



THE MATRIMONIAL HOME

Report for Discussion No. 14

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PART III — LIST OF RECOMMENDATIONS

RECOMMENDATION 1

Spouses should be entitled to equal possession of the matrimonial home, regardless of the state of title, and without the need to obtain a court order. Spouses may therefore not expel each other from the home. This right of possession should be capable of being protected by the filing of a caveat in the Land Titles Office. (p. 29)

RECOMMENDATION 2

When granting an order under Part 2 of the Matrimonial Property Act, a court should have regard to the following factors:

- (a) The interests of any dependent children, taking into account such factors as (i) the health of the children and their need for continued stability, and (ii) the impact that a move might have on the ability of the children to attend school or participate in extra-curricular activities.
- (b) The financial position of the spouses, including their ability to continue to maintain the property as well as to continue to dwell under separate roofs.
- (c) Any existing orders pertaining to property or support.
- (d) The health and safety of the family, including the apprehension of violence.
- (e) The special character of the neighbourhood, including such considerations as the presence of friends, relatives, members of a specific ethnic community.
- (f) The date when the property was acquired.
- (g) The historical ties of the parties to the property in question.
- (h) The extent to which the property was acquired by one of the spouses by gift or special effort.
- (i) The effect of an order on any other person who holds an interest in the home.
- (j) Any informal agreement between the parties as to the home.
- (k) Any other fact or circumstance that is relevant. (p. 34)

RECOMMENDATION 3

An order for possession of the home can be made to cover the whole or any part of the premises. However, an order should not be made granting possession of part of the premises to one of the spouses, and part to the other, where there is an apprehension of violence. (p. 35)

RECOMMENDATION 4

Children should not be entitled to seek orders for possession under Part 2 of the Matrimonial Property Act. (p. 36)

RECOMMENDATION 5

When granting an order of possession under Part 2, a court should continue to be able to grant orders allowing for the possession of household goods. (p. 37)

RECOMMENDATION 6

When granting an order for possession under Part 2 of the Matrimonial Property Act, the court may also:

(a) determine any rights of spouses that may arise as a result of the occupancy of a matrimonial home and postpone any rights of the spouse who is the owner or lessee, including the right to apply for partition and sale or to dispose of or encumber the matrimonial home

(b) authorize the disposition or encumbrance of the interest of the spouse in a matrimonial home subject to the right of exclusive possession contained in the order

(c) fix the obligation to repair and maintain a matrimonial home

(d) fix the obligation to pay, and the responsibility for, any liabilities whatsoever that may arise out of the occupation of the matrimonial home

(e) direct a spouse to whom exclusive possession of a matrimonial home is given to make any payment to the other spouse that is prescribed in the order.

(f) grant such other orders as are necessary for the proper management or maintenance of the property covered by the order. (p. 39)

RECOMMENDATION 7

The right to a life estate under the Dower Act should be replaced with a right of occupancy governed by Part 2 of the Matrimonial Property Act. The right should arise automatically on the death of the owning spouse and should continue until the surviving spouse dies, or until a court orders otherwise. Such an order should not be granted unless a court is convinced that the benefits of the home to the widowed spouse are substantially outweighed by the benefits that would accrue to those making a claim. The burden of proof should be a heavy one to provide the widowed spouse with security of tenure in the home. The factors to be taken into account should include financial and non-financial considerations. (p. 60)

RECOMMENDATION 8

The powers of a court to grant ancillary orders under Part 2 of the Matrimonial Property Act should be applicable to situations in which a widowed spouse remains in the home on the death of the owning spouse. Unless varied by court order, the surviving spouse should be responsible for all current expenses and repairs. (p. 61)

RECOMMENDATION 9

A surviving spouse enjoying a right of occupancy under Part 2 of the Matrimonial Property Act should also be entitled to possession of the household furnishings and appliances normally found in the house, and one automobile (unless the surviving spouse owns an automobile). This right should arise automatically on the death of the owning spouse and should continue until the surviving spouse dies, or until a court orders otherwise. Such an order should not be granted unless a court is convinced that the benefits of to the widowed spouse in relation to the personal property are substantially outweighed by the benefits that would accrue to those entitled to make a claim. A court may also grant an order of possession in favour of the widowed spouse in relation to other “household goods” (as that term is defined in the Matrimonial Property Act). (p. 66)

RECOMMENDATION 10

Matrimonial misconduct should not constitute a bar to the enjoyment of any of the rights contained in Part 2 of the Matrimonial Property Act. (p. 69)

RECOMMENDATION 11

The current definition of a “disposition” should be amended to include leases of less than three years. When a lease of less than three years is granted without compliance with the consent provisions, the lease is valid, unless it can be shown that the tenant was aware that consent was required and had no reason to believe that the consent was given. If the lease cannot be set aside, a court should have the power to order that all or part of the rents should be paid to the spouse whose consent was not obtained. The court should also have the power to direct that the lease be terminated at the earliest opportunity allowable under the terms of the lease. (p. 95)

RECOMMENDATION 12

The law should continue to require a consent and acknowledgment; the use of a standard form should be continued. That form should include both the consent and acknowledgment. It should clearly state that the rights being surrendered are those contained in Part 2 of the Matrimonial Property Act, as reformed, and that a given transaction is not effective until the document is completed. (p. 98)

RECOMMENDATION 13

(1) The law should require that the consent and acknowledgment form be properly completed. Minor defects should be ignored; the absence of a signature should not be treated as a minor defect.

(2) Where the formalities are not complied with properly, the law should provide that the transaction is void for all purposes. The law should also provide that the doctrine of estoppel does not apply to prevent any party from relying on the absence of a spousal consent.

(3) When the form is properly completed, the voluntariness of the consent can still be challenged by demonstrating that the consent was in fact given under duress. (p. 103)

RECOMMENDATION 14

The law governing the time at which a wrongful disposition of the matrimonial home can be set aside should conform with the general law governing land titles registration. Occupancy rights should not be classified as overriding interests under the land titles system. (p. 107)

RECOMMENDATION 15

(1) An action for damages should be available as a remedy for a wrongful disposition of any kind. This cause of action should not be extinguished by divorce.

(2) The quantum of damages to be awarded should be left to the discretion of the court. In assessing damages, a court should take into account all of the circumstances of the case, including the costs of relocation and comparable accommodation, and any inconvenience caused to a spouse or the children of the marriage. In the case of a wrongful mortgage, a court can assess damages at the level of the monies advanced, together with any incidental affects associated with the mortgage.

(3) Damages awarded to compensate for the loss of occupancy rights on death should be ordered to be secured against property, or paid into court, to be paid to the plaintiff-spouse only if that spouse survives the defendant. (p. 116)

RECOMMENDATION 16

A spouse who suffers a loss of occupancy rights owing, at least in part, to the operation of the land titles system, should be able to seek compensation from the assurance fund in accordance with the general law governing that fund. (p. 117)

RECOMMENDATION 17

A wrongful disposition of the matrimonial home should not give rise to quasi-criminal liability under provincial law. (p. 118)

RECOMMENDATION 18

The provisions governing dispensing with consent under the Dower Act should be incorporated into the consent rules under Part 2 of the Matrimonial Property Act. (p. 120)

RECOMMENDATION 19

(1) Spouses should be free to enter into a contract releasing their rights to occupancy of the matrimonial home on the death of the owning spouse. When such a contract is validly entered into the court should not be empowered to grant an order conferring possession on death unless it can be shown (i) that there has been a substantial change of circumstance since the entering into of the agreement that imposes a hardship on a spouse, or (ii) that the agreement would not be in the best interests of any children of the marriage.

(2) When a contract releasing rights of occupancy on death has been entered into and the owning spouse subsequently dies, the surviving spouse should be able to remain in the home for a transitional period. That period should be three months.

(3) An order that overrides the terms of a contract releasing occupancy rights should not be granted where to do so would affect the rights of a third party who acquired an interest in the home under a valid disposition of the home. (p. 130)

RECOMMENDATION 20

Spouses should be allowed to contract out of their rights of occupation arising prior to death. However, a contract entered into prior to separation should be unenforceable. Such a contract would be variable on the same grounds as contracts affecting occupancy rights on death. Third parties acting on the faith of a valid contract should not be prejudiced by a judicial alteration of the contract. (p. 132)

RECOMMENDATION 21

Part 1 of the Matrimonial Property Act should be amended to provide explicitly that an order under Part 2 can be made, even where no separate application under that Part has been launched. (p. 137)

RECOMMENDATION 22

Where the homestead is seized and sold under execution, the exempt portion of the proceeds of sale should be placed in the hands of the judgment debtor in accordance with general principles of exemptions law. (p. 144)

RECOMMENDATION 23

The current definitions of “homestead” under the Dower Act and “matrimonial home” under the Matrimonial Property Act should be replaced by a single definition. (p. 152)

RECOMMENDATION 24

The “matrimonial home” should be defined to include (a) lot in a subdivision, and (b) a “residential unit” as defined by the Condominium Property Act together with the owner’s interest in the common areas of the condominium. (p. 154)

RECOMMENDATION 25

The “matrimonial home” should be defined to include an ascertainable parcel of land of not more than one quarter section of land on which the home is situated. (p. 154)

RECOMMENDATION 26

(1) Where the matrimonial home is situated on a parcel of greater than a quarter section, the court should be empowered to delineate an area as the home of not more than 160 acres.

(2) Where the home straddles two or more parcels, each of these parcels should be treated as the home, unless a court orders a delineation, or orders compensation in lieu of occupancy rights.

(3) Where the parcel of land on which the home is located is a quarter section, that area should constitute the home, whether contained within a municipal area or otherwise. (p. 155)

RECOMMENDATION 27

- (1) The “matrimonial home” should be defined to include a suite.
- (2) When an order of exclusive possession is made under Part 2 of the Matrimonial Property Act in relation to a rental suite, excluding the original tenant, that spouse in whose favour the order has been made should be deemed to be an assignee of the interest of the other spouse in the lease.
- (3) When an order of exclusive possession is made excluding the original tenant, the obligations of that tenant to the landlord will continue only until the earliest time at which the tenant could have terminated the lease following the granting of the order.
- (4) The Matrimonial Property Act should provide for notice to the landlord of an order made under Part 2, and the effects of that order on the rights of the landlord that are affected by the order. (p. 158)

RECOMMENDATION 28

- (1) The “matrimonial home” should be defined to include a mobile home.
- (2) When a mobile home is located on a rented site, the recommendations concerning tenant liability and notice to the landlord that apply to residential tenancies should apply in relation to the mobile home site tenancy.
- (3) As a general rule, the provisions governing the disposition of the matrimonial home should apply to a mobile home. However, a disposition of a mobile home is valid, unless it can be shown that the transferee was aware that consent was required and had no reason to believe that the consent was given.
- (4) A spouse should be able to file a notice in the Personal Property Register, identifying a mobile home as a matrimonial home. That notice should specify that the consent requirements that apply. As under the present law, a spouse should also be able to file an order for possession.
- (5) Once an order for possession of a mobile home has been made, neither spouse should be allowed to relocate the home without either a consent or a court order having first been obtained. (p. 161)

RECOMMENDATION 29

The “matrimonial home” should be defined to include a part of business premises (other than a farm) used as living accommodation. (p. 163)

RECOMMENDATION 30

Rights over mines and minerals should not be considered to be part of the matrimonial home. (p. 165)

RECOMMENDATION 31

A home owned by a third party and one of the spouses should fall within the definition of the matrimonial home. The rights conferred on the other spouse under a possession order should be no greater than those held by the owning spouse. The

interests of the third party should be a consideration when an order for possession is sought. (p. 166)

RECOMMENDATION 32

The definition of the matrimonial home should not include property owned by a corporation. (p. 170)

RECOMMENDATION 33

The current requirement under the Matrimonial Property Act that a property falls within the definition of the matrimonial home only if lived in by both spouses should be retained. (p. 171)

RECOMMENDATION 34

A property should not cease to be a matrimonial home because a subsequent matrimonial home has been acquired. The election procedures currently contained in the Dower Act where a spouse dies owning more than one homestead should apply. The general rules governing releases and contracts should apply to all matrimonial homes. (p. 174)

RECOMMENDATION 35

- (1) The reforms proposed in the Report should be given prospective application.
- (2) Reform of the law should not affect dower life estates that have vested in possession.
- (3) The new provisions governing consent and the remedies for wrongful dispositions should apply only to dispositions occurring after the reforms become law. However, conduct giving rise to a quasi-criminal offence under the present Dower Act should not be amenable to prosecution after the new law takes effect.
- (4) Agreements made under the Dower Act and Part 2 of the Matrimonial Property Act prior to the coming into force of these reforms should remain binding on the spouses. (p. 178)