

BACKGROUND

The common law gave to wives and husbands certain rights known as dower and curtesy respectively. Dower consisted of the right of a wife to a life interest, after the death of her husband, in one-third of the lands which he owned at any time during the marriage. Curtesy consisted of the right of a husband to a life estate, after the death of his wife, in all lands which she owned at any time during the marriage, provided they had children who might have been capable of inheriting the lands. (1) These rights did not prevent either spouse from disposing of land but any purchaser had to ensure that the rights were released if he or she did not want to be subject to the rights of the surviving spouse when the married person died.

The common law rules no longer apply in Alberta (2) but have been replaced by the Dower Act which grants dower rights to both the husband and wife and uses the term "spouse". These dower rights (3) include, among others, the following:

- (i) the right to prevent disposition of the homestead by withholding consent to the disposition,
- (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 Assurance 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 writ proceedings.

Any disposition of the homestead of a married person must either be consented to by the spouse of the person making the disposition or be accompanied by an order of the Court of Queen's Bench of Alberta dispensing with the consent of the spouse. (4)

"Homestead" means a parcel of land on which the dwelling house occupied by the owner of the parcel as his residence is situated and that consists of

- a) not more than 4 adjoining lots in one block (according to a registered plan) of a city, town or village, or
- b) not more than one quarter-section of land other than land in a city, town, or village. (5)

Land which becomes a homestead remains so, notwithstanding the acquisition of another homestead or a change of residence, until

- a) a transfer of land by the married person is registered,
- b) a release of dower rights by the spouse of the married person is registered, or
- c) a judgment for damages against the married person is obtained by the spouse of the married person in respect of any land disposed of by the married person and is registered at the Land Titles Office. (6)

REGISTRATION PROCEDURE

1. Dispositions by individuals which must be checked to ensure that dower requirements have been complied with include the following documents: (7)

- a transfer,
- a lease for more than three years, (8)
- a mortgage or encumbrance,
- any other instrument intended to convey or transfer an interest in land, such as an easement, party wall agreement, utility right of way, restrictive covenant, encroachment agreement, transfer or surrender of lease, etc.

2. Compliance with the Dower Act is established primarily by the following methods:

- consent and acknowledgement by spouse
- affidavit establishing that the land is not a homestead
- court order dispensing with consent

3. **Consent and Acknowledgement** - The consent in writing of the spouse of the married person to any disposition is to be in the prescribed form (FORM A). It must 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. (9)

4. The consent required for the *inter vivos* (during life) disposition of the homestead must be contained in or annexed to the instrument by which the disposition is effected. If the consent appears on one of the numbered pages of the instrument or if there is some other reasonable indication that the consent formed part of the original instrument, it will be considered to be contained in the instrument. If the consent appears to have been attached to the original instrument, the signature of the spouse on both the consent and the instrument is required. (10) If there is doubt as to whether the consent has been annexed to the instrument or is contained in the instrument, a letter from the solicitor for the transferor stating that the consent formed part of the original document may be accepted.

5. When the spouse of a married person executes a consent to a disposition or executes a disposition containing the consent, the spouse must make an acknowledgment apart from the married person (11) before a person authorized to take proof of the execution of instruments under the Land Titles Act (see procedures under AFF-1 and AFF-2). A certificate of acknowledgment in the prescribed form (FORM C)

must be endorsed on or attached to the disposition. (12) The Court of Queen's Bench may authorize the registration of a disposition notwithstanding that the making of the acknowledgment is defective. (13)

6. The consent of the spouse of a married person is not required when the married person is required to make a disposition of the homestead by the operation of regulations under the Agricultural and Recreational Land Ownership Act and section 35 of the Citizenship Act (Canada). (14) A disposition to which this applies should be referred to the Foreign Ownership of Land Administration representative for confirmation.

7. **Affidavit** - When a disposition of land that
a) does not purport to be consented to, and
b) is not accompanied by an order dispensing with the consent,
is presented for registration, an affidavit of the owner in the prescribed form (FORM B) must be provided. (15)

8. When a disposition is executed under a power of attorney, the party executing the disposition may make the dower affidavit (FORM B) if he is acquainted with the facts. (16) Neither the consent of spouse (FORM A) nor the certificate of acknowledgment by spouse (FORM C) may be executed by an attorney under a power of attorney because the intent of a consent and acknowledgment cannot properly be said to have been accomplished through an attorney and there is no specific authorizing provision as there is for the dower affidavit.

9. **Court Order** - A court order dispensing with the consent of the spouse may be obtained as provided for in section 10 of the Dower Act. The disposition document accompanied by a certified copy of the order is registered in the same manner as if the spouse of the married person had consented to the disposition. (17) The order only extinguishes the dower right of the spouse to the extent that the voluntary consent of the spouse would have done. (18) The requirements of section 191 of the Land Titles Act must be complied with (see procedure under ORD-1).

10. **Release of Dower Rights** - The spouse of a married person may execute in the prescribed form (FORM D) a release of dower rights in the homestead of the married person. The release must be supported by the affidavit of the spouse in the prescribed form (FORM E). A release of dower rights when registered has the following effect:
a) the land described in the release ceases to be the homestead of the married person, and
b) the spouse of the married person ceases to have any dower rights in the land described in the release (19)
c) the Registrar shall endorse a memorandum of the release of dower rights on the certificate of title.

11. A release is only registrable if it contains a proper legal description.

A witness and an affidavit of execution are required. (20)

12. The release of dower rights and supporting affidavit must be executed and sworn by the spouse apart from the married person in whose favour the release is made. Also, the witness and commissioner of the supporting affidavit must be a solicitor, barrister, lawyer or attorney-at-law other than the solicitor or the partner or employee of the solicitor acting for the married person in whose favour the release is made. (21) If the information in the documentation submitted for registration indicates that the latter requirement may not have been complied with, confirmation should be requested; otherwise, the requirement may be assumed to have been complied with.

13. A disposition of land which relies on a release of dower rights must be accompanied by an affidavit in the prescribed form (FORM B or FORM G). FORM B or FORM G is required even when the release of dower is submitted simultaneously with other documents. The purpose of the affidavit is to verify that the person executing the disposition is still married to the person who executed the release. If the release is submitted with a disposition, the form should be modified to identify the release by its date rather than registration particulars. The release is not carried forward to the new certificate of title.

14. If a release of dower rights is contained in an agreement (usually a separation agreement or minutes of settlement in a divorce action), (22) the agreement is not registrable but can be used to obtain a court order dispensing with consent pursuant to section 10.

15. **Revocation of a Release of Dower Rights** - Revocation of a release of dower rights can be effected by the spouse registering a caveat revoking the release of dower against the land in which the dower has been released. The registration of the caveat is to be endorsed on title only as a discharge of the release of dower rights.

Notice of the registered caveat must be sent manually by mail to the person against whose title the caveat is registered. [Tariff item 5\(1\)](#) is charged for registration of the caveat. A fee adjustment must be made by charging the difference between the discharge fee and the caveat fee under "other services" using the miscellaneous (MISC) code.

Upon registration of the caveat, the spouse is then entitled to dower rights in the land to the same extent as if the release of dower rights had never been registered, 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. (23)

16. A release of dower rights may also be discharged by a formerly married person by registering a statutory declaration which states that he is no longer married to the person who executed the release.

17. **Agreement for Sale** - A transfer which does not otherwise comply with dower requirements can be registered if the transferee files

- the agreement for sale accompanied by either the consent and acknowledgment of the spouse or an order dispensing with consent, and
- an affidavit identifying the transferee as the purchaser under the agreement for sale. (24)

18. **Transfer to Spouse** - Compliance with the Dower Act is not required where there is evidence which confirms that the spouse of the transferor is the sole transferee. The evidence should be by way of statutory declaration stating that the transferee is (or was at the time of death) the spouse of the transferor or by way of a similar addition to the affidavit of attestation or the affidavit of transferee. (25)

19. **Co-tenants** - If there are more than two joint tenants or tenants in common in land, or if there are only two and they both execute a disposition, there are no dower requirements to be complied with since

- if one of the co-tenants is not the spouse of another co-tenant, the land is not a homestead and the Dower Act does not apply, (26) or
- if the co-tenants are married to each other, the execution of the disposition by them (or on their behalf pursuant to a power of attorney) constitutes a consent by each of them to the release of their dower rights. (27)

However, if a disposition is executed by only one of two tenants in common or one of two joint tenants, dower requirements must be complied with unless there is evidence establishing that the co-tenants are not married to each other. Assumptions cannot be made on the basis of surnames as persons with different surnames may be married to each other and persons with identical surnames may not be.

20. **Estate** - A disposition of land by the executor or administrator of the estate of a deceased married person must be

- consented to by the surviving spouse (FORM H) (a certificate of acknowledgment is not required in this situation),
- accompanied by a court order dispensing with the consent of the spouse, or
- accompanied by an affidavit in the prescribed form (FORM G). (28)

21. The executor or administrator may make an application pursuant to the provisions of section 22 for an order dispensing with the consent of a spouse to a disposition. A certified copy of the order must be presented for registration and is to be attached to the disposition document. The requirements of section 191 of the Land Titles Act must be complied with (see procedure under ORD-1).

22. **Dependent Adult Spouse** - A dower consent and acknowledgment can be accepted from a trustee who has been given powers under section 40 of the Dependent Adult Act, as section 40(a.1) specifically allows for this. A release of dower rights can only be accepted from a trustee, if the court order expressly gives that power to the trustee pursuant to section 40(j). Otherwise, dower compliance in respect of a

dependent adult requires a court order dispensing with consent pursuant to section 10(1)(f) of the Dower Act.

23. **Election** - A life estate vests in the surviving spouse when the homestead of a married person is the subject of a disposition by will of the married person or the subject of a devolution on the death of the married person dying intestate. (29) This right applies to only one homestead. If a married person dies owning two or more homesteads, the surviving spouse must elect in writing in which homestead the life estate is claimed. (30) The election is to be in the prescribed form (FORM F) with a witness and affidavit of execution and is registered against the certificate of title indicated in the election form with the following particulars:

"DOWER ELECTION BY JOAN SMITH"

24. If the surviving spouse neglects or refuses to make an election within 3 months of the death of the married person, the executor or administrator may apply for a court order designating which parcel is the homestead to which the dower rights of the surviving spouse attach. A certified copy of the order is to be registered against the certificate of title as follows: (31)

"DOWER ELECTION BY COURT ORDER IN FAVOUR OF
JOAN SMITH"

25. The registration of the election or the order has the effect that all other land belonging to the deceased married person and not designated in the election or order shall be deemed not to be a homestead. The executor or administrator may transfer or dispose of such other land without any consent from the surviving spouse (32) by completing the affidavit (FORM G) with the applicable clause stating that an election or order has been made.

26. **Mines and Minerals** - The disposition of mines and minerals contained in or forming part of the homestead is covered by the Dower Act and requires the consent in writing of the spouse of the married person. (33) If a disposition of mines and minerals is not accompanied by any of the usual methods of evidencing compliance with the Dower Act, an affidavit or statutory declaration from the owner stating that he has never owned the surface rights is sufficient evidence that dower requirements do not apply.

27. **Judgments Arising from Unauthorized Disposition of Homestead** - The Act provides a remedy, in the form of an action for damages, to a spouse who was denied his dower rights by virtue of a married person making a disposition of the homestead without either the consent of the spouse or an order dispensing with consent. (34) A certified copy of the judgment for damages together with proof that the judgment has been paid in full can be registered against land if legal descriptions are provided. (35) A certified copy of a judgment together with a certified copy of an order directing payment of the judgment out of the Assurance Fund can also be registered. (36) The judgment and order should be accompanied by a writ of enforcement against the married person.

Future dispositions by the married person should be accompanied by a dower affidavit ([FORM B](#)) with the applicable statement referring to the registered judgment.

STATUTE AND CASE REFERENCES

Statute references are to the Dower Act, R.S.A. 2000, c. D-15, unless otherwise indicated.

1. Henry Campbell Black, *Black's Law Dictionary*, (4th rev. ed., 1968), pp. 459 - 460 and 580 - 581
2. s. 3 and 4, Law of Property Act, R.S.A. 2000, c. L-7
3. s. 1(c); s. 169 Land Titles Act, R.S.A. 2000, c. L-4; *McNeil v. Martin and Peters* (1983), 2 W.W.R. 198 (Alta. C.A.); *Green Drop Ltd v. Schwormstede* 74 Alta. L.R. (2d) 161 (Alta. C.A.)
4. s. 2(1)
5. s. 1(d)
6. s. 3
7. s. 1(b)
8. *Bank of Montreal v. Pawluk* (1994), 21 Alta. L.R. (3d) 410
9. s. 4(2)
10. s. 4; *Reynolds v. Ackerman* (1960), 32 W.W.R. 289 (Alta. S.C.T.D.)
11. s. 5(1)
12. s. 5(2)
13. s. 5(3)
14. s. 2(2)
15. s. 4(6); s. 163, Land Titles Act
16. s. 4(7); s. 163, Land Titles Act
17. s. 10(7)
18. s. 3(3)
19. s. 7(4)
20. s. 155, Land Titles Act. Although the release of dower rights is provided for in the Dower Act, it is registered under s. 14(2), 24(2) and 25 of the Land Titles Act and therefore subject to the requirements of s. 155. ([FORM D](#)) requires a witness so the document does not come within s. 159(k) exception.
21. s. 7(3)(b)
22. s. 9
23. s. 8
24. s. 6(1); see also *Senstad v. Makus* [1977] 5 W.W.R. 731 (S.C.C.); *McFarland v. Hauser et al.* (1979) 7 Alta. L.R. (2d) 204 (S.C.C.)
25. *Scott and Cresswell v. Cresswell and Registrar for North Alberta Land Registration District et al.*, [1975] 3 W.W.R. 193 (Alta. C.A.)
26. s. 25(1)
27. s. 25(2)
28. s. 21
29. s. 18
30. s. 19(1)
31. s. 19

- 32. s. 20
- 33. s. 24
- 34. s. 11
- 35. s. 12(2) and 16(2)
- 36. s. 16