue Fund of an unsatisfied judgment against the married person in respect of a disposition of the homestead that is made without consent and that results in the registration of the title in the name of any other person,

(iv) the right of the surviving spouse to a life estate in the homestead of the deceased married person, and

(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 execution;

(e) "homestead" means a parcel of land

(i) on which the dwelling house occupied by the owner of the parcel as his 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.

RSA 1980 cD-38 s1;1994 c31 s5

Disposition Prohibited Without Consent

Disposition prohibited without consent

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

(2) Notwithstanding subsection (1), the consent of the spouse of a married person is not required when the married person is required by the operation of regulations under the *Agricultural and Recreational Land Ownership Act* and section 35 of the *Citizenship Act* (Canada) to make a disposition of the homestead.

(3) A married person who makes a disposition of a homestead in contravention of this section is guilty of an offence and liable to a fine of not more than $1000 or to imprisonment for a term of not more than 2 years.

RSA 1980 cD-38 s2;1994 c23 s50

Duration of Homestead

Duration of homestead

3(1) When land becomes the homestead of a married person it continues to be his homestead within the meaning of this Act until the land ceases to be a homestead pursuant to subsection (2), notwithstanding the acquisition of another homestead or a change of residence of the married person.

(2) Land ceases to be the homestead of a married person

(a) when a transfer of the land by that married person is registered in the proper land titles office,

(b) when a release of dower rights by the spouse of that married person is registered in the proper land titles office as provided in section 7, or

(c) when a judgment for damages against that married person is obtained by the spouse of the married person pursuant to sections 11 to 17 in respect of any land disposed of by the married person and is registered in the proper land titles office.

(3) When a disposition of a homestead is made by an agreement for sale, lease, mortgage, encumbrance or other instrument that does not finally dispose of the interest of the married person in the homestead, an order of the Court dispensing with the consent of the spouse of the married person to the disposition extinguishes the dower right of the spouse in the homestead to the extent only that the voluntary consent of the spouse to the disposition would have done.

RSA 1980 cD-38 s3

Consents

Consent

4(1) A consent required for the disposition inter vivos of the homestead shall be contained in or annexed to the instrument by which the disposition is effected and whenever that instrument is produced for registration under the *Land Titles Act,* the consent shall be produced and registered therewith.

(2) The consent in writing of the spouse of the married person to any disposition shall, in the prescribed form, state that the spouse consents to the disposition of the homestead and has executed the consent for the purpose of giving up the life estate of the spouse and other dower rights of the spouse in the homestead to the extent necessary to give effect to the disposition.

(3) When the consent is contained in the instrument the signature of the spouse to the instrument is a sufficient signature to the consent as well as to the instrument.

(4) The consent may be contained in or written or endorsed at the end of or at any place on the instrument and the signature of the spouse to the consent is a sufficient signature to the instrument as well as to the consent.

(5) When the consent is annexed to the instrument, the spouse shall sign both the consent and the instrument.

(6) The Registrar of Land Titles before registering a disposition of land that

(a) does not purport to be consented to under this Act, and

(b) is not accompanied by an order of the Court dispensing with the consent,

(c) repealed 1985 c48 s1,

shall require an affidavit of the owner in the prescribed form supported by any other evidence by affidavit or otherwise that the Registrar may prescribe.

(7) Notwithstanding subsection (6), when the disposition is executed under a power of attorney, the party executing the disposition, if he is acquainted with the facts, may make the affidavit.

RSA 1980 cD-38 s4;1985 c48 s1

Acknowledgment by spouse

5(1) When the spouse of a married person executes a consent to a disposition as required under this Act or executes a disposition containing the consent, the spouse shall acknowledge apart from the married person

(a) that the spouse is aware of the nature of the disposition,

(b) that the spouse is aware that the *Dower Act* gives the spouse a life estate in the homestead and the right to prevent disposition of the homestead by withholding consent,

(c) that the spouse consents to the disposition for the purpose of giving up, to the extent necessary to give effect to the disposition, the life estate and other dower rights given by the *Dower Act* in the homestead, and

(d) that the spouse is executing the document freely and voluntarily without any compulsion on the part of the married person.

(2) The acknowledgment may be made before a person authorized to take proof of the execution of instruments under the *Land Titles Act,* and a certificate of the acknowledgment in the prescribed form shall be endorsed on or attached to the disposition executed by the spouse.

(3) The Court on being satisfied of the due execution of a consent and the making of an acknowledgment, whether the consent was executed and the acknowledgment made within or outside Alberta, may authorize the registration of the disposition notwithstanding that the proof of the execution of the consent or of the making of the acknowledgment is defective.

RSA 1970 c114 s6

Homestead sold under agreement of sale

6(1) When a homestead has been sold under an agreement of sale and

(a) the spouse entitled to dower rights has consented thereto and given the acknowledgment required by this Act,

(b) the Court has dispensed with the consent of the spouse to the sale, or

(c) a subsisting release of dower rights was registered at the time of the execution of the agreement of sale,

no further signature or acknowledgment of the spouse is required on a transfer of the homestead in fulfilment of the terms of the agreement of sale.

(2) On the transferee filing

(a) the agreement of sale accompanied by

(i) the consent and the acknowledgment in the prescribed forms,

(ii) the order dispensing with the consent of the spouse, or

(iii) the consent and acknowledgment required by chapter 206 of the Revised Statutes of Alberta, 1942, if executed before September 1, 1948,

(b) a transfer of the land, and

(c) an affidavit identifying the transferee as the purchaser under the agreement of sale,

and otherwise complying with the provisions of this Act and paying the prescribed fees, the Registrar shall issue a certificate of title in favour of the transferee.

RSA 1970 c114 s7

Releases

Release of dower rights

7(1) When a married person owns a homestead, the spouse of the married person may execute a release of dower rights in the prescribed form.

(2) A release of dower rights shall be supported by the affidavit of the spouse in the prescribed form.

(3) A release of dower rights and supporting affidavit shall be executed and sworn to by the spouse

(a) apart from the married person in whose favour the release is made, and

(b) before a solicitor, barrister, lawyer or attorney-at-law residing in Alberta, or residing in any other province, realm and territory, state or country, other than the solicitor or the partner or employee of the solicitor acting for the married person in whose favour the release is made.

(4) On the registration of a release of dower rights in the proper land titles office

(a) the land described in the release ceases to be a homestead,

(b) the spouse of the married person ceases to have any dower rights in the land described in the release, and

(c) the Registrar shall endorse a memorandum of the release of the dower rights on the certificate of title.

RSA 1970 c114 s8

Caveat

8(1) When a release of dower rights in respect of the land of a married person has been registered under section 7, the spouse of the married person may execute and register a caveat against the land at any time before a transfer transferring that land is registered in the proper land titles office and thereupon

(a) the Registrar shall cancel the release of dower rights, and

(b) the spouse is entitled, except as otherwise provided in this Act, to dower rights in that land to the same extent as if the release of dower rights had never been registered.

(2) The dower rights to which the spouse becomes entitled under subsection (1) are subject to any rights that have accrued to or been acquired by a person in the land in good faith and for valuable consideration before the filing of the caveat.

RSA 1970 c114 s9

Agreement releasing dower rights

9(1) When a married person owns a homestead, the spouse of the married person may execute an agreement releasing to the married person the dower rights in the homestead that are given to the spouse by this Act.

(2) The agreement

(a) shall be in writing,

(b) shall be for valuable consideration and the consideration shall be expressed in the agreement,

(c) shall be acknowledged by the spouse releasing the dower rights

(i) apart from the married person with whom the agreement is being made, and

(ii) before a solicitor, barrister, lawyer or attorney-at-law residing in Alberta or residing in any other province, realm and territory, state or country, other than the solicitor or the partner or employee of the solicitor acting for the married person with whom the agreement is made,

(d) shall be signed by the spouse releasing the dower rights in the presence of the person before whom the acknowledgment was made,

(e) may be contained in or form part of a separation or other agreement, and

(f) may be general in character applying to all homesteads of the married person, or may be specific applying only to a described homestead.

(3) A certificate of acknowledgment in the prescribed form shall be signed by the person before whom the acknowledgment was made and shall be endorsed on or attached to the agreement.

RSA 1970 c114 s10

Dispensing with Consent

Application to dispense with consent

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

(a) when the married person and his 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,

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

(2) When the Court is satisfied

(a) that the spouse has not since the marriage lived within Alberta, or

(b) that the whereabouts of the spouse is unknown,

it may dispense with the giving of notice of the application for the order or give any other direction relating to the service of notice which to it appears proper.

(3) When the spouse is a mentally incompetent person or a person of unsound mind, notice of an application to dispense with the consent of the spouse shall be served in the manner provided by the Alberta Rules of Court for the service of statements of claim on such persons.

(4) On the application the Court may hear any evidence and consider any matters that in its opinion relate to the application, and without restricting the generality of the foregoing, it may consider

(a) in the case of a husband and wife who are living apart, the circumstances of the separation and the financial resources of the parties and their mode of life,

(b) in the case of a married person with 2 or more homesteads, the homestead the spouse of the married person would prefer the married person to retain, and

(c) in the case of a spouse who has executed in writing and for valuable consideration an agreement to release the claim of the spouse to dower, whether the other provisions of the agreement have been performed and whether the consideration has been paid.

(5) The Court by order may dispense with the consent of the spouse if in the opinion of the Court it appears fair and reasonable under the circumstances to do so.

(6) The Court may make the order without imposing any conditions or may make the order on any terms and conditions relating to notice, payment into court or otherwise as the Court in the circumstances thinks proper.

(7) On the order being made and filed, together with the disposition, with the Registrar of Land Titles, the Registrar on payment of the proper fees shall register the disposition in the same manner as if the spouse of the married person had consented thereto.

RSA 1970 c114 s11

Remedy of Spouse

Action for damages

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.

(2) The amount of the damages for which the married person is liable to the spouse is a sum equivalent to

(a) 1/2 of the consideration for the disposition made by the married person, 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.

(3) If the married person dies, the action for damages may be commenced, or continued against the executors or administrators of the estate of the deceased married person, but the liability of the executors or administrators in the action is limited to the assets of the estate that are undistributed at the time of the service of the statement of claim on the executors or administrators or any of them.

(4) No action for damages shall be commenced except

(a) within 6 years from the discovery by the spouse of the disposition, and

(b) within 2 years from the death of the married person.

RSA 1970 c114 s12

Registration of copy of judgment

12(1) When a spouse recovers a judgment against the married person pursuant to section 11, the married person on producing proof satisfactory to the Registrar of Land Titles that the judgment has been paid in full may register a certified copy of the judgment in the proper land titles office.

(2) On the registration of the certified copy of the judgment the spouse ceases to have any dower rights in any land registered or to be registered in the name of the married person and the land ceases to be a homestead for the purposes of this Act.

RSA 1970 c114 s13

Payment from General Revenue Fund

13(1) When

(a) a spouse recovers a judgment against the married person pursuant to section 11,

(b) the amount of the judgment is not paid, and

(c) the assets of the judgment debtor that are liable to be sold or applied in satisfaction of the judgment or of the balance owing thereon are insufficient to satisfy the judgment or balance owing on the judgment,

the spouse may apply by way of originating notice to the Court for an order directing payment of the unsatisfied judgment out of the General Revenue Fund.

(2) The originating notice shall be served

(a) on the Registrar of the land registration district in which the homestead disposed of is situated, and

(b) on the Attorney General,

30 days before the date on which the originating notice is returnable.

RSA 1980 cD-38 s13;1994 c31 s5

Evidence required

14 On the hearing of the application, the applicant, unless the Court in its discretion otherwise orders, shall

(a) show that he has obtained a judgment as set out in section 11 and state the amount of it and the amount owing on it at the date of the application,

(b) show that he has issued a writ of execution, and that

(i) the sheriff or bailiff has made a return showing that no goods of the judgment debtor that are liable to be seized in satisfaction of the judgment debt could be found, or

(ii) the amount realized on the sale of goods seized or otherwise realized under the writ was insufficient to satisfy the judgment, stating the amount so realized, and the balance remaining due on the judgment after application on it of the amount realized,

(c) show either

(i) that he has pursuant to the law for that purpose caused the judgment debtor to be examined touching his estate and effects and his property and means, or

(ii) that he is unable to examine the judgment debtor and why he is unable to do so,

(d) show that he has made searches and inquiries to ascertain whether the judgment debtor is possessed of assets, real or personal, that are liable to be sold or applied in satisfaction of the judgment, and

(e) show that by those searches, inquiries and examination

(i) he has learned of no assets, real or personal, possessed by the judgment debtor and liable to be sold or applied in satisfaction of the judgment debt, or

(ii) he has learned of certain assets, which he must describe, owned by the judgment debtor and liable to be seized or applied in satisfaction of the judgment, and has taken all necessary actions and proceedings for the realization of it, and that the amount thereby realized was insufficient to satisfy the judgment, stating the amount so realized and the balance remaining due on the judgment after application of the amount realized.

RSA 1970 c114 s15

Order directing payment from General Revenue Fund

15 If the Court is satisfied

(a) of the truth of the matters shown by the applicant as required by section 14,

(b) that the applicant has taken all reasonable steps to learn what means of satisfying the judgment are possessed by the judgment debtor, and

(c) that there is good reason for the belief that the assets of the judgment debtor that are liable to be sold or applied in satisfaction of the judgment or of the balance owing on it are insufficient to satisfy the judgment or the balance owing on it,

the Court may make an order directing payment of the unsatisfied judgment out of the General Revenue Fund.

RSA 1980 cD-38 s15;1994 c31 s5

Registration of copies of judgment

16(1) The spouse shall register forthwith in the proper land titles office certified copies of the judgment and of the order directing payment of the unsatisfied judgment out of the General Revenue Fund.

(2) On registration of the certified copies of the judgment and order in the proper land titles office, the spouse ceases to have any dower rights in any land registered or to be registered in the name of the married person and the land ceases to be a homestead for the purposes of this Act.

(3) On proof of the registration of the certified copies of the judgment and the order in the proper land titles office, and on receipt of a certified copy of the order, the Provincial Treasurer shall pay the amount so ordered to be paid out of the General Revenue Fund and on paying that amount the Provincial Treasurer is entitled to an assignment of the judgment and is subrogated to all the rights of the spouse who recovered the judgment.

RSA 1980 cD-38 s16;1994 c31 s5

Application of the Land Titles Act

17 The provisions of the *Land Titles Act* relating to recovery from the General Revenue Fund apply to applications for payment out of the Fund pursuant to this Act in so far as those provisions are not varied by the provisions of this Act.

RSA 1980 cD-38 s17;1994 c31 s5

Life Estate to Survivor

Life estate to surviving spouse

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 the spouse of the married person, which is hereby declared to be vested in the surviving spouse.

RSA 1970 c114 s19

Election of homestead by surviving spouse

19(1) The rights of a surviving spouse under section 18 in no case apply to more than one homestead, and if a married person dies owning 2 or more homesteads, the surviving spouse shall in writing, signed by the spouse, elect the homestead in which the life estate is claimed.

(2) The election shall be addressed to the Registrar of the proper land titles office and shall be in the prescribed form.

(3) If a married person dies owning 2 or more homesteads, no homestead belonging to the deceased married person shall be transferred or otherwise disposed of by the executor or administrator of the estate of the deceased married person until the executor or administrator has registered in the proper land titles office the election of the surviving spouse.

(4) If the surviving spouse neglects or refuses to make an election, the executor or administrator may, at the expiration of 3 months after the date of the death of the married person, apply by notice of motion to the Court for an order designating the homestead to which the dower rights of the surviving spouse attach.

(5) The executor or administrator shall register any order made pursuant to subsection (4) with the Registrar of the proper land titles office.

RSA 1970 c114 s20

Effect of registering election, etc.

20 On the registration of

(a) an election, or

(b) an order designating the homestead of a deceased married person,

all other land belonging to the deceased married person and not designated in the election or the order shall be deemed not to be a homestead within the meaning of this Act, and the executor or administrator may transfer or dispose of it without any consent from the surviving spouse.

RSA 1980 cD-38 s20

Execution of consent

21(1) When a disposition of the homestead of a deceased married person is made during the lifetime of the surviving spouse, the spouse shall execute the consent in the prescribed form.

(2) The Registrar of Land Titles before registering a disposition of land that is made by the executor or administrator of the estate of a deceased married person, and that

(a) does not purport to be consented to under this Act by the surviving spouse, and

(b) is not accompanied by an order of the Court dispensing with the consent of the surviving spouse,

(c) repealed 1985 c48 s1,

shall require from the executor or administrator an affidavit in the prescribed form.

RSA 1980 cD-38 s21;1985 c48 s1

Order dispensing with consent

22(1) When at the time of the death of a married person the spouse of the married person is living apart from the married person under circumstances that would disentitle the spouse to alimony, no life estate vests in the spouse and the spouse takes no benefit under this Act.

(2) In the case referred to in subsection (1) or in a case where the deceased person while alive could have made an application for an order dispensing with the consent of the spouse to a disposition, the executor or administrator of the estate of the deceased married person may apply to the Court by notice of motion for an order dispensing with the consent of the surviving spouse to a disposition.

RSA 1980 cD-38 s22

Personal property

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 declared in the *Exemptions Act* to be free from seizure under a writ of

execution in his lifetime and the surviving spouse is entitled to the use and enjoyment of that personal property.

(2) If a dispute arises as to the articles that are included in the personal property referred to in subsection (1), the question shall be submitted by way of notice of motion to the Court which shall summarily decide the question.

RSA 1980 cD-38 *s23*

General

Mines and minerals

24(1) The dower rights given to the spouse of a married person by this Act apply to mines and minerals contained in a homestead, and no married person shall make a disposition of mines and minerals contained in or forming part of a homestead without obtaining in accordance with this Act the consent in writing of the spouse of the married person.

(2) Nothing in this section gives the spouse of a married person a dower interest in mines and minerals contained in any certificate of title registered in the name of the married person other than the certificate of title to the homestead, and no consent or acknowledgment under this Act is required to the disposition of those mines and minerals or any interest in them.

(3) Notwithstanding sections 13 to 16, no order shall be made directing payment out of the General Revenue Fund of any damages awarded to the spouse of a married person by reason of a disposition by the married person of mines and minerals, whether the disposition was of mines and minerals only or of the homestead including mines and minerals.

(4) When pursuant to section 11 a spouse recovers a judgment against a married person in respect of a disposition by the married person of the homestead including mines and minerals and the judgment is not paid, an order made directing payment of the unsatisfied judgment out of the General Revenue Fund shall relate only to that portion of the awarded damages that is based on the value of the surface rights of the homestead excluding the value of the mines and minerals, and shall so relate only to the extent that that portion of the damages remains unpaid.

RSA 1980 cD-38 *s24*;1994 c31 *s5*

Non-application of Act

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.

(2) When a married person and his 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.

RSA 1980 cD-38 *s25*

Married persons

26 This Act applies to all married persons whether or not they have attained the age of 18 years, and for the purposes of this Act and every matter or thing done under or by virtue of its provisions, a married person of whatever age shall be deemed to be an adult.

RSA 1980 cD-38 *s26*

Regulations

27 The Lieutenant Governor in Council may make regulations prescribing forms for the purposes of this Act.

RSA 1980 cD-38 *s27*

APPENDIX B

MATRIMONIAL PROPERTY ACT, R.S.A. 1980, C. M-9

Table of Contents

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "Court" means the Court of Queen's Bench;

(b) "household goods" means personal property

(i) that is owned by one or both spouses, and

(ii) that was ordinarily used or enjoyed by one or both spouses or one or more of the children residing in the matrimonial home, for transportation, household, educational, recreational, social or aesthetic purposes;

(c) "matrimonial home" means property

(i) that is owned or leased by one or both spouses,

(ii) that is or has been occupied by the spouses as their family 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;

(d) "matrimonial property order" means a distribution by the Court under section 7 and an order under section 9;

(e) "spouse" includes a former spouse and a party to a marriage notwithstanding that the marriage is void or voidable.

1978 c22 s1;1978 c51 s38(40)

Knowledge of void marriage

2 Nothing in this Act confers a right on a spouse who at the time of marriage knew or had reason to believe that the marriage was void.

1978 c22 s2

PART 1

MATRIMONIAL PROPERTY

Application by spouse

3(1) A spouse may apply to the Court for a matrimonial property order only if

(a) the habitual residence of both spouses is in Alberta, whether or not the spouses are living together,

(b) the last joint habitual residence of the spouses was in Alberta, or

(c) the spouses have not established a joint habitual residence since the time of marriage but the habitual residence of each of them at the time of marriage was in Alberta.

(2) Notwithstanding subsection (1), if a petition is issued under the *Divorce Act* (Canada) in Alberta, the petitioner or the respondent may apply for a matrimonial property order.

1978 c22 s3

Form of application

4 An application for a matrimonial property order shall be made by statement of claim.

1978 c22 s4

Conditions precedent to application

5(1) A matrimonial property order may only be made

(a) if

(i) a decree nisi of divorce has been granted, or

(ii) a declaration of nullity of marriage has been made

with respect to the marriage,

(b) if one of the spouses has been granted a judgment of judicial separation,

(c) if the Court is satisfied that the spouses have been living separate and apart

(i) for a continuous period of at least one year immediately prior to the commencement of an application, or

(ii) for a period of less than one year immediately prior to the commencement of an application if, in the opinion of the Court, there is no possibility of the reconciliation of the spouses,

(d) if the Court is satisfied that the spouses are living separate and apart at the time the application is commenced and the defendant spouse

(i) has transferred or intends to transfer substantial property to a third party who is not a bona fide purchaser for value, or

(ii) has made or intends to make a substantial gift of property to a third party,

with the intention of defeating a claim to property a spouse may have under this Part, or

(e) if the Court is satisfied that the spouses are living separate and apart and one spouse is dissipating property to the detriment of the other spouse.

(2) Notwithstanding that a matrimonial property order has been made under circumstances to which subsection (1)(b),(c),(d) or (e) applies, the Court may make a further matrimonial property order under circumstances to which subsection (1)(a) applies with respect to the property of the same spouses if there has been a subsequent resumption of cohabitation by the spouses during a period of more than 90 days with reconciliation as its primary purpose.

(3) Spouses may be held to be living separate and apart notwithstanding that they have continued to reside in the same residence or that either spouse has rendered some household service to the other during the period of separation.

(4) For the purposes of subsection (1)(c), the period during which spouses have been living separate and apart shall not be considered to have been interrupted by reason only that there has been a resumption of cohabitation by the spouses during a single period of not more than 90 days with reconciliation as its primary purpose, and that period shall not be included in computing the period during which the spouses are living separate and apart.

1978 c22 s5;1979 c3 s3(2)

Time for application

6(1) An application for a matrimonial property order to which section 5(1)(a) or (b) applies

(a) may, notwithstanding subsection (2), be commenced at or after the date proceedings are commenced for a decree of divorce, a declaration of nullity or judgment of judicial separation, but

(b) may be commenced not later than 2 years after the date of the decree nisi, declaration or judgment.

(2) An application for a matrimonial property order to which section 5(1)(c) or (e) applies may be commenced within 2 years after the date the spouses separated.

(3) An application for a matrimonial property order to which section 5(1)(d) applies may be commenced within

(a) 2 years after the date the spouses separated, or

(b) one year after the date the property is transferred or given,

whichever occurs first.

(4) Any single period of not more than 90 days during which the spouses resumed cohabitation with reconciliation as its primary purpose shall not be included in computing the 2-year period under subsection (2) or (3).

1978 c22 s6

Distribution of property

7(1) The Court may, in accordance with this section, make a distribution between the spouses of all the property owned by both spouses and by each of them.

(2) If the property is

(a) property acquired by a spouse by gift from a third party,

(b) property acquired by a spouse by inheritance,

(c) property acquired by a spouse before the marriage,

(d) an award or settlement for damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses, or

(e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses,

the market value of that property

(f) at the time of marriage, or

(g) on the date on which the property was acquired by the spouse,

whichever is later, is exempted from a distribution under this section.

(3) The Court shall, after taking the matters in section 8 into consideration, distribute the following in a manner that it considers just and equitable:

(a) the difference between the exempted value of property described in subsection (2) (in this subsection referred to as the "original property") and the market value at the time of the trial of the original property or property acquired

(i) as a result of an exchange for the original property, or

(ii) from the proceeds, whether direct or indirect, of a disposition of the original property;

(b) property acquired by a spouse with income received during the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);

(c) property acquired by a spouse after a decree nisi of divorce, a declaration of nullity of marriage or a judgment of judicial separation is made in respect of the spouses;

(d) property acquired by a spouse by gift from the other spouse.

(4) If the property being distributed is property acquired by a spouse during the marriage and is not property referred to in subsections (2) and (3), the Court shall distribute that

property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8.

1978 c22 s7

Matters to be considered

8 The matters to be taken into consideration in making a distribution under section 7 are the following:

(a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

(b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;

(c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;

(d) the income, earning capacity, liabilities, obligations, property and other financial resources

(i) that each spouse had at the time of marriage, and

(ii) that each spouse has at the time of the trial;

(e) the duration of the marriage;

(f) whether the property was acquired when the spouses were living separate and apart;

(g) the terms of an oral or written agreement between the spouses;

(h) that a spouse has made

(i) a substantial gift of property to a third party, or

(ii) a transfer of property to a third party other than a bona fide purchaser for value;

(i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;

(j) a prior order made by a court;

(k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;

(l) that a spouse has dissipated property to the detriment of the other spouse;

(m) any fact or circumstance that is relevant.

1978 c22 s8

Power of the Court

9(1) If part of the property of the spouses is situated in Alberta and part elsewhere, the Court may distribute the property situated in Alberta in such a way as to give effect to the distribution under section 7 of all the property wherever it is situated.

(2) The Court, in order to effect a distribution under section 7, may do any one or more of the following:

(a) order a spouse to pay money or transfer an interest in property to the other spouse;

(b) order that property be sold and that the proceeds be divided between the spouses as the Court directs;

(c) by order declare that a spouse has an interest in property notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property.

(3) To give effect to an order under this section the Court may do any one or more of the following:

(a) order a spouse to pay money over a period of time with or without interest;

(b) order a spouse to give security for all or part of any payment;

(c) charge property with all or part of a payment to be made under the order and provide for the enforcement of that charge;

(d) prescribe the terms and conditions of a sale ordered under subsection (2);

(e) require a spouse, as a condition of an order, to surrender all claims to property in the name of the other spouse;

(f) require a spouse, as a condition of an order, to execute a release of dower rights under the *Dower Act* with respect to all or any property owned by the other spouse or transferred to the other spouse;

(g) impose a trust in favour of a spouse with respect to an interest in property;

(h) vary the terms of an order made under subsection (2) in accordance with this subsection;

(i) if property is owned by spouses as joint tenants, sever the joint tenancy;

(j) make any other order that in the opinion of the Court is necessary.

1978 c22 *s*9

Return of gift or property when insufficient consideration

10(1) When an application has been made for a matrimonial property order and the Court is satisfied that

(a) a spouse has

(i) transferred property to a person who is not a bona fide purchaser for value, or

(ii) made a substantial gift of property,

(b) the spouse making the transfer or gift did so with the intention of defeating a claim that the other spouse may have under this Part,

(c) the transferee or donee accepted the transfer or gift when he knew or ought to have known that the transfer or gift was made with the intention of defeating a claim a spouse may have under this Part, and

(d) the transfer or gift was made not more than one year before the date on which either spouse commenced the application for the matrimonial property order,

the Court may do any one or more of the following:

(e) order the transferee or donee to pay or transfer all or part of the property to a spouse;

(f) give judgment in favour of a spouse against the transferee or donee for a sum not exceeding the amount by which the share of that spouse under the matrimonial property order is reduced as a result of the transfer or gift;

(g) consider the property transferred or the gift made to be part of the share of the spouse who transferred the property or made the gift, when the Court makes a matrimonial property order.

(2) For the purposes of this section, the value of the property transferred or the gift shall be the market value at the time of the trial.

(3) If a spouse applies for an order under subsection (1), the applicant shall serve the transferee or donee with notice of the application and shall include the allegations made and the nature of the claim of the applicant as it affects the transferee or donee.

(4) A transferee or donee who is served with notice under this section shall be deemed to be a party to the application for the matrimonial property order as a defendant with respect to any allegation or claim that affects the transferee or donee.

1978 c22 s10

Application by spouse of deceased

11(1) Subject to this section, an application for a matrimonial property order may be made or continued by the surviving spouse after the death of the other spouse.

(2) A matrimonial property order may be made on the application of a surviving spouse only if an application for a matrimonial property order could have been commenced immediately before the death of the other spouse.

(3) When a matrimonial property order is made in favour of a surviving spouse, the Court, in addition to the matters in section 8, shall take into consideration any benefit received by the surviving spouse as a result of the death of the deceased spouse.

(4) An application by a surviving spouse for a matrimonial property order may not be commenced more than 6 months after the date of issue of a grant of probate or administration of the estate of the deceased spouse.

1978 c22 s11

Suspension of administration of deceased's estate

12 The Court may make an order suspending in whole or in part the administration of the estate of the deceased spouse until an application for a matrimonial property order has been determined.

1978 c22 s12

Consent to distribution of estate

13(1) Until the expiration of 6 months from the date of issue of the grant of probate or administration of the estate of a deceased spouse, the executor, administrator or trustee shall not distribute any portion of the estate to a beneficiary without the consent of the living spouse or an order of the Court.

(2) If

(a) an executor, administrator or trustee distributes a portion of the estate contrary to subsection (1), and

(b) the Court makes a matrimonial property order with respect to property in the estate of the deceased spouse,

the executor, administrator or trustee is personally liable to the living spouse for a loss to that spouse as a result of the distribution.

1978 c22 s13

Distribution in accordance with Court order

14(1) If an application for a matrimonial property order is made or continued by a spouse, the executor, administrator or trustee of the deceased spouse shall hold the estate subject to any matrimonial property order that may be made, and the executor, administrator or trustee shall not proceed with the distribution of the estate other than in accordance with the matrimonial property order.

(2) If an executor, administrator or trustee distributes a portion of the estate contrary to subsection (1), the executor, administrator or trustee is personally liable to the living spouse for any loss to that spouse as a result of the distribution.

1978 c22 s14

Property deemed never part of estate

15 Money paid to a living spouse or property transferred to a living spouse under a matrimonial property order shall be deemed never to have been part of the estate of the deceased spouse with respect to a claim against the estate

(a) by a beneficiary under a will,

(b) by a beneficiary under the *Intestate Succession Act*, or

(c) by a dependant under the *Family Relief Act*.

1978 c22 s15

Actions continued by estate

16 Where a person dies after commencing an action under this Part,

(a) the action may be continued by the estate of the deceased person, and

(b) the rights conferred on that person under this Part prior to that person's death survive that person's death for the benefit of that person's estate.

RSA 1980 cM-9 s16;1991 c21 s24

Question re other matrimonial cause

17(1) If a question respecting property arises between spouses in any other matrimonial cause, the Court may decide the question as if it had been raised in proceedings under this Part.

(2) If in an application under this Part it appears to the Court that it is necessary or desirable to have other matters determined first or at the same time, the Court may direct that the application be adjourned until those matters are determined or brought before the Court.

1978 c22 s17

Effect on Family Relief Act

18(1) Nothing in this Act affects the right of a surviving spouse to make an application under the *Family Relief Act*.

(2) An application by a surviving spouse under the *Family Relief Act* may be joined with an application under this Part.

1978 c22 s18

PART 2

MATRIMONIAL HOME POSSESSION

Grant of exclusive possession of home

19(1) The Court, on application by a spouse, may by order do any one or more of the following:

(a) direct that a spouse be given exclusive possession of the matrimonial home;

(b) direct that a spouse be evicted from the matrimonial home;

(c) restrain a spouse from entering or attending at or near the matrimonial home.

(2) In addition to making an order under subsection (1) the Court may, by order, give a spouse possession of as much of the property surrounding the matrimonial home as is necessary, in the opinion of the Court, for the use and enjoyment of the matrimonial home.

(3) An order under this section may be made subject to any conditions and for any time that the Court considers necessary.

(4) An order under this section may be varied by the Court on application by a spouse.

(5) An order under this section does not create a subdivision within the meaning of the *Planning Act*.

1978 c22 s19;1979 c3 s3(3)

Matters to be considered

20 In exercising its powers under this Part, the Court shall have regard to

(a) the availability of other accommodation within the means of both the spouses,

(b) the needs of any children residing in the matrimonial home,

(c) the financial position of each of the spouses, and

(d) any order made by a court with respect to the property or the maintenance of one or both of the spouses.

1978 c22 s20

Precedence of order

21 An order made under this Part takes effect notwithstanding an order under Part 1 or a subsequent order for the partition and sale of the matrimonial home.

1978 c22 s21

Registration of order for possession

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

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

(b) is leased by one or both of the spouses 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,

the order may be registered with the Registrar of Land Titles for the land registration district in which the property is situated.

(2) An order registered under this section binds the estate or interest of every description that the spouse or spouses have in the property to the extent stipulated in the order.

(3) A spouse against whose estate or interest an order is registered under this section may only dispose of or encumber his estate or interest with the consent in writing of the spouse in possession or under an order of the Court.

RSA 1980 cM-9 s22

Registration of financing statement re mobile home

23 If the Court makes an order under section 19 and the matrimonial home is a mobile home owned or leased by one or both spouses, a financing statement may be registered in the Personal Property Registry under the *Personal Property Security Act.*

RSA 1980 cM-9 s23;1983 cC-7.1 s25;1988 cP-4.05 s89

Spouse as tenant

24 If a matrimonial home is leased by one or both spouses under an oral or written lease and the Court makes an order giving possession of the matrimonial home to one spouse, that spouse shall be deemed to be the tenant for the purposes of the lease.

RSA 1980 cM-9 s24

Exclusive use of household goods

25(1) The Court, on application by a spouse, may by order direct that a spouse be given the exclusive use and enjoyment of any or all of the household goods.

(2) An order under subsection (1) may be made subject to any conditions and for any time that the Court considers necessary.

(3) An order made under this section may be varied by the Court on application by a spouse.

RSA 1980 cM-9 s25

Registration of financing statement re household goods

26 If the Court makes an order with respect to household goods under section 25, a financing statement may be registered in the Personal Property Registry under the *Personal Property Security Act.*

RSA 1980 cM-9 s26;1983 cC-7.1 s25;1988 cP-4.05 s89

Effect of registration

27(1) If an order is registered under section 23 or 26, the order

(a) is notice of the interests of the spouses in the property described in the order during the time that the registration is effective, and

(b) takes effect, as against subsequent creditors, purchasers and mortgagees only from the date of registration of the financing statement.

(2) A spouse against whose interest in property an order is registered under section 23 or 26 may only dispose of or encumber that interest with the consent in writing of the spouse in possession or under an order of the Court.

RSA 1980 cM-9 s27;1988 cP-4.05 s88

Rights additional to rights under Dower Act

28(1) The rights under this Part are in addition to and not in substitution for or derogation of the rights of a spouse under the *Dower Act.*

(2) If a spouse is in possession of a matrimonial home and a life estate in the matrimonial home vests in that spouse pursuant to the *Dower Act,* the registration of an order under this Part may be cancelled by the Registrar of Land Titles on application by that spouse.

RSA 1980 cM-9 s28

Cancellation of registration of order

29(1) The person against whose property an order is registered under section 22 may apply to the Court for an order directing the Registrar of Land Titles to cancel the registration.

(2) The person against whose property an order is registered under section 23 or 26 may apply to the Court for an order cancelling the registration.

(3) The Court may make an order under this section on any conditions the Court considers necessary.

RSA 1980 cM-9 s29

Methods of making application

30(1) An application under this Part

(a) may be made by originating notice,

(b) may be joined with, or heard at the same time as, a matrimonial cause between the spouses, or

(c) may be made as an application in an action or proceeding between the spouses under the *Domestic Relations Act* or Part 1 of this Act.

(2) An order may be made under this Part on an ex parte application if the Court is satisfied that there is a danger of injury to the applicant spouse or a child residing in the matrimonial home as a result of the conduct of the respondent spouse.

(3) If an application is made ex parte, the Court may dispense with service of notice of the application or direct that the originating notice be served at a time and in a manner that it sees fit.

1978 c22 s30

PART 3

GENERAL

Disclosure of property by spouses

31(1) If an application has been commenced under Part 1, each spouse shall file with the Court and serve on the other spouse a statement, verified by oath, disclosing particulars of all the property of that spouse, whether it is situated in Alberta or elsewhere.

(2) A statement made under subsection (1) shall include particulars of property disposed of by that spouse within one year before the application was commenced.

(3) A statement made under subsection (1) shall

(a) be in the form, and

(b) contain the information,

prescribed by the regulations.

1978 c22 s31

Regulations

32 The Lieutenant Governor in Council may make regulations

(a) as to the procedure to be followed and the forms to be used under this Act;

(b) prescribing the time within which documents are to be filed and served under this Act;

(c) prescribing the information to be contained in a statement made under section 31.

1978 c22 s32

Disposition prohibited during proceedings

33(1) If proceedings have been commenced under this Act, a spouse who knows or has reason to believe that the proceedings have been commenced shall not

(a) dispose of or encumber any household goods, or

(b) except in an emergency, remove from the matrimonial home any household goods that are household appliances or household effects or that form part of the household furnishings of that matrimonial home,

without an order of the Court or the consent of the other spouse.

(2) A person who contravenes subsection (1) is guilty of an offence and liable to a fine of not more than $1000.

1978 c22 s33;1979 c3 s3(4)

Prevention of gift or sale

34(1) If the Court is satisfied that a spouse intends to transfer property to a person who is not a bona fide purchaser for value or to make a substantial gift of property that may defeat a claim of the other spouse under this Act, the Court may, by order, restrain the making of the transfer or gift.

(2) An application for an order under subsection (1) may be made while the spouses are cohabiting.

(3) An application for an order under subsection (1) may be made as an application in proceedings commenced under this Act or by originating notice.

(4) An application for an order under subsection (1) may be made ex parte.

(5) If an application is made ex parte the Court may dispense with service of notice of the application or direct that the originating notice be served at a time and in a manner that it sees fit.

1978 c22 s34

Filing certificate of lis pendens

35(1) A spouse who commences proceedings under this Act may file a certificate of lis pendens with the Registrar of Land Titles for the land registration district in which land in which the other spouse has an interest is situated.

(2) If the description of the land is known, the Registrar of Land Titles shall make a memorandum of the certificate of lis pendens on the certificate of title for that land.

(3) If a certificate of lis pendens is filed under this section, the Registrar of Land Titles shall not register an instrument purporting to affect land in respect of which the certificate of lis pendens is filed unless the instrument is expressed to be subject to the claim of the spouse who filed the certificate of lis pendens.

1978 c22 s35

Presumption of advancement

36(1) In making a decision under this Act, the Court shall not apply the doctrine of presumption of advancement to a transaction between the spouses in respect of property acquired by one or both spouses before or after the marriage.

(2) Notwithstanding subsection (1),

(a) the fact that property is placed or taken in the name of both spouses as joint owners is prima facie proof that a joint ownership of the beneficial interest in the property is intended, and

(b) money that is deposited with a financial institution in the name of both spouses shall be deemed to be in the name of the spouses as joint owners for the purposes of clause (a).

1978 c22 s36

Agreements between spouses

37(1) Part 1 does not apply to property that is owned by either or both spouses or that may be acquired by either or both of them, if, in respect of that property, the spouses have entered into a subsisting written agreement with each other that is enforceable under section 38 and that provides for the status, ownership and division of that property.

(2) An agreement under subsection (1) may be entered into by 2 persons in contemplation of their marriage to each other but is unenforceable until after the marriage.

(3) An agreement under subsection (1)

(a) may provide for the distribution of property between the spouses at any time including, but not limited to, the time of separation of the spouses or the dissolution of the marriage, and

(b) may apply to property owned by both spouses and by each of them at or after the time the agreement is made.

(4) An agreement under subsection (1) is unenforceable by a spouse if that spouse, at the time the agreement was made, knew or had reason to believe that the marriage was void.

1978 c22 s37;1979 c3 s3(5)

Formal requirements for agreement

38(1) An agreement referred to in section 37 is enforceable if

(a) each spouse, or

(b) each person, in the case of persons referred to in section 37(2),

has acknowledged, in writing, apart from the other spouse or person

(c) that he is aware of the nature and the effect of the agreement,

(d) that he is aware of the possible future claims to property he may have under this Act and that he intends to give up these claims to the extent necessary to give effect to the agreement, and

(e) that he is executing the agreement freely and voluntarily without any compulsion on the part of the other spouse or person.

(2) The acknowledgement referred to in subsection (1) shall be made before a lawyer other than the lawyer acting for the other spouse or person or before whom the acknowledgement is made by the other spouse or person.

1978 c22 s38;1979 c3 s3(6)