

## DEATH & DOWER:

### How Dower and a Family Maintenance and Support Claim Interact

#### Introduction

Dower legislation in Alberta has a nearly century-long history. The first *Dower Act* came into being in 1917. Although the Act has gone through a number of amendments, it has essentially remained the same since 1948.

English common law has long recognized the social good of ensuring a widow had a life estate in her dead husband's homestead. Similarly, a widower's interest in the lands of his dead wife had an estate by the curtesy of England. When Alberta received English law in 1870, both of these life estates came over to Alberta.<sup>1</sup> However, both common law life estates have now been replaced by the *Dower Act* (the Act). The Alberta Act is far more similar to American homestead legislation than English Dower.<sup>2</sup>

In Alberta, the Act only applies to married couples and then only where one party to the marriage owns the homestead. I note that the Act is gender neutral in that it uses the term 'spouse' and not a gendered noun (wife, husband) of one of the parties to a marriage. This means it applies to either spouse. The Act is also not heteronormative. The use of 'spouse' applies to same sex marriages as well as opposite sex marriages. So long as the parties are married, the non-owning spouse has dower rights.

The Act gives five main rights to a spouse:

- prevents disposition of a homestead without the consent of the non-owning spouse;
- a right to damages should a disposition occur without consent;
- a claim from the General Revenue Fund where damages are unpaid;

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<sup>1</sup> For an in depth history of common law dower and curtesy, please see ALRI Report for Discussion #14 *The Matrimonial Home* March 1995.

<sup>2</sup> Wilbur F. Bowker, *Reform of the Law of Dower in Alberta* 1960 1 Alta Law. Rev. 501.

- a life estate on the death of the owning spouse; and
- a life estate in the personal property of the deceased owning spouse.

It is the life estate rights that this paper is concerned with.

### **Dower Life Estate**

The dower life estate vests in the surviving spouse upon the death of the owning spouse. The dower life estate passes outside of the will much like life insurance or an investment account with a beneficiary designation. The dower life estate can only attach to the homestead - the definition of which is contained in the Act and has been the subject of some case law.<sup>3</sup> However, the life estate in the deceased's personal property applies to all of the deceased's personal property.<sup>4</sup> The dower life estate is an asset of the surviving spouse.

In its essence, the dower life estate entitles the surviving spouse to remain in the homestead and have full use of it. It is not a fee simple estate as the remaindermen hold the ultimate interest in the property and the dowered spouse cannot unilaterally dispose of the fee simple in the homestead either while alive, or through a testamentary disposition. However, the dowered spouse is entitled to remain in the homestead or rent it out. The dowered spouse must pay all of the carrying costs of the homestead including capital maintenance. No conditions can be placed on a dower life estate such as those that are regularly placed on a life estate gifted in a will.<sup>5</sup>

The court, under s. 10(5) of the Act, can dispense with the consent of the dowered spouse if the court considers it fair and reasonable under the circumstances. The personal

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<sup>3</sup> *Melnychuk v Bassingthwaighe* [1990] A.J. No. 852; *Baker v Piccinin* 2006 ABQB 174.

<sup>4</sup> s.23 *Dower Act*.

<sup>5</sup> Such as the life estate expiring on the remarriage of the surviving spouse. See s.18 of the *Dower Act*: "postponed to an estate for **the life of** the spouse" [emphasis added].

representative may apply to the court for such dispensation under s. 22. However, the court cannot compel the sale of the homestead through partition and sale.<sup>6</sup> When the courts dispense with the dower consent, the dowered spouse is compensated for her dower life estate.<sup>7</sup> A surviving spouse cannot be paid for her dower life estate and also remain in the homestead enjoying it.<sup>8</sup> A surviving spouse must decide whether to enjoy the dower right, or be paid its value in exchange for the disposition of the homestead.

The dower life estate is a vested asset with considerable value. But how is the dower life estate valued? How does a dower life estate affect a claim for family maintenance and support (*FMS*) under Part 5 of the *Wills and Succession Act (WSA)*?

### **Valuing the Dower Life Estate**

There is little case law that deals with valuing the dower life estate. Most cases cite there being no judicial guidance on how to value the dower life estate.

The Supreme Court of Canada made it clear in the case *Re Morice Estate v Davidson et al.*<sup>9</sup> that the value of the life estate must be ascertained on the basis of the value of the property (being the combined value of the life estate and the remainder) and with reference to an actuary. The SCC declined to determine the value of the life estate as they had inadequate information.

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<sup>6</sup> *Ibid* 3 at page 7.

<sup>7</sup> *Kosic v Kosic*, 2002 ABQB 325. But in *Cartwright v Havens Estate*, 2010 ABQB 91, the dowered spouse was not compensated for his dower life estate as the court found that the marriage triggering the dower life estate was entered into for the sole purpose of the surviving spouse receiving the deceased's CPP pension upon her death and that the homestead was always contemplated to go to the deceased's children.

<sup>8</sup> *Estate of Johnson, Rick Allen (Re)*, 2017 ABQB 399 at para 24: "... the life interest in the *Dower Act* does not confer the right to capitalize that interest... This coupled with an entitlement to remain in the house would mean, in effect, she would benefit twice from the life estate."

<sup>9</sup> (1943 CanLii 56(SCC)).

One case, *Stojkovich Estate (Re)*<sup>10</sup> does address the formula used by an actuary to value the life interest. The actuary indicated that

The computation of the life estate is derived by determining the capitalized value of the total annual income from the property over the life expectancy of the income beneficiary.

The annual income from the property is the interest on the value of the property at the end of each year.<sup>11</sup>

Using the 1995-97 Canadian Life Tables to determine that the widow's life expectancy was 50.33 years, the actuary then employed an annual interest rate of 5% (based on the average yield on long term Government of Canada bonds). The actuary multiplied the value of the homestead by the 5% interest rate multiplied by 17.814592.

It is not clear what the 17.814592 number is. It may possibly be the remaining years of life expectancy of the widow. Because this number was determined by the court to be arbitrary, the valuation was deemed to be unacceptable. The court goes on to note that "no satisfactory evidence or case law has been presented to me to establish how the evaluation of the dower interest... should be determined."<sup>12</sup>

Similarly, in *Estate of Johnson*<sup>13</sup>, an actuarial report was used to capitalize the dower interest. This case focussed on an intestate estate and whether the capitalizing of the dower life estate would reduce the value of the residue and therefore the surviving spouse was entitled to the entire residue as it would have been less than \$150,000. The actuarial report was not accepted as it failed to take into account the individual circumstances of the surviving spouse.

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<sup>10</sup> 2006 ABQB 467.

<sup>11</sup> *Ibid.* Para 7.

<sup>12</sup> *Ibid.* Para 21.

<sup>13</sup> 2017 ABQB 399.

The Act does have a formula to determine damages of a disposition of a homestead without consent in section 11. The non-owning spouse is entitled to a sum equivalent to ½ of the consideration paid if the consideration is substantially equivalent to that of the transferred property. If the consideration paid is not substantially equivalent, then the non-owning spouse is entitled to ½ the value of the property at date of disposition. However, if the owning spouse dies, the non-owning spouse is only able to claim damages on the undistributed assets in the estate at the time of service of the claim. But damages are quite different than the value of a life estate.

The Court of Appeal in *Joncas v Joncas*<sup>14</sup> writes that there is no discretion under the Act to calculate damages or to value dower rights. The court then goes on to say that damages can only be calculated in accordance with section 11 of the Act. However this case is only about damages owed to the dowered spouse when the homestead is disposed of without her consent. This case only considers what damages the dowered spouse has suffered and the corresponding monetary remedy. It does not consider the value of a dower life estate in the context of a FMS claim.

The courts haven't provided guidance about valuing a dower life estate for the purposes of a FMS claim but there is clearly a value to the surviving spouse's dower life estate and it must be considered in a FMS claim. There are two possible ways to value a life estate.

#### *Monthly Rental Valuation*

A life estate is the right to live in the homestead of the deceased. What then would the cost be for the surviving spouse to live in a similar home? That is, what would it cost the surviving spouse in rent to live in the homestead? Once the fair market value of renting a comparable home is determined, one then needs to figure out how long the surviving spouse is likely to live. As done in *Stojkovich*, life expectancy is the easiest way to determine how long a person will live. Based on life expectancy tables, take the remaining

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<sup>14</sup> 2017 ABCA 50 at para 22.

years of the surviving spouse and determine how many months the surviving spouse would have to pay rent for.<sup>15</sup> Multiply the rent by the number of months, add in a present value calculation, and you have the value of the dower life estate. The formula looks like this:

$$\text{monthly fmv rent} \times \text{months of life expectancy} = \text{rental costs}$$

$$\text{rental costs put through a present value calculation} = \text{value of the life estate}^{16}$$

### *Future Discounted Valuation*

If the surviving spouse were to be able to earn on the value of their life estate, how much could they earn if it was invested? This calculation takes into consideration the value of the homestead and what a reasonable rate of annual return would be on the value of the homestead. This is also based on life expectancy tables and determines how many more years the surviving spouse is likely to live. As this provides a future value, it needs to be discounted down to a present value. The formula looks like this:

$$\text{value of house} \times \text{reasonable rate of return} = \text{annual return}$$

$$\text{annual return} \times \text{life expectancy} = \text{future value}$$

future value put through a discounted present value calculation = value of the life estate.

Once you have the value of the life estate, you can work it into your calculations for the purposes of family maintenance and support.

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<sup>15</sup> Some members of the Edmonton Estates Bar use actuaries with great frequency. It does not appear that the courts have accepted these actuarial reports when it comes to valuing dower. The court has also made clear that expert reports that do not reflect reality are of no use - *Woods v McKenna* 2015 ABQB 37.

<sup>16</sup> Note: this formula does not take into account the likelihood that a surviving spouse will, at some point, not be able to remain in the homestead due to health and medical needs but could rent out the homestead.

## Dower in FMS Applications

A dower life estate is an asset that vests in the surviving spouse at the death of the other spouse. It is not an asset of the estate. This means the asset is on the surviving spouse's side of the ledger.<sup>17</sup>

### *Dower as a legal obligation under Tataryn*

The first part of the *Tataryn* test is the legal obligations the deceased owed to his surviving spouse. The legal obligations are made up of matrimonial property sharing, support obligations, and dower.

ALRI's final report on the Division of Matrimonial Property on Death argues that the dower life estate "... should coexist with the right to seek division of matrimonial property, but the dower life estate should be treated as property of the surviving spouse for the purposes of the matrimonial property action."<sup>18</sup> The final report then goes on to say that the "... fact that the surviving spouse receives the dower life estate should be no reason to deviate from equal division of matrimonial property."<sup>19</sup>

Section 11(3) of the *Matrimonial Property Act (MPA)* requires the court, when making a matrimonial property order, to take into consideration any benefit received by the surviving spouse as a result of the deceased's death. Section 93(g)(ii) of the *WSA* requires the court to consider any property or benefit that a family member is entitled to receive by reason of the deceased's death when making a family maintenance and support order.

The SCC in *Morice Estate* makes it clear that the homestead is made up of two estates - the life estate and the remainder of the fee simple estate.

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<sup>17</sup> ALRI's *The Matrimonial Home* pg 43.

<sup>18</sup> ALRI Final Report *Division of Matrimonial Property on Death* May 2000, page 114.

<sup>19</sup> *Ibid*, page 115.

The dower life estate is a benefit the surviving spouse receives as a result of the deceased's death. ALRI, the *MPA*, the *WSA*, and the *SCC* all seem to point to the value of the dower life estate being put on the surviving spouse's side of the ledger when performing the math to determine both matrimonial property sharing and a FMS claim. However, there is no guidance as to what value to place on the homestead itself when doing the calculations.

It is common practice in the estate bar to put the full value of the homestead in the deceased's NC7 inventory for a grant application. Does this value transfer over to the *MPA*/*FMS* calculations? Should the value of the homestead be reduced by the amount of the dower life estate? Or, is it unlikely the value of the homestead will be greatly affected by the passage of the dower life estate and the remaindermen will receive the property with a similar value as it was at date of death? When doing a matrimonial property calculation, is the dower life estate set off against the value of the homestead? What value is put in the deceased's column for the calculations?

Case law does not provide guidance regarding the valuation of the homestead and whether it should be reduced in the face of a dower life estate.<sup>20</sup> The case law largely ignores asset values. However, the case law does not reduce the value of the homestead when making *FMS* decisions.

### *Dower & FMS*

Dower is clearly a piece of the *FMS* considerations. Not only does s.93 of the *WSA* require the court to take it into consideration, it also hamstring what assets can be used to satisfy a *FMS* claim if the surviving spouse intends to enjoy his dower right and live in the homestead.

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<sup>20</sup> The *Johnson* case is an intestacy where the surviving spouse did not claim *FMS*. However it was determined that the capitalization of the dower right while still enjoying the dower right could not occur.



When it is only the surviving spouse making an FMS claim, consideration of dower is simplified. The case law consistently makes a note that the surviving spouse has a dower right to remain in the homestead.<sup>21</sup> The case law also comments on the dower life estate being an asset of the surviving spouse and that this must be taken into consideration.<sup>22</sup> However none of the case law comments on what exactly the value of the dower life estate is when the court does its calculations.

The trend appears to be that, when a surviving spouse remains in the homestead pursuant to a dower life estate but does not have enough cash assets to support the life estate, the courts will turn the dower life estate into a fee simple estate. As Justice Wilson wrote in *Argue*,

... the Dower interest cannot be given value enough to overcome the need for further assistance from the Testator's estate. The Dower interest has a certain value, but the dependant does not have the means to enjoy it, unless he is to be given assistance from the estate.<sup>23</sup>

Likewise, Justice Rowbotham (as she was then) decided that where the homestead

... is the only significant asset of the estate, Mr. Stadler's share of the estate under intestacy is effectively of little value to him. Given this difficulty, I conclude that Richard Stadler is not adequately provided for under the Intestate Succession Act.<sup>24</sup>

The courts have recognized that the dower life estate is not liquid and may not be enough for the proper maintenance and support of the surviving spouse. Further, the courts seem willing to ensure that the surviving spouse is given enough of the estate to pay for the maintenance of their dower life estate.

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<sup>21</sup> *Broen Estate (Re)* 2002 ABQB 806; *Gow v Gow Estate* 1998 ABQB 1073.

<sup>22</sup> *Argue v Ebeling-Argue Estate* 2008 ABQB 299.

<sup>23</sup> *Ibid.*, para 45.

<sup>24</sup> *Stadler v MacDonald* 2001 ABQB 406, para 8. In this estate, the net value of the estate was \$166,000 - \$165,000 of it being the homestead.

The courts have not determined a formula by which to value a dower life estate. However, there has rarely been a case where the courts have commented on needing a specific value. Instead, the courts have looked to the surviving spouse's ability to maintain the dower life estate and used the moral part of *Tataryn* to award the surviving spouse more of the estate in order for the surviving spouse to enjoy, and pay for, their dower life estate.

### *Dower and competing FMS claims*

What happens when a dowered spouse is subject to an FMS claim from a dependant child? Does dower trump FMS? Section 2 of the *WSA* provides that where a provision of Part 2 or 3 of the *WSA* conflicts with the *Dower Act*, the *Dower Act* prevails. But the *WSA* is silent on which Act prevails when there is a conflict with Part 5 of the *WSA* which provides for FMS claims. Dower trumps disposition of the homestead by will or by intestacy; does it also constrain the courts from rearranging the assets of the estate to satisfy FMS claims?

There is little case law regarding a dowered spouse and a dependent child's FMS claim. In the one reported case - *J.O.K. v Nelson*<sup>25</sup>, the dowered spouse was given a life estate in the will while the dependent adult child was a remainderman of one half of the homestead. The will further contemplated that the beneficiaries might agree to sell the homestead and "... subject to suitable remuneration being paid to my husband in respect of his life estate interest" the proceeds were to be divided into two equal shares.<sup>26</sup> During oral argument, the dowered spouse indicated he was willing to relinquish his right to remain in the homestead. The house was ordered sold: the original purchase price was determined to be exempt and given to the dependent child; the remaining surplus was equally divided between the dowered spouse and the dependent child. The dependent child was given the residue of the estate for her proper maintenance and support.

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<sup>25</sup> 2013 ABQB 15. This case was governed by the *Dependant Relief Act (DRA)* as the death predated the *WSA*.

<sup>26</sup> *Ibid.* Para 67.

While *JOK v Nelson* was resolved by the dowered spouse relinquishing his right to remain in the homestead, Justice Lee does make some comments regarding dower's ability to trump FMS. At para 51:

I am of the opinion that this dower right, as an entitlement of a surviving spouse which this Court cannot override, takes precedence over the Represented Adult's dependent relief claim pursuant to the *DRA*, which is governed by the Court's discretionary jurisdiction. That said, the Court retains the authority to make an order conditional upon a spouse relinquishing dower rights and interest if necessary, to make adequate provision out of a deceased's estate for the proper maintenance and support of a dependent.

To parse this out, Justice Lee says dower does trump DRA/FMS but that the court can make an order conditional on relinquishing dower rights - this is consistent with s. 10(5) of the Act. Although Justice Lee did not dispense with the dowered spouse's consent (as it had been given in oral argument), he did consider that the dowered spouse needed to be compensated for the dower life estate.

How Justice Lee determined the 'suitable remuneration' in respect of the husband's dower life estate, has no rationale. While the will proposed the splitting of the proceeds, that was after the suitable remuneration for the dower interest was paid. Justice Lee does not consider how to value a dower life estate.

This case does not illustrate how dower would interplay with competing FMS claims from a spouse that cannot support himself and also from a dependent child. In *JOK* the husband had enough assets outside the dower life estate to support himself. The dependent child was the only family member making a claim for more of the estate than she received under the will. What would happen if the spouse was unable to support himself and there was a dependant child that also needed more from the estate? Would the surviving spouse's dower right eliminate the homestead from the assets available to be rearranged to satisfy the claims? How is the surviving spouse's highest moral claim and vested right balanced against a dependant child's needs?

## **Conclusion**

The dower life estate is an asset of considerable value. The surviving spouse can enjoy her dower life estate and maintain her homestead as before the death of the owning spouse. Or, she can be paid out the value of her life estate and move on from the homestead. Regardless, the dower life estate must be taken into account for a FMS claim.

It is clear that the interplay of legislation in a FMS claim requires the dower life estate to be considered on the surviving spouse's side of the ledger when doing both a matrimonial property and a family maintenance and support calculation. It is also clear that the courts are willing to turn a dower life estate into a fee simple to satisfy a surviving spouse's FMS claim. What is not clear is how the dower life estate should be valued for the necessary calculations. It is also not clear how the dower life estate fully interplays where an FMS claim is brought not only by the surviving spouse but also by a dependant child.

While I have suggested two possible formulas for determining the value of the dower life estate, I have not answered the other questions posed regarding two competing claims for FMS. As FMS cases are so fact-specific, it would be difficult to come up with a generalized approach. The highest moral claim of the surviving spouse and the vested dower life estate will most likely cause difficulty for the courts in ensuring a dependant child is properly maintained, especially for smaller estates.