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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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Breaking Pet News: You Keep Your Llama; I'll Keep My Yak

On October 25, the Governor of New York State signed Bill A5775 — "An act to amend the domestic relations law, in relation to requiring the court to consider the best interest of a companion animal when awarding possession in a divorce or separation proceeding" (the "Bill").

The Bill amended New York's Domestic Relations Law to provide that "in awarding the possession of a companion animal, the court shall consider the best interest of such animal."

The Bill defines "companion animal" as "any dog or cat, and shall also mean any other domesticated animal normally maintained in or near the household of the owner or person who cares for such other domesticated animal." The legislation does, however, provide that "farm animals", which are defined as "any ungulate, poultry, species of cattle, sheep, swine, goats, llamas, horses or fur-bearing animals, as defined in section 11-1907 of the environmental conservation law, which are raised for commercial or subsistence purposes", do not qualify as "companion animals". So, New York is not concerned about the best interests of llamas or yaks.

Whether this type of legislation is a good idea or not is a question that is open to very serious debate. On the one hand, there is no question that for many people, a pet is a loved and treasured part of the family. To them, it must seem absurd that courts in most jurisdictions treat pets as just another chattel when they are clearly far more than that.

On the other hand, family law cases already involve far too much conflict, and family law courts in many jurisdictions are already trying to cope with unmanageable case loads. Requiring courts to decide, and allowing people to litigate, whether it would be in the best interests of the family dog, cat, parrot, turtle, hamster, (goldfish?) etc. to live exclusively with one spouse or the other, or whether it would be in the pet's best interests for the spouses to share "custody", will certainly not help to improve that situation.

But at least one thing is entirely clear in all of this: Phil would have loved this, and he is surely smiling down on New York State.

The Power of Dower

"All life is a series of problems which we must try and solve, first one and then the next and then the next, until at last we die."

— Dame Maggie Smith as Violet, Dowager Countess of Grantham, Downton Abbey

Graham v. Graham, 2021 CarswellAlta 2496 (C.A.) — McDonald, Veldhuis and Strekaf JJ.A.

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On Downton Abbey, Dame Maggie Smith plays Violet, Dowager Countess of Grantham, the widowed matriarch of the Crawley family. Historically, a "dowager" was a woman that held property or a title from her deceased husband.

In very general terms, "rights of dower" are rights given to a married person in the couple's "homestead" (think present day matrimonial home) when only one spouse is named on title. Some provinces still have dower legislation (Alberta, for example — the *Dower Act*, R.S.A. 2000, c. D-15). Other provinces have statutes with similar function, but with different names: *Land (Spouse Protection) Act*, R.S.B.C. 1996, c. 246; *Homesteads Act*, C.C.S.M. c. H80; *Homesteads Act*, S.S. 1989-90, c. H-5.1. And others accomplish the same goal through family law legislation: *Family Law Act*, R.S.O. 1990, c. F.3, s. 24; *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 8.

It is because of these similar statutory provisions that *Graham* may be of use to practitioners in all provinces, not just those with specific dower legislation.

In *Graham*, the Alberta Court of Appeal provides historic context to the Alberta *Dower Act*, and tries to judicially modernize the archaic statute to some extent. And in so doing, the Alberta Court of Appeal has revitalized the *Act* as another arrow in the quiver of family law practitioners.

The parties married in 1995 and separated in 1997. They had three children. Although the husband started divorce proceedings in 2014, the parties were still not divorced almost 25 years after they separated. That is, they were still married spouses. This was important for *Dower Act* purposes.

While the husband led a very comfortable life after separation (in some years earning as much as $1 million), things were not so good for the wife and the children. They led a meagre financial existence, close to if not below the poverty line, often relying on food banks. The husband paid little by way of child support, and it is not clear from the decision why that situation was allowed to persist.

In 2006, the husband purchased a home in Duchess, Alberta (the "Duchess Home"), which he subsequently mortgaged twice — once in 2006 and then again in 2012. He then sold the Duchess Home in 2014 for $325,000, and for net proceeds of $123,000.

Here the husband ran into trouble: to obtain both mortgages and to sell the Duchess Home, the husband had to either get the wife's consent or get her to waive her rights under the *Dower Act*. He did neither for any of the three transactions. Oops. In fact, for all three transactions, the husband swore that he was not married. Double oops.

When the husband started his claim for divorce in 2014, the wife counterclaimed for corollary relief, including child support, retroactive child support, and the division of matrimonial property. During those proceedings, the wife learned about the various transactions regarding the Duchess Home, based on which she claimed damages under the *Dower Act*. The wife claimed damages of $162,500.00 — exactly 50 percent of the proceeds of sale of the Duchess Home.

The wife's claim under the *Dower Act* was heard at the same time as her claim for property division and retroactive child support.

The trial judge awarded the wife retroactive child support of about $150,000. However, he denied her claim for property division (under the *Matrimonial Property Act* at the time) because neither party had any substantial assets when the parties separated, and the wife had not contributed to the acquisition of the husband's assets during their long separation.

The trial judge also did not award anything to the wife for her claim under s. 11 of the *Dower Act*, which dealt with damages for breaches. Rather, "because the *Dower Act* is punitive in nature," the trial judge ordered that the husband pay the wife a penalty (as opposed to damages) for three offences under s. 2(3) of the *Dower Act* as a result of the three false dower affidavits he had sworn. This amounted to $3,000, which was characterized in the resulting order as a "matrimonial property/dower offset".

The trial judge held that due to the interplay between ss. 7 and 8 of the *Matrimonial Property Act*, any dower interests held by the wife would be offset by the distribution of matrimonial property.

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The wife appealed to the Alberta Court of Appeal on the basis that the trial judge did not award her proper damages under the *Dower Act*. Her appeal focussed on the interplay between the *Matrimonial Property Act* and the *Dower Act*.

Sections 2 and 11 of the *Dower Act* were relevant to the appeal [emphasis added]:

> **Disposition prohibited without consent**
>
> 2(1) No married person shall by act inter vivos make a disposition of the homestead of the married person whereby any interest of the married person will vest or may vest in any other person at any time
>
> > (a) during the life of the married person, or
> >
> > (b) during the life of the spouse of the married person living at the date of the disposition,
>
> unless the spouse consents to the disposition in writing, or unless the Court has made an order dispensing with the consent of the spouse as provided for in section 10.
>
> . . . . .
>
> 2(3) A married person who makes a disposition of a homestead in contravention of this section is **guilty of an offence** and liable to a fine of **not more than $1000** or to imprisonment for a term of not more than 2 years.
>
> . . . . .
>
> **Action for damages**
>
> 11(1) A married person who without obtaining
>
> > (a) the consent in writing of the spouse of the married person, or
> >
> > (b) an order dispensing with the consent of the spouse,
>
> makes a disposition to which a consent is required by this Act and that results in the registration of the title in the name of any other person, **is liable to the spouse in an action for damages**.
>
> 11(2) **The amount of the damages** for which the married person is liable to the spouse is a sum equivalent to
>
> > (a) 1/2 of the consideration for the disposition made by the married person, if the consideration is of a value substantially equivalent to that of the property transferred, or
> >
> > (b) 1/2 of the value of the property at the date of the disposition,
>
> **whichever is the larger sum**.

The Court of Appeal started by setting out the history and purpose of the *Dower Act*:

> [24] The *Dower Act* has a long history in Alberta and has existed in one form or another since the early 1900s. Generally speaking, the purpose of dower rights throughout history has been the protection of wives' interests in their husbands' property by creating a life estate for the wife in that property [citations omitted]. In keeping with this purpose, the *Dower Act* is still recognized to be protective in nature today: *Joncas* at para 25.
>
> [25] Through various amendments of the *Dower Act*, dower rights have become gender neutral and there are now five enumerated dower rights. The dower rights most relevant to this appeal are "the right to prevent disposition of the homestead by withholding consent" and "the right of action for damages against the married person if a disposition of the homestead

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> that results in the registration of the title in the name of any other person is made without consent": *Dower Act* ss. 1(c)(i) and (ii). These rights crystallize immediately upon one spouse acquiring property which meets the definition of a homestead and are terminated by divorce or by the non-owner spouse predeceasing the owner spouse: *Phan v. Lee*, 2005 ABCA 142 at paras 9 and 10.
>
> . . . . .
>
> [27] As the transfer of land essentially ends the non-owner spouse's dower interests, there are a number of protections built into the *Dower Act* to prevent this from happening without proper consent. The first protection is that in order to register a transfer, the disposition must be accompanied by written consent of the non-owner spouse or an order of the court dispensing with consent: *Dower Act* ss. 4 and 10. In the absence of consent or court order, the disposition must be accompanied by a dower affidavit which states that either the owner is not married, the property is not a homestead, that there has been a release of dower rights, or that a judgment for damages for a wrongful disposition has been registered: *Dower Act* s. 4(6); Forms Regulation, Alta Reg 39/2000.
>
> [28] **If the above protections fail and the owner spouse wrongfully disposes of the land, under s. 2(3), the owner spouse is guilty of an offence and liable to a fine of not more than $1,000.00 or imprisonment for not more than two years**.
>
> [29] **The *Dower Act* also provides a remedy to the non-owner spouse in s. 11, under which the owner spouse is liable to the non-owner spouse in an action for damages**. Once a disposition is found to be wrongful pursuant to s. 11(1), damages are owed under s. 11(2). Section 11(2) provides that the amount of damages the owner spouse will be liable for is the larger of either one half the consideration for the disposition or one half the value of the property at the date of disposition. **There is no discretion under the *Dower Act* for calculating damages or valuing the dower rights; therefore, the damages awarded must be as directed by s. 11**: *Phan* at para 13, *Joncas* at para 25.
>
> [30] There are no provisions contained in the *Dower Act* which contemplate a spouse being excused for their wrongful disposition based on the impact it may have on the division of matrimonial property. **Further, there is no discretion to deviate from the formula to calculate damages.** Therefore, if the trial judge was of the opinion that the [husband] had violated s. 11, (which he was) he was required to award full damages as contemplated within s. 11 to the [wife]. To fail to do so was an error of law. [emphasis added]

Therefore, the *Act* contemplates *both* an offence/penalty regime *and* a proscribed damages regime.

First, the Court of Appeal was of the view that the trial judge had improperly conflated the analysis of damages under the *Dower Act* with the distribution of matrimonial property under the *Matrimonial Property Act*:

> [21] . . . The *MPA* and the *Dower Act* serve different purposes: *Joncas* at para 30. Therefore, the determination of claims for damages brought under the *Dower Act* and the division of any such damages awarded as matrimonial property under the *MPA*, require two separate analyses.

The Court of Appeal then emphasized the mandatory provisions of the *Dower Act* that provide the proper measure of damages — half the proceeds of sale of the Duchess Home — being $162,500. Again, there is no discretion under the *Act* for calculating damages or valuing dower rights. Damages must be awarded as directed by s. 11.

And, finally, the Court of Appeal confirmed that the wife's damages under the *Dower Act* were divisible matrimonial property and considered what the division of these damages should be under s. 8 of the *Matrimonial Property Act*. In concluding that the wife should receive an unequal division in her favour, the Court of Appeal found the husband's "abject failure" to contribute to the welfare of his family was highly relevant. The husband offered no reasonable justification for having thrice breached the *Dower Act*, and the Court of Appeal awarded the wife 75 percent of the damages, for an award of $121,875.

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It is important to understand that the wife was *not* awarded any of the proceeds of sale of the Duchess Home as a division of matrimonial property. Rather, she was awarded damages under the *Dower Act*, emphasizing the separate nature of the provisions. It was the husband's own conduct of breaching the *Dower Act* that led to these damages being awarded even though the wife, in fact, received no division of property.

Who Gets the LIRA?

Ray-Ellis v. Goodtrack et al., 2021 CarswellOnt 6398 (S.C.J.) — Gilmore J.

Ray-Ellis offers an important reminder to *always* tell your clients to ensure they change their beneficiary designations.

The husband and wife were married in 1993 and separated in 1998.

In 1997, the husband signed a designation naming the wife as the sole beneficiary of his Locked in Retirement Account ("LIRA"). When they separated in 1998, the LIRA had a total value of $67,000 (rounded).

The parties eventually signed a Separation Agreement that required the husband to pay the wife $100,000 in full and final settlement of all issues. The agreement also included the usual family law property, estate, and support releases.

In 2001, the husband signed a designation naming his parents as the sole beneficiaries of his LIRA. However, for reasons that remain unclear, the husband either never sent the new designation to his bank, or the bank received the designation and lost it. Either way, the bank's records continued to show the wife as the sole beneficiary of the husband's LIRA.

In 2007 and 2015, the bank contacted the husband about updating the beneficiary designation for the LIRA, and sent him the necessary forms. The husband never signed and returned the updated forms to the bank. However, during a call with a bank employee in 2015 that the bank recorded ("this call may be recorded for training purposes"), the husband made it very clear that he did not want the wife to be the beneficiary of his LIRA.

The husband died in 2018. As the bank's records still listed the wife as the LIRA's sole beneficiary, the husband's executor contacted her and asked her to release any rights she might have in the LIRA, which, by that point, was worth more than $166,000.

Despite having signed a full release as part of the settlement, and although she had been separated from the husband for almost 20 years by that point, the wife took the position that "the 1997 designation has not been revoked because of the deceased's affirmation in 2015 that the [wife] was the beneficiary and his failure to change the designation despite being provided with beneficiary change forms on three separate occasions."

In response, the estate took the position that the husband had revoked the 1997 beneficiary designation when he signed the 2001 designation in favour of his parents. It also argued that the wife had released any claim she might have to the proceeds of the LIRA as part of the family law settlement, and that the wife would be unjustly enriched if she were to receive the money from the LIRA.

In order to resolve the dispute, Justice Gilmore had to review the statutory regime that governs LIRAs. But before getting into the decision itself, it is useful to go back to first principles to understand what a LIRA actually is.

A LIRA is a type of registered savings plan that generally arises when an employee leaves a job where he/she is a member of either a federally or provincially regulated pension plan. Upon leaving the job, the value of the employees interest in the pension plan can be transferred to a LIRA.

A LIRA is similar to an RRSP, but is also subject to certain restrictions that are set out in the applicable pension statutes, including the following:

1) Unlike an RRSP, no further contributions can be made to a LIRA; and

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2) Unlike an RRSP, money usually cannot be withdrawn from a LIRA until the owner reaches a certain age (at which point the LIRA gets converted into an annuity or other form of retirement vehicle).

In this case, as the husband's LIRA came from a federally regulated pension plan, it was governed by the *Pension Benefits Standards Act*, R.S.C. 1985, c. 32 (2nd Supp.) (the "*PBSA*"). However, just to clarify Justice Gilmore's comment at paragraph 23 that "[i]t is well known that LIRAs are a form of pension fund under the federal *Pension Benefits Standards Act*," not all LIRAs are actually governed by the federal pension legislation. If a LIRA is derived from a provincially regulated pension plan, it would be governed by the applicable provincial pension legislation. It is important to correctly identify which legislation governs the LIRA, because the rules about them, including those dealing with what happens to the LIRA if its owner dies, can vary depending on which legislation applies.

Section 31 of the *PBSA* provides that the rules for dealing with beneficiary designations for federally regulated pensions are governed by the applicable provincial law, which in Ontario is the *Succession Law Reform Act*, R.S.O. 1990, c. S. 26 (the "*SLRA*"). Accordingly, Justice Gilmore turned to ss. 51 and 53 of the *SLRA*, which provide as follows:

51 (1) **A participant may designate a person to receive a benefit payable under a plan on the participant's death**,

(a) **by an instrument signed by him or her** or signed on his or her behalf by another person in his or her presence and by his or her direction; or

(b) by will,

and may revoke the designation by either of those methods.

. . . . .

53 **Where a participant in a plan has designated a person to receive a benefit under the plan on the death of the participant**,

(a) **the person administering the plan is discharged on paying the benefit to the person designated under the latest designation made in accordance with the terms of the plan, in the absence of actual notice of a subsequent designation or revocation made under section 51** but not in accordance with the terms of the plan; and

(b) the person designated may enforce payment of the benefit payable to him under the plan but the person administering the plan may set up any defence that he could have set up against the participant or his or her personal representative. R.S.O. 1990, c. S.26, s. 53. [emphasis added]

Justice Gilmore determined that the 2001 designation was an "instrument" for the purposes of s. 51(1) of the *SLRA*. She also determined that s. 53 made it clear that the *SLRA* does ***not*** require an instrument to be registered, or even sent to the relevant bank for it to be binding, and it did not matter for the purposes of the *SLRA* that the parties had been unable to locate an original copy of the 2001 designation. Accordingly, as the wife had not even tried to challenge the authenticity of the 2001 designation, "simple presentation of the 2001 designation, which accords with the requirements in s. 51(1)(a), is sufficient for [the bank] to pay out as it is the 'latest' beneficiary designation."

Justice Gilmore was also of the view that even though the releases in the parties' settlement did not expressly refer to the LIRA, they were clear and broad enough to cover any further claim the wife might have with respect to that particular asset.

Finally, Justice Gilmore determined that even if she was wrong that the 1997 designation had been revoked both by the 2001 designation and the release, the wife would be unjustly enriched if she were to receive the funds from the LIRA because the value of this asset had already been factored into the husband and wife's family law settlement. As a result, her Honour would have imposed a constructive trust over the LIRA in the estate's favour. [See also *Moore v. Sweet*, 2018 CarswellOnt 19478 (S.C.C.).]

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Accordingly, Justice Gilmore ordered that the husband's parents were entitled to receive the funds from the LIRA in accordance with the 2001 designation.

This was an incredibly fortunate result for the husband's parents. While the equities in this case were on their side, issues involving beneficiary designations can be quite confusing and technical, and can often depend on the type of asset being dealt with and the statutory regime governing it. For example, had the wife been the designated beneficiary of a life insurance policy instead of a LIRA, the estate may very well have found itself out of luck, at least with respect to its arguments regarding the effect of the releases (see *Richardson Estate v. Mew* (2009), 64 R.F.L. (6th) 126 (Ont. C.A.) at para. 55).

So, please remember — always tell your clients to change their beneficiary designations and to check with the provider to ensure that the change in designation was received. And put your advice to them ***in writing***. That way, your clients can ensure that they organize their affairs properly, and there can be absolutely no dispute later over what advice was, or was not, given in the event a subsequent dispute.

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