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The Impact of a *Dower Act* Life Estate on the Valuation and Distribution of Intestate Estates

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Case Commented On: *Estate of Johnson, Rick Allen (Re)*, [2017 ABQB 399 \(CanLII\)](#)

The deceased, Rick Allen Johnson, died intestate — i.e., without a will — in February 2013. He was survived by a spouse and by two children of a previous marriage. The years of aggravation, frustration, hostilities and legal fees that is foretold by those two short sentences will be obvious to the many individuals who have found themselves in a similar situation. The particular issue in this case was how much of the deceased’s property his children inherited, if any, given the life estate in the deceased’s house granted to his surviving spouse by the *Dower Act*, [RSA 2000, c D-15](#), and the preferential share of an intestate estate given to the surviving spouse by the *Wills and Succession Act*, [SA 2010, c W-12.2](#). Specifically, the question was: Should the present value of the wife’s *Dower Act* life estate be deducted from the value of the deceased’s house for the purpose of distributing his estate between his surviving spouse and his children? Justice John W. Hopkins answered that question with a “no”, holding that the value of the deceased’s house for the purposes of the distribution of his estate under the *Wills and Succession Act* was the full value of the house, with no deduction for the life estate. I think his answer is wrong.

I will first set out the relevant statutory law. I will next briefly contextualize the issue with the values of the property interests at stake in this case. Then I will describe Justice Hopkins’ reasons for his decision. Then I will set out why I think his conclusion is wrong.

The Relevant Statutory Law

The *Dower Act* gives a surviving spouse a life estate in a house that was registered in the sole name of the deceased at the time of the deceased’s death and occupied by the deceased as their residence prior to their death. Section 1(d) of that Act defines a “homestead” to be “a parcel of land (i) on which the dwelling house occupied by the owner of the parcel as the owner’s residence is situated” and there was no question that the house in this case met that definition. Section 18 of the *Dower Act* then provides the surviving spouse with a life estate in the homestead on the death of the married owner:

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. (emphasis added)

In this case, the surviving spouse’s life estate was created by section 18 postponing the disposition of the deceased’s homestead that was dictated by the legislation governing the estates

of those who die without a will. Section 18 also provides that the life estate created by that postponement is “vested” in the surviving spouse. “Vested” means that a surviving spouse’s legal right to possess a homestead for his or her life is secure and enforceable as a present right of enjoyment. The life estate is no longer contingent on the death of the married person; it is now absolute and unconditional.

The holder of a life estate has the right to occupy, use and deal with the property during his or her lifetime. When a life estate is “carved out” of the totality of the interests in a property — called the fee simple estate, which is as close to absolute ownership as the common law gets — what is left is called the “remainder” interest. The holder of the remainder interest has to wait until the life estate ends before he or she can occupy, use and deal with the property. That remainder interest is also called the fee simple in remainder because, once the holder of the life estate dies, the remainder interest becomes the total interest in the property. Or, as Chief Justice D.G.H. Bowman put it in a tax case, *Nauss v The Queen*, [2005 TCC 488 \(CanLII\)](#) at para 11: “The life interest and the remainder interests together represent the totality of the interest in the property capable of being owned, that is to say, the fee simple.”

The legislation governing the disposition of the deceased’s property is the *Wills and Succession Act*. Part Three of that *Act* provides for the distribution of intestate estates. When you have a surviving spouse and children who are not the children of that surviving spouse, the rule about who gets what is found in section 61:

- 61(1) Subject to section 63, if an individual dies leaving a surviving spouse and one or more descendants . . .
- ...
- (b) if any of the intestate’s descendants are not descendants of the surviving spouse . . . ,
- (i) the surviving spouse . . . is entitled to the greater of the prescribed amount or 50% of the net value of the intestate estate, and
 - (ii) the residue of the intestate estate shall be distributed among the intestate’s descendants in accordance with this Part.
- (2) The Minister of Justice and Solicitor General may make regulations prescribing an amount for the purpose of subsection (1)(b)(i). (emphasis added)

Two aspects of section 61(1)(b) need further explanation: the definition of “net value of the intestate estate” and the “prescribed amount”. Section 58(1) defines the first of these terms:

- 58(1) In this Part,
- (a) “intestate estate” means an estate, or any part of an estate, that is not disposed of by will;
 - (b) “net value of the intestate estate” means the value of the intestate estate wherever situated, both within and outside Alberta, after deducting any debts, including debts arising from an order or agreement under the Matrimonial Property Act, and any charges and funeral and administration expenses payable from the estate.

The “prescribed amount” (i.e., the preferential share that comes “off the top”) is found in the *Preferential Share (Intestate Estates) Regulation*, [Alta Reg 217/2011](#), which states:

1. For the purposes of section 61(1)(b)(i) of the Act, the prescribed amount is \$150,000.

The *Dower Act* does not mention the *Wills and Succession Act*, but the *Wills and Succession Act* does have two things to say about its interaction with the *Dower Act*. Section 2 provides for the precedence of the *Dower Act* in the event the two statutes conflict:

2. In the event of a conflict between the *Dower Act* and a provision of Part 2 or 3 respecting a spouse's rights in respect of property after the death of the other spouse, the *Dower Act* prevails.

Section 75 provides a surviving spouse who is not on the title to the family home as an owner with the right to occupy the family home for 90 days after the deceased's death. However, section 75(2) says that this temporary right to possess the family home "does not apply to a surviving spouse in whom a life estate in the family home is vested by section 18 of the *Dower Act*."

The Value of the Property Interests

The 2013 municipal tax assessment valued the deceased's house at \$359,000. The house appears to have been the only major asset of the deceased. The surviving spouse provided an appraisal valuing the house at \$270,000. The children produced an appraisal valuing it at \$390,000. Holding that he did not have to decide how much the house was worth yet because the remainder interest would not devolve to the children until after the surviving spouse's life estate came to an end (at para 25), Justice Hopkins notionally valued the house, for the purposes of the inventory of the deceased's property and debt, at the tax assessed value of \$359,000 (at para 27).

As we saw in the section on the relevant legislation, in a situation where there is a surviving spouse and children who are not children of the surviving spouse, the surviving spouse will inherit the entire estate if its net value is less than \$150,000. That preferential share is why the issue in this case arose. When the surviving spouse has been granted a life estate in the house which is the only major asset of the deceased, what value is placed on the house? Is it the value of the house — the \$359,000 — as the children argued? Or is it, as the spouse argued, the value of the house with the value of the life estate — said to be \$190,265 — deducted, thereby reducing the value of the intestate estate below \$150,000? In the words of Justice Hopkins (at para 7), the issue was whether the spouse was entitled to deduct the "alleged capitalized value of the life estate" from the value of the deceased's estate.

Justice Hopkins' Reasons for his Decision

Justice Hopkins decided that the value of the deceased's house was \$359,000, with no deduction for the life estate of the surviving spouse. Why did he not accord any value to the life estate?

Justice Hopkins begins his analysis (at para 8) by noting the purpose and nature of dower rights. In essence, the purpose of the *Dower Act* is to secure to the spouse of a married person an interest in the family home: *Senstad v Makus*, [1978] 2 SCR 44, [1977 CanLII 201 \(SCC\)](#) at 51. As for the nature of dower rights, the cases cited by Justice Hopkins involved creditors of either the spouse with the dower rights or the owner spouse who wanted their debts paid from the sale

of the homestead (at para 9). In these contexts, *Kuehn v Otis Engineering*, (1996) 179 A.R. 225, [1996 CanLII 10596 \(AB QB\)](#) at para 6 discussed whether a dower interest could be valued by someone other than the spouse and found that it could be; *Re Gates*, 40 DLR (3d) 442, [1973 CanLII 245 \(AB QB\)](#) at para 16 held there was only one circumstance in which dower has a real and ascertainable value and that was when an improper disposition of the homestead gave rise to a claim for damages by the wronged spouse; and the majority in *McNeil v Martin*, [1982 ABCA 351 \(CanLII\)](#) at para 23, found that while the sheriff may sell a homestead subject to the dower interest in order to pay creditors, the issue of valuing the estate “. . . may become a thorny one.”

Justice Hopkins stated that the recent Alberta Court of Appeal decision in *Joncas v Joncas*, [2017 ABCA 50 \(CanLII\)](#) — which I commented on in “[The Harsh Consequences of Ignoring the Dower Act](#)” — addresses the surviving spouse’s argument that she should be entitled to receive a value for her interest under the *Dower Act* and the *Wills and Succession Act*, i.e. the value of her life estate and the value of her share of the estate in remainder (at para 17). In *Joncas*, the interplay was between the *Dower Act* and the *Matrimonial Property Act*, [RSA 2000, c M-8](#). Section 28 of the *Matrimonial Property Act* specifically states that the rights to possession of the matrimonial home that are granted “are in addition to and not in substitution for or in derogation of the rights of a spouse under the *Dower Act*” (emphasis added). Therefore, the rights granted by each statute were given effect by the Court of Appeal, which noted that the purpose of each statute was different.

What Justice Hopkins said he took from the *Joncas* case was that, like the *Dower Act* and the *Matrimonial Property Act* in that case, the *Dower Act* and the *Wills and Succession Act* in this case “operate separately to secure different interests of the surviving spouse” (at para 18). He relied on section 2 of the *Wills and Succession Act*, which provides for the paramountcy of the *Dower Act* in the event of a conflict, for this parallel (at para 18).

After the discussion of *Joncas*, Justice Hopkins turned to the surviving spouse’s arguments. She argued that she was entitled to receive a value for her interest under both the *Dower Act* and the *Wills and Succession Act*, i.e. her interest in the life estate and her interest in the remainder (at para 11). As for the value of the life estate, she argued that it could and should be valued, notwithstanding the difficulty of an actuarial valuation, relying on *Re Stojkovich Estate*, [2006 ABQB 467 \(CanLII\)](#). She cited *Nauss v The Queen* for finding that an actuarial report can provide a reasonable ascertainable value for a life estate. The children had argued that the actuarial valuation of the life estate did not take into consideration the individual circumstances of the surviving spouse and was therefore speculative (at para 10). An actuarial value of a life estate is based only on the age and gender of the life estate holder, and compared to life expectancy or actuarial tables to arrive at a factor multiplied by the value of the property. The children also argued that permitting the surviving spouse to live in the house after valuing the life estate for the purpose of the distribution of the property under the *Wills and Succession Act* would allow her to benefit from the life estate twice.

Although Justice Hopkins discussed the difficulties of valuing a life estate (at para 22), he did not decide the case entirely on this point. He agreed with *Re Stojkovich Estate* that it was doubtful an attempt to sell a surviving spouse’s dower interest would attract purchasers because of the uncertainty in the actuarial method of determining the life expectancy of the surviving spouse, thereby acknowledging that a life estate is alienable. But based on that uncertainty and the lack of purchasers for a sale, Justice Hopkins held that the surviving spouse’s actuarial

valuation was “artificial and speculative,” failed to take into account the individual circumstances of the surviving spouse, and was of questionable reliability (at para 22). Nevertheless, he did note the surviving spouse’s argument that life estates have been valued in other circumstances, such as those in *Nauss v The Queen*, which involved valuing a life estate in order to calculate the capital gain of the holders of the remainder interest (at para 20).

In addition to the difficulties of valuation, Justice Hopkins turned to *Joncas* again and focused on the *Dower Act* provision for valuing the damages of a spouse who has been wrongfully deprived of her dower rights by the married owner (at para 21). Justice Hopkins noted that the only method for valuing dower rights that is provided by the *Dower Act* is found in section 11. He noted the statement in *Joncas* that “there is no discretion... for calculating damages or valuing dower rights” under the *Dower Act*. He also acknowledged that what section 11 provides is a method for calculating damages that a spouse is entitled to recover when the married owner disposes of the homestead in contravention of the *Dower Act*. When calculating those damages, a court has no discretion; the amount is set by section 11(2).

Based on the presence of section 11 in the *Dower Act*, Justice Hopkins determined that it was “reasonable to conclude that in the absence of any method for valuing the life estate other than for damages for the disposition of the homestead without consent, the legislature did not intend for the life estate to be valued” in other circumstances (at para 23).

Justice Hopkins concluded that a *Dower Act* life estate did not confer the right to capitalize the value of that property interest in the way that the surviving spouse proposed to do (at para 24). He held that capitalizing the interest so that only the remainder was valued under the *Wills and Succession Act*, coupled with the surviving spouse’s right to remain in the house “would mean, in effect, she would benefit twice from the life estate” (at para 24). He described the valuation of the life estate to decrease the value of the intestate’s estate as “defeat[ing] the scheme of distribution of the intestacy to the other holders of the interest in remainder” (at para 24).

Why I Think Justice Hopkins’ Decision is Wrong

By valuing the deceased’s house at its full (tax assessed) value, Justice Hopkins ignored the life estate as a property right. He treated the life estate granted by the *Dower Act* as though it was simply a statutory right to temporarily possess a matrimonial home under section 19 of the *Matrimonial Property Act* or section 75 of the *Wills and Succession Act*. He in effect treats the interest held by the intestate’s estate as the entire fee simple estate.

The *Dower Act*, however, grants a life estate. The life estate and the estate in remainder are both present property interests in the same piece of land, although they are successive in time, with the remainder interest following after the life interest. They are two separate and large bundles of rights in the same piece of land. They may not be the most commercially valuable or saleable interests in property, but they are not valueless. Giving value to a life estate and giving value to a remainder interest does not allow the surviving spouse to benefit twice from the life estate, as Justice Hopkins concluded (at para 24). They are separate property interests. Additionally but relatedly, when Justice Hopkins postponed the valuation of the house because the remainder interest would not devolve to the children until after the surviving spouse’s life estate came to an end (at para 25), he ignored the fact that a fee simple in remainder is a present interest in land, not a future interest.

It is true that the *Dower Act* provides for a punitive amount of damages if a married owner disposes of a homestead in contravention of the *Act*. That was the issue in *Joncas*: the fact that section 11 does not allow for the deduction of any mortgage or other encumbrance or the costs of valuing or selling the homestead and is therefore, according to the Alberta Court of Appeal (at paras 22, 24, 27) punitive.

However, it is not reasonable to conclude, as Justice Hopkins did, that because the *Dower Act* only provides for a method of calculating damages for its contravention, the legislature did not intend that the life estate be valued — or recognized as valuable. The life estate is a centuries-old property interest and there was no need for the *Dower Act* to spell out its value. Had the *Dower Act* not intended to create the real property interest known as the life estate, it could have created a simple statutory right to temporarily possess a matrimonial home, as do section 19 of the *Matrimonial Property Act* and section 75 of the *Wills and Succession Act*.

The *Matrimonial Property Act* considered in the *Joncas* case specifically states in section 28 that the rights to a home that each act confers can co-exist and both can be given effect. The *Wills and Succession Act*, on the other hand, states in section 2 that if it comes into conflict with the *Dower Act*, the *Dower Act* prevails. Justice Hopkins did not address whether he saw any conflict between the two statutes. But he did hold that allowing the surviving spouse to value her life estate “would be to defeat the scheme of distribution of the intestacy” (at para 24), suggesting that he did see a conflict between the two statutes. What he allowed to prevail in that conflict, however, was not the *Dower Act*, contrary to section 2 of the *Wills and Succession Act*.

Section 75(1) of the *Wills and Succession Act* grants a surviving spouse who normally occupies the family home but is not registered on the title as an owner the right to possess the family home for a period of 90 days after the death of the owner. Section 75(2) specifically provides that the 90 day right to possess “does not apply to a surviving spouse in whom a life estate in the family home is vested by section 18 of the *Dower Act*.” The legislature could have easily provided that the \$150,000 preferential share of the surviving spouse only applied to spouses who did not receive a life estate under the *Dower Act*. Or it could have required the surviving spouse to elect to receive the life estate under the *Dower Act* or the preferential share under the *Wills and Succession Act*. But the legislature did neither. Instead, it enacted section 2, which states that in the event of a conflict about a spouse’s property rights after the death of their husband or wife, the *Dower Act* prevails over the *Wills and Succession Act*.

Conclusion

Justice Hopkins might not have liked the fact that the children of the deceased would have received nothing from their father’s estate if the only major asset in the deceased’s estate was the remainder interest in the house, and not the total interest in the house. But that does not change the fact that the only property interest the deceased’s estate owned, once he died and the life estate granted by the *Dower Act* vested in the surviving spouse, was the remainder interest. That the children received nothing from their father’s estate has more to do with the fact he did not make a will than with the law in this case. The lesson to be learned from this case, like so many others, is a simple one. Make a will.

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