

Manitoba Law Reform Commission

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May 27, 2010

Hon. Andrew Swan
Minister of Justice and Attorney General of Manitoba
104 Legislative Building
Winnipeg, MB R3C 0V8

Dear Minister:

RE: REVIEW OF COMPENSATION FOR THE LOSS OF HOMESTEAD RIGHTS

A. INTRODUCTION

In the past, the Commission has found it useful to submit by letter to the Minister of Justice and Attorney General what is referred to as an informal report. The following is such a report and contains our review and recommendation regarding compensation in Manitoba for the loss of homestead rights.

Compensation for a spouse whose homestead rights have been lost through the fraudulent or wrongful act of a spouse in disposing of homestead property has been identified as a potential project for law reform.¹ The matters dealt with in this review arise, in part, out of the case of *Dowse v. Dowse*² wherein certain judicial comments regarding the difficulty in assessing damages caused the Commission to consider whether legislative guidance on the quantification of damages for a fraudulent or wrongful disposition would be beneficial.

The case of *Dowse*³ involved a release of homestead rights which had been erroneously registered. The wife had instructed her lawyer to register a Homestead Notice against title to the family home, but the Registrar of Land Titles erred and registered a Release of Homestead Interest. The court awarded a nominal value of \$1,000 for the loss of a tactical advantage of homestead rights given that these rights can be used as part of the negotiation process in

¹ A professor at the Faculty of Law, University of Manitoba, suggested this topic for consideration.

² (2003), 171 Man. R. (2d) 129 (Man. Q.B.) [*Dowse*].

³ *Ibid.*

domestic disputes. The court also valued the wife's homestead interest, as per actuarial evidence, in the amount of \$6,955 and further awarded the wife the sum of \$1,000 for punitive or exemplary damages for the husband's duplicity in selling the homestead without a release of homestead rights. One of the unique aspects of this case is that liability and a claim for damages for the fraudulent disposition of homestead property were the foundation of the plaintiff's action. A judicial comment was made that there is no precedent for fixing damages for the loss of tactical advantage and other judicial comments were cited by the court suggesting the difficulty in fixing an amount of damages.⁴

By way of background, it should be noted that while life estates may be valued relatively easily on the basis of actuarial evidence, the valuation of homestead rights may be more difficult; they are not truly proprietary and are not vested rights. Rather, they are inchoate and a contingent expectation of a life estate. *The Homesteads Act*⁵ in Manitoba provides for a remedy in damages for a fraudulent disposition and provides that the amount of damages is within the discretion of the court. The Act provides no guidance with respect to the assessment of damages. In contrast, the *Dower Act*⁶ in Alberta provides a formula to determine the damages in an action.⁷ Some states in the United States also provide a formula to calculate homestead values.

B. SHOULD A REMEDY FOR DAMAGES BE FIXED OR DISCRETIONARY?

Should legislative reform be considered to *The Homesteads Act*⁸ so that the statute provides a formula to determine the amount of damages for the loss of homestead rights as a result of a fraudulent or wrongful disposition?

C. MANITOBA LEGISLATION

*The Homesteads Act*⁹ provides as follows:

Disposition prohibited without consent

- 4 No owner shall, during his or her lifetime, make a disposition of his or her homestead unless, subject to sections 2.1 and 2.2
- (a) the owner's spouse or common-law partner consents in writing to

⁴ In *Dowse*, Mr. Justice Schwartz cited guidelines suggested by Twaddle J.A. in *Abraham v. Wingate Properties Limited* (1986), 36 Man. R. (2d) 264, and quoted as follows: "...The difficulty in fixing an amount of damages must not deter us from doing justice...A court or judge must, of course, use some logical basis for making his estimate of the damages suffered, but better that the damaged party receive a reasonable, if not mathematically measurable, amount than that there should be no compensation for the loss".

⁵ C.C.S.M. c. H80, s. 16.

⁶ R.S.A. 2000 c. D-15. Specifically, section 11(2) provides that the amount of damages is a sum equivalent to one-half the consideration for the disposition of the property, if the value of the consideration is substantially equivalent to that of the property, or one-half of the value of the property at the date of disposition, whichever is larger.

⁷ Aside from the valuation of homestead rights in a case of a wrongful disposition, the Alberta legislation does not otherwise provide for the valuation of homestead rights.

⁸ *Supra* note 5.

⁹ *Ibid.*

the disposition;

(b) the disposition is in favour of the owner's spouse or common-law partner;

(c) the owner's spouse or common-law partner has released all rights in the homestead in favour of the owner under section 11;

(d) the owner's spouse or common-law partner has an estate or interest in the homestead in addition to rights under this Act and, for the purpose of making a disposition of the spouse's or common-law partner's estate or interest, is a party to the disposition made by the owner and executes the disposition for that purpose; or

(e) the court has made an order dispensing with the consent of the owner's spouse or common-law partner under section 10.

Liability for fraudulent disposition

16(1) An owner who makes a fraudulent or wrongful disposition of the homestead by failing to obtain

(a) the consent of his or her spouse or common-law partner as required by this Act; or

(b) an order dispensing with the spouse's or common-law partner's consent under section 10;

is liable to the spouse or common-law partner in an action for damages.

Meaning of wrongful disposition

16(1.1) For the purpose of subsection (1), a wrongful disposition includes a disposition where an owner, in good faith, obtains the consent of a spouse or common-law partner who does not have homestead rights under this Act and fails to obtain the consent of the spouse or common-law partner who does have homestead rights.

Damages

16(5) The court may, in its discretion, determine the amount of a spouse's or common-law partner's damages under this section, subject to such terms and conditions as the court considers appropriate.

Contracting out

28 Nothing in this Act prohibits a person, for valuable consideration, from releasing or contracting out of his or her rights under this Act, either before or after marriage or before or after commencement of a common-law relationship.

The scheme of the legislation provides that where homestead property is conveyed without consent to an innocent purchaser for value without notice of a homestead interest, and the property becomes duly registered, the only remedy available to a spouse is one in damages.

In contrast, if the person who acquired an interest under a disposition had actual knowledge of the untruth of an affidavit or statutory declaration or participated or colluded in the fraud, upon an application by the owner's spouse, the court shall set the disposition aside.¹⁰

*The Law of Property Act*¹¹ provides for the valuation of homestead rights in a court-ordered sale of property. Section 24 provides as follows:

Value of inchoate homestead right and payment thereof

24 Where a person is a party to the action, the court shall, in case of sale, determine the value of any rights under The Homesteads Act of his or her spouse or common-law partner according to the principles applicable to deferred annuities and survivorships, and shall order the amount of that value to be paid out of the share of the purchase money to which the person is entitled, or shall order the payment to the spouse or common-law partner of the person out of the share of the purchase money to which the person is entitled, of an annual sum, or of such income or interest...; and the payment shall be a bar to any right or claim under The Homesteads Act.¹²

D. CASE LAW IN MANITOBA REGARDING VALUATION OF HOMESTEAD RIGHTS

Much of the case law pertaining to dispositions made without homestead consent pertains to whether transactions can be set aside and in these cases the courts have not needed to deal with the assessment of damages. In *Migas v. Migas Estate*,¹³ the husband swore a false dower affidavit and transferred part of the subject property to his son. Had the son known the affidavit was false, the transfer of the homestead would have been invalid and ineffective. In this case, the court found that while the son did not know that the affidavit was false, he knew that his mother had lived and worked on the land, and he could not rely upon a false affidavit through his willful blindness. The court held that the transaction between the husband and son was "absolutely null and void for all purposes". As another example, in *Moreau v. Moreau Estate*,¹⁴ the deceased transferred homestead property without consent, but the recipient obtained good title and had no knowledge of the untruth of the affidavit. The court held that while the transfer of the property deprived the spouse of her dower rights and she did have a cause of action in damages, the action was statute barred. Recently, in the case of *Williams v.*

¹⁰ *Supra* note 5, s. 5.

¹¹ C.C.S.M. c. L. 90.

¹² Section 24 seems to present some uncertainty for the courts. For example, in *Winspear Higgins Stevenson Inc. v. Frieson* [1978] 5 W.W.R. 337, O'Sullivan JA noted that "...I must confess that at the present time I would have difficulty in determining and applying the "principles applicable to deferred annuities and survivorship"".

¹³ *Migas v. Migas Estate* (1990), 64 Man. R. (2d) 276 (Man. Q.B.). Note that since the 1992 enactment of *The Homesteads Act*, *supra* note 5, the subject rights are referred to as homestead rights rather than dower rights.

¹⁴ *Moreau v. Moreau Estate* (1986), 42 Man. R. (2d) 299 (Man. Q.B.).

Kruger,¹⁵ the Manitoba Court of Queen’s Bench reaffirmed the need for consent in disposing of homestead property and the right to set aside such a transaction or to seek damages. However, the court could not deal with damages because the proper application had not been filed.

There have been some cases (outside the scope of fraudulent dispositions) where the courts have valued homestead rights. In such cases, the courts have exercised their discretion and awarded a lump sum order of spousal support intended to include the loss of dower rights¹⁶ or have calculated the value of homestead interests based upon actuarial evidence.¹⁷

E. THE MANITOBA LAW REFORM COMMISSION’S REPORT ON THE DOWER ACT

The Manitoba Law Reform Commission issued a report in 1984 entitled *An Examination of ‘The Dower Act’*.¹⁸ The Dower Act Report dealt with various issues related to the distribution of property and was originally referred to the Commission as a consequence of the enactment of marital property and family maintenance legislation. In the Dower Act Report, the Commission considered whether a remedy should be available to the non-consenting spouse where a disposition has occurred absent the written consent requirement, and recommended a provision to confer expressly a cause of action for damages on the non-consenting spouse. Further, the Dower Act Report also considered the fixed formula approach in other legislation and provides as follows:¹⁹

“With respect to the measure of damages, we prefer the discretionary approach adopted in Ontario and other jurisdictions rather than Alberta’s fixed formula. As mentioned earlier, Alberta arbitrarily fixes the damages to which a spouse is entitled at one-half the value of the property. We believe that the discretionary approach will provide greater flexibility to meet the facts and circumstances of each particular case.”

...

¹⁵ *Williams v. Kruger* (2008), 229 Man. R. (2d) 133 (Man. Q.B.). This case involved a reference to a master for an accounting and valuation of the parties’ assets pursuant to *The Family Property Act*, C.C.S.M. c. F25. The wife disposed of property in which the husband had homestead rights, but failed to obtain her husband’s consent. The husband had contributed to the betterment of the land. The court commented that it was unfortunate that the wife’s disposition took place without dealing with the husband’s homestead interest. However, in the absence of an application filed by the husband, the court found that it had no reference power to impute a homestead value in favour of the husband. The court noted that under certain evidentiary conditions the husband may apply to set aside a transfer and referred the husband to his remedies pursuant to section 16 of *The Homesteads Act*. There is no further judicial history of this case. Aside from *Dowse*, this is the only other Manitoba case to have considered section 16 of *The Homesteads Act*. In the other reported cases where valuation issues arose, it was pursuant to the repealed *Dower Act*, R.S.M. 1970, c. D-100.

¹⁶ For example, in *Palahitski v. Palahitski* (1982), 18 Man. R. (2d) 374 (Man. C.A.), the Court of Appeal increased a lump sum order of spousal support to compensate a wife for her loss of dower rights as a result of the dissolution of the marriage.

¹⁷ For example, in *Zarowiecki Estate*, [1982] 4 W.W.R. 728 (Man. Surr. Ct. J.), the court determined the life interest of a widow in homestead property based upon the sale proceeds calculated on the basis of actuarial evidence (the components in the calculation included the interest rate, the value of the property and the life expectancy of the widow).

¹⁸ Manitoba Law Reform Commission, *An Examination of ‘The Dower Act’* (Report # 60, 1984) [Dower Act Report].

¹⁹ *Ibid.* at 222-223.

Recommendation 80

That the non-consenting spouse should have a cause of action against the owner spouse if a disposition of the homestead is made without consent through the fraud or wrongful act of the spouse.

Recommendation 81

That on application by the non-consenting spouse, the court may, in its discretion, determine the amount of damages to be paid by the owner spouse subject to such terms and conditions as the court considers appropriate.

These recommendations (among most others in the report) were implemented by the enactment of *The Homesteads Act*.²⁰

F. OTHER LAW REFORM COMMISSIONS

The quantification of the loss of homestead rights has been the subject of other law reform attention. The Alberta Law Reform Institute²¹ issued a report recommending reforms to the *Dower Act*,²² *inter alia*. Consideration was given to an action for damages for the non-consenting spouse where a disposition of the homestead is made through fraud or a wrongful act. This report suggested that while the Alberta legislation contains a fixed formula for the assessment of damages for such an action, the “computation of damages, and the terms and the conditions that may be imposed, should be at the discretion of the court, as in Manitoba”. Further, it was observed that while the formulaic approach 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”, there is still much uncertainty surrounding the correct assessment of damages (i.e. determining whether the consideration for the sale of the home is equal to its value). It was recommended that judicial discretion is warranted and some guidance be provided to assist in the assessment of damages (such as the costs of relocation and comparable accommodation or any inconvenience caused to a spouse or the children of the marriage).²³

²⁰ *Supra* note 5 and quoted earlier at note 9.

²¹ Alberta Law Reform Institute, *The Matrimonial Home* (Report for Discussion #14, 1995). There are differences between a matrimonial home and a homestead and the Alberta Law Reform Institute’s report is mentioned only for its recommendations pertaining to homestead dispositions without consent. Briefly stated, the matrimonial home is defined as property that is owned or leased by one of the spouses and has been occupied by the spouses as their family home. In contrast, the *Dower Act* defines homestead as a parcel of land on which the dwelling house occupied by the owner of the parcel as the owner’s residence is situated, and need not have been occupied by both spouses.

²² R.S.A. 1980, c. D-38.

²³ *Ibid.* at 113-115.

G. CONCLUSION

While the scope of this review considers the valuation of homestead rights in cases of fraudulent or wrongful dispositions, it is noted that for valuation of homestead rights generally, courts have valued such rights using their discretion and actuarial evidence, notwithstanding the acknowledged difficulty associated with this task.

It is concluded that the current compensation model pursuant to *The Homesteads Act*²⁴ should remain discretionary and that a fixed formula model could create unnecessary complications and could unduly restrict a court's discretion. Ultimately, the courts are best informed to determine the appropriate damages, and accordingly the Commission does not recommend legislative reform.

²⁴ Supra note 5.

This is informal report no. 25 pursuant to section 6 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 27th day of May, 2010.

“Original Signed by”
Cameron Harvey, President

“Original Signed by”
John C. Irvine, Commissioner

“Original Signed by”
Gerald O. Jewers, Commissioner

“Original Signed by”
Perry W. Schulman, Commissioner