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Dower Consent Teasers

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Cases Considered:

Karafiat v Webb, 2012 ABCA 115 and *Webb (Re)*, 2011 ABQB 89.

This case shows that the *Dower Act*, RSA 2000, c D-15 can still throw up intellectual teasers 55 years after this version of the statute was first enacted (*Dower Act*, 1948 (Alta), c 7). The case highlights the distinction between the consent required by section 4 of the Act (the normal case), and the consent required under section 25(2). Section 25(2) deals with the situation where the homestead property is co-owned by the spouses. The issue is whether a request by both spouses to the holder of a charge to postpone that charge is a consent to a disposition (i.e. the charge) for the purposes of section 4 or section 25(2). The majority responds in the negative.

The facts

The dower homestead was registered in the name of the husband, Franklin Webb. In June 2001 Franklin promised to pay Karafiat a sum of money in recognition of an existing indebtedness and purported to charge the dower homestead as security for that payment. His wife, Carmen Webb, provided neither a dower consent nor a dower acknowledgement to that charge of which she was not even informed. Karafiat filed a caveat to protect his charge. In October 2001 "the Webbs became owners in joint tenancy of the Property" (QB at para 2). It would be nice to know more about how this happened but this is all there is to the flat statement in Justice Donna Shelley's memorandum of decision. Justice Frans Slatter in the Court of Appeal hints that there must have been a waiver by the wife of her dower interest on the transfer from the husband to the husband and wife because section 4 requires one (at para 43).

In November 2001, the Webbs, through their lawyer, procured Karafiat's agreement (for valuable consideration) to postpone his charge in order to accord priority to a mortgage to be granted by the Webbs to the Alberta Treasury Branches. At about the same time the Webbs granted ATB that mortgage.

In October 2003 the Webbs filed for bankruptcy and in their statement of bankruptcy acknowledged that Karafiat had a charge on the property.

ATB foreclosed in 2004 and Karafiat claimed priority to the $57,809 surplus realized on the sale. The Registrar of Bankruptcy directed a trial of the issue of whether "the encumbrance registered by Mr. Karafiat was invalid due to non-compliance with the *Dower Act*." (QB at para 7)

The decision at trial

All parties agreed that Karafiat's original charge did not comply with the *Dower Act*. At trial Justice Shelley concluded: (1) the transfer from husband to husband and wife as joint tenants did not cause "the matrimonial home" to cease to be the wife's homestead under section 3(2)(a) of the Act. (QB at para 17); and (2) the record did not show that the wife had subsequently explicitly consented to the charge so as to "rehabilitate" the voidable disposition (QB at paras 19 and 22).

The decision on appeal

The majority of the Court of Appeal - Justices Ronald Berger and J.D. Bruce McDonald - agreed with Justice Shelley in their in Reasons for Judgment. The original charge was "invalid" and that invalidity was never cured by the subsequent transactions (at para 21):

> The invalidity of the Appellant's claim when first asserted and registered as a caveat is not in dispute. In my opinion, that invalidity persists throughout the subsequent chain of events. The failure to properly correct the initial omission to address dower rights is not cured by either the transfer to joint tenancy or the mortgage disposition. In my view, Mrs. Webb's dower right did not cease when title was transferred to herself and Mr. Webb jointly. Rather, the doctrine of merger would have the effect of extinguishing her dower rights with respect to her undivided one half interest in the title but her dower rights would continue to exist in what is now Mr. Webb's undivided one half interest. The postponement is also of no assistance to the Appellant mindful that there is absolutely no evidence in the record to demonstrate that anyone, least of all Ms. Webb, turned their mind to the question of dower rights. In so holding, I must not be taken to have said that the transfer to joint tenancy did not result in a diminution of the dower interest of Ms. Webb given that the property was now jointly held by the spouses. Nonetheless, Ms. Webb enjoyed a dower interest prior in time and continued to have such an interest following the title transfer. Section 25(2) of the *Dower Act* makes that clear.

Justice Slatter, in his Reasons for Judgment Reserved, took a different position. In his view the registered transfer from the husband to the husband and wife as joint tenants caused that property to cease to be a homestead under section 3(2) (a) (at para 41). However, that arrangement was immediately succeeded by a new homestead arrangement in which the husband and wife had homestead rights in each other's joint tenancy (at para 39). Property held by spouses as co-owners is still subject to the Act, but the Act applies in a different way: section 25(2).

Justice Slatter seems to give two reasons for concluding that the charge which was created contrary to the Act and therefore voidable should be enforced on these facts. One possibility is that the charge was "rehabilitated" immediately upon registration of the transfer from the husband to the husband and wife (at para 44). The second possibility is that the charge became enforceable when the husband and wife made a joint request of Karafiat that Karafiat postpone his caveated interest to the ATB mortgage. This somehow caused the charge to be enforceable because the request to postpone the charge satisfied section 25(2). That request, while not a consent for the purposes of section 4 of the Act, was perhaps enough to satisfy section 25(2) of the Act. As Justice Slatter put it, by consenting to the ATB mortgage, Mrs. Webb consented to "all components of the transaction," which included the Webbs' request for a postponement of Karafiat's charge (at para 45).

Analysis

In order to succeed, Karafiat has to show that the disposition - his charge - was consented to by the non-owning spouse: either the consent referred to in section 4 of the Act or the consent referred to in section 25(2). The majority fails to make any distinction between the two different homesteads that existed over the relevant time period in relation to the matrimonial home. The majority is surely wrong to conclude that section 3(2)(a) does not apply to a transfer from the husband to the husband and wife. Section 3(2)(a) rather unequivocally provides:

> 3(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,

If the majority were correct that section 3(2)(a) did not apply to a transfer from the husband to the husband and wife as joint tenants, there would multiple homesteads held by the wife in relation to the same parcel of land at the same time. Thus, in our view, the reasoning of the majority was incomplete, insofar as the majority fails to fully analyse the two distinct homestead situations (i.e. Franklin as sole owner and Franklin and Carmen as co-owners).

Justice Slatter, on the other hand, does proceed to take the next step and to analyse both homestead situations, but both of the reasons he gives for finding in favour of Karafiat are problematic. The first reason - the charge is no longer voidable once the transfer from the husband to the husband and wife is registered - cannot be correct because the registration of the transfer is no evidence of consent to the disposition to Karafiat, whether consent in the form required by section 4 or consent in the form required by section 25(2).

Justice Slatter's second reason - the request to postpone was consent within the meaning of section 25(2) - does seem to have more merit. After all, the Act does seem to suggest that a section 25(2) consent is different from a section 4 consent, although as Justice Slatter acknowledges (at para. 45) "[t]he exact nature of the 'consent' that is deemed to occur is perhaps open to debate." And that points to the difficulty facing Karafiat. A request to postpone cannot be a section 4 consent because it does not speak to the qualities demanded by section 4: i.e., even if not in the prescribed form, the consent must be a consent which demonstrates that the spouse consents "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." But neither does it meet the standard demanded by section 25(2) which provides:

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

It does not meet the standard required by section 25(2) because section 25(2) requires both spouses to execute the disposition. A request to postpone might be interpreted colloquially as consent to the underlying interest but that was not the question of statutory interpretation that Justice Slatter had to address. The question he had to address was whether the deemed consent which section 25(2) provides for had been triggered. To determine that, he had to ask if both husband and wife had executed the disposition. The disposition at issue was the initial charge, not the ATB mortgage. The answer must be "no"; a written request to postpone the charge is not execution of the charge (and note that, if it were, Karafiat would have succeeded in encumbering

the wife's interest as well as the husband's, hardly what Carmen Webb would have expected) so there could be no deemed consent within the meaning of section 25(2).

Two final points: the first relates to the caveat and the second relates to the way the two judgments are styled.

First, was the caveat valid? In order for a person to file a caveat the caveator must claim to have an interest in land: *Holt, Renfrew & Co. Limited v Henry Singer Limited*, 1982 ABCA 135 CanLII; *1244034 Alberta Ltd. v Walton International Group Inc.* (2007), 422 AR 189 (CA) leave to appeal to SCC refused, [2008] SCCA No 43). While an equitable charge is clearly an interest in land, a charge that does not comply with the consent provision of the *Dower Act* is voidable. Can a voidable interest confer an interest in land or is it the better view that the holder of the charge only gets an interest in land once the Act is complied with? It is not clear on these facts whether there might have been a priority problem to add to the basic dower problem.

Second, as noted above, the majority's reasons are styled as "Reasons for Judgment" while Justice Slatter's reasons are styled as "Reasons for Judgment Reserved." Our understanding of the distinction between these two stylings is that the term "Reserved" connotes that the judgment was circulated in draft amongst all members of the Court before being finalized. If this understanding is correct, should we conclude that Justice Slatter's judgment was circulated but the not the judgment of the majority? We would be interested in knowing if readers have come across other examples of this usage.