Citation: Siwak v Siwak, 2019 MBCA 60 Date: 20190524
Docket: AF18-30-09039

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice Christopher J. Mainella
Madam Justice Karen I. Simonsen

B E T W E E N :

WILLIAM MIKE CHARLES SIWAK	)	
	)	
(Petitioner) Appellant	)	
	)	
- and -	)	***M. Capozzi***
	)	*for the Appellant*
DIANNE LYNNE SIWAK	)	
	)	
(Respondent)	)	***R. G. Waugh***
	)	*for the Respondent*
A N D B E T W E E N :	)	
	)	
WILLIAM MIKE CHARLES SIWAK	)	*Appeal heard:*
	)	***November 26, 2018***
(Petitioner) Appellant	)	
	)	
- and -	)	*Judgment delivered:*
	)	***May 24, 2019***
THE ESTATE OF DIANNE LYNNE SIWAK	)	
	)	
(Respondent) Respondent	)	
	)	

On appeal from 2016 MBQB 61; and 2018 MBQB 9

BEARD JA

I. THE ISSUES

[1] This appeal and cross appeal raise issues related to the title to, and disposition of, the parties' jointly owned home (the home) following their

separation and whether homestead rights attached to the home. The petitioner, William Mike Charles Siwak (the husband), applied for a divorce and for partition or sale of the home, but the proceedings became complicated when the respondent Dianne Lynne Siwak (the wife) died before the disposition of the home was completed. The proceedings were continued by her estate in the name of the respondent The Estate of Dianne Lynne Siwak (the estate).

[2] This matter proceeded by way of two separate hearings. At the first hearing, the trial judge found that the joint tenancy in the home had been severed before the wife died (the first decision) (see 2016 MBQB 61). Following a second hearing, the trial judge found that the husband had a life interest in the wife's interest in the home at her death, and she ordered the sale of the home (the second decision) (see 2018 MBQB 9). The husband filed an appeal of the finding that there had been a severance of the joint tenancy, and the estate filed a cross appeal of the finding that the husband had homestead rights in the estate's interest in the home.

[3] More particularly, the issues are as follows:

(i) Did the trial judge err in finding that spouses who are co-owners of their residence also have homestead rights under *The Homesteads Act*, CCSM c H80 (proclaimed August 15, 1993) (the *HA*), in that co-owned property?

(ii) Did the trial judge err in finding that there had been a severance of the joint tenancy before the wife died?

(iii) Did the trial judge err in finding that the husband, as a tenant in common, had a life interest in the wife's interest as a tenant in common in their co-owned property?

(iv) Did the trial judge err in dispensing with the husband's consent to the sale of the co-owned property pursuant to section 19 of *The Law of Property Act*, CCSM c L90 (the *LPA*)?

(v) Did the trial judge err in presuming that the estate had a prima facie right to the partition or sale of the co-owned property without the husband's consent?

The relevant legislative provisions are set out in the appendix to these reasons.

II. THE FACTS

[4] In the first decision, the trial judge explained the background facts as follows (at para 8):

> The parties prepared a statement of agreed facts, which served to establish the foundation for this proceeding. The agreed facts are in summary form as follows:
>
> (i) [The husband] and [the wife] were married on July 6, 1998 and separated on June 6, 2011. They purchased 56 Crescent Boulevard, Matlock, Manitoba ("the marital home") and held the title in joint tenancy.
>
> (ii) The [husband and the wife] separated on June 6, 2011 and on that same date, [the husband] filed a petition for divorce seeking, among other things, partition or sale of the marital home and unequal division of marital property.

(iii) [The wife] filed an answer on September 14, 2011, seeking, among other things, exclusive occupancy of the marital home and opposing partition or sale.

(iv) [The husband] signed a notice of intent to sever title to the marital home under ***The Real Property Act*** C.C.S.M. c. R30 ("***RPA***"), on October 11, 2012 and served [the wife] with the notice on that same date at a case conference held in Manitoba Queen's Bench to attempt to settle their marital dispute. [This notice was never filed against the title to the home.]

(v) [The husband] and [the wife] each brought motions for exclusive occupancy of the . . . home. These motions were heard before Yard J. on November 28, 2011, at which time he pronounced an order granting [the wife] exclusive occupancy of the . . . home.

(vi) On March 11, 2013, [the wife] signed a notice of intent to sever the joint tenancy of the . . . home under the ***RPA***. She passed away on March 14, 2013. [This notice was neither filed against the title to the home nor served on the husband.]

(vii) On June 28, 2013, Yard J. rescinded his interim order pronounced on November 28, 2011. [The husband] moved back into the marital home on that same date and has remained living there since.

[5] On March 20, 2013, the husband requested that the Winnipeg Land Titles Office transfer title to the home into his name as sole owner on the basis that he was the surviving joint tenant, which registration was completed on April 11, 2013. Following that registration and on the same date, the executor of the estate caused a caveat to be filed against the husband's title to the home, giving notice of the estate's claim to ownership of a one-half interest in the home.

[6] There were several case conferences held prior to the trial. At the first case conference, being on October 13, 2011, the husband and the wife agreed that the husband's appraiser could have access to the home. At the second case conference, being on October 11, 2012, the husband and the wife again agreed that the husband's appraiser could have access to the home and that the husband's lawyer would be suggesting a listing price for the home to the wife's lawyer.

[7] Following the first hearing, the trial judge found that there had been a severance of the joint tenancy before the wife passed away, at which point, the husband and the wife became tenants in common, each entitled to an undivided one-half interest in the home. The husband has appealed the finding that there was a severance.

[8] Following the second hearing, the trial judge found that the husband, as a tenant in common, had homestead rights in the wife's interest as a tenant in common in the home which, upon her death, became a life estate in her interest in the home. The estate has appealed the finding that a spouse or common-law partner who is a joint tenant or a tenant in common also has homestead rights in the home.

[9] In the second decision, the trial judge also found that the husband had a life interest in the home, but that that interest did not prevent the home from being sold without his consent pursuant to section 19 of the *LPA*. She found that the court could dispense with the husband's consent to the sale of the home, including his life interest. In this case, she found that the husband had not demonstrated that there was a basis to refuse to grant an order for sale,

and she exercised her discretion to order that the home be sold. The husband has appealed this finding.

III. HOMESTEAD RIGHTS OF CO-OWNERS

The Issue

[10] The estate argues that homestead rights exist only where the homestead property is owned by one spouse or one common-law partner alone or together with others who are not the spouse or common-law partner of the owner. Its position is that, where spouses or common-law partners are the co-owners of the homestead property, their interests are adequately protected through their co-ownership and there is no place for homestead rights in addition to the rights that accrue through the co-ownership.

[11] The estate bases its position on the wording of certain provisions in the *HA* and comments made in a report by the Manitoba Law Reform Commission, *Report on An Examination of "The Dower Act"*, Report 60 (Winnipeg: 19 November 1984, 1984), online: <www.manitobalawreform.ca/pubs/pdf/archives/60-full_report.pdf> (the dower report).

[12] The trial judge considered those arguments but followed the decision of this Court in *Wimmer v Wimmer*, [1947] 4 DLR 56, and that of the trial judge in *4414790 Manitoba Ltd et al v Nelson and Duck Mountain Outfitters Ltd*, 2003 MBQB 183, holding that the husband had homestead rights in the home in addition to his rights as a co-owner.

[13] The estate argued at the appeal hearing that this Court should no longer be bound by its earlier decision in *Wimmer* due to changes in the

legislation, specifically, the replacement in 1993 of *The Dower Act*, RSM 1988, c D100, with the *HA* (see SM 1992, c 46, section 67) and the statutory changes to the right to partition and sale that were made to the *LPA* in 1949 (see *An Act to amend The Law of Property Act*, SM 1949, c 32), after the decision in *Wimmer*.

Standard of Review

[14] The issue of whether homestead rights under the *HA* extend to a spouse or common-law partner who is also a co-owner of their residence relates to the interpretation of the statutes and is, therefore, a question of law. This issue does not raise any factual issues specific to this case and it does not involve the application of the specific facts of this case to the law. The standard of review of such issues is that of correctness. (See Donald JM Brown with the assistance of David Fairlie, *Civil Appeals* (Toronto: Thomson Reuters, 2017) (loose-leaf release 2019-2), ch 14 at 14-17, 14-20, ch 15 at 15-29, 15-30; *Kiddie Kampus Inc v Winnipeg City Assessor*, 2005 MBCA 86 at para 25; *Gendis Inc v Canada (Attorney General) et al*, 2006 MBCA 58 at para 42; *Chartier (Bankrupt), Re*, 2013 MBCA 41 at para 20; and *TransCanada Pipelines Ltd v Manitoba*, 2013 MBCA 88 at para 39.)

Analysis—Homestead Rights

(i) Homestead Rights of Co-owners

[15] The seminal decision on this issue is this Court's decision in *Wimmer*. There were two issues before the Court in *Wimmer*: (i) whether a dwelling-house owned by a husband and wife as joint tenants, and occupied by them as their residence, was the homestead of the husband; and (ii) whether

the husband, as a matter of right, was entitled to have the property disposed of by an order for partition or sale. All four judges sitting on the appeal were in agreement that the answer to the first question was "yes", and the answer to the second was "no". The decision regarding the first issue was clearly set out by McPherson CJM (at p 61):

> . . . [W]here the title to the property upon which they reside, and the dwelling in which they live, is in their names as joint tenants, the same is the homestead of the husband under the Act; and that the wife has, in addition to her survivorship as a joint tenant, her right of dower in the interest of the husband—which interest must be released, in accordance with the terms of the *Dower Act* [RSM 1940, c 55], unless she joins with her husband in the sale or disposition of her whole interest in the said property.

[16] The decision on the second issue in *Wimmer* was based on the effect of the right to partition and sale contained in section 19 of *The Law of Property Act*, RSM 1940, c 114, (the *LPA, 1940*). That section, in its entirety, read as follows at that time:

> **19.** All joint tenants, tenants in common, mortgagees and other creditors having any lien or charge on, and all persons interested in, to, or out of any land in Manitoba, may be compelled to make or suffer partition or sale of the land or any part thereof.

[17] In *Wimmer*, this Court noted that, if a spouse was not an owner of the homestead, then he or she would have the full protection of *The Dower Act*, RSM 1940, c 55 (*The Dower Act, 1940*), by way of the right to a life estate in the homestead. If a spouse who was a co-owner was excluded from the protection of *The Dower Act, 1940*, his or her interest would be liable to be partitioned or sold under section 19 of the *LPA, 1940*, without his or her consent, and he or she would lose the right to a life interest in the property.

The Court concluded that the lesser protection given to a spouse who was a joint owner was unfair and not consistent with the purpose of dower legislation, being to protect the home for the use of the wife during her lifetime. To ensure that the purpose of the homestead legislation was carried out, the Court held that the protection in *The Dower Act, 1940,* applied to a homestead property that was co-owned by the spouses.

[18] In 1949, less than two years after this Court's decision in *Wimmer* was released, amendments were enacted to both section 19 of the *LPA, 1940* (see para 13 above); and to section 3 of *The Dower Act, 1940* (as amended by *An Act to amend The Dower Act*, SM 1949, c 12, section 1). Section 19 of the *LPA, 1940* was amended by adding the following subsection:

> 19(2) Where a person to whom subsection (1) applies is a married man or a married woman, an action for partition or sale of the land may be brought by or against him or her; and
>
> (*a*) partition, or
>
> (*b*) where in the opinion of the court, the land cannot reasonably be partitioned, sale thereof in lieu of partition,
>
> may be ordered by the court without the consent of any party to the action, and without the consent of his or her spouse having been obtained as provided in The Dower Act.

[19] The application of the amended legislation came before this Court in 1949, very soon after the amendments, in *Fritz v Fritz*, [1950] 2 DLR 104. The parties were husband and wife and also the joint owners of the homestead property. The wife applied to sell the property and the husband opposed the sale on the basis of the decision in *Wimmer*, being that the property was his homestead and, therefore, could only be sold with his consent.

[20] Coyne JA, in dissent but not on this point, stated that "the amendment of 1949 was intended to change the law as it stood at the time of, and as it was found in, the *Wimmer* case, and this application comes within the amended section" (at p 108). The difference between Coyne JA in dissent and the four justices in the majority in *Fritz* related to the appropriate remedy, not to the interpretation of the legislation. Important to the current matter is the fact that all of the appellate judges accepted that the property was owned by the spouses as joint tenants and, also, that it was their homestead (see pp 105-106, 111-12, 120).

[21] As noted by Coyne JA (at p 108) and Adamson JA (at p 120), the change in section 19 of the *LPA*, *1940*, was made to address the finding in *Wimmer* that a spouse who was a joint owner of a homestead property could not apply to sell it without the consent of the other spouse/joint owner.

[22] The Legislature could have addressed that finding in one of two ways: it could have changed the legislation to state that homestead rights did not apply where the spouses were co-owners of the property; or it could give a co-owning spouse the right to apply for an order for partition and sale of the homestead property without the consent of the other spouse. The Legislature chose the second option, leaving in effect the finding in *Wimmer* that homestead rights would apply where the spouses were also co-owners.

[23] This conclusion is confirmed by the wording and operation of section 19(2). The provision is premised on the co-owner spouses having homestead rights which are, by the amended provision, held not to be a bar to an application for partition or sale. If the Legislature had intended that co-owners would have no homestead rights, section 19(2) would not have been

necessary. The husband in *Fritz* argued for a narrower interpretation of section 19(2), being that it applied only where the property was owned by joint owners who were not spouses and the non-owner spouse of one of the joint owners claimed dower rights against another joint owner. That argument was specifically rejected (see pp 108, 120).

[24] The estate raises other arguments in support of its interpretation of the *HA* that arise from the wording of the definition of "homestead" in the *HA* (at section 1) and also the wording of sections 2.1, 2.2 and 4 of the *HA*.

[25] Dealing first with the definition of "homestead" in the *HA*, that definition applies to a residence "occupied by the owner and the owner's spouse or common-law partner as their home". The estate argues that the words "the owner and the owner's spouse" mean that there can be only one owner, not two co-owners. The difficulty with this argument is that essentially the same definition of "homestead" appeared in *The Dower Act, 1940*, that was under consideration in *Wimmer*, being "a dwelling house in a city, town, or village occupied by the owner" (at section 2(c)(i)). The argument that the estate is now making was made and rejected in *Wimmer* (see pp 57, 61, 65-66). Thus, this argument does not assist the estate's position.

[26] As regards the wording and operation of the provisions in sections 2.1 and 2.2 of the *HA*, those provisions do not address the issue of co-owners having or not having homestead rights in their co-owned residence; rather, they were added to the legislation in 2002 (see *The Common-Law Partners' Property and Related Amendments Act*, SM 2002, c 48, section 10) to extend spousal homestead rights to common-law partners. In my view, those amendments do not support a finding that the Legislature intended to

end the homestead protection for co-owners who are also spouses or common-law partners of each other by overturning the decision in *Wimmer* that had, for decades, held that otherwise qualifying co-owners have homestead rights.

[27] Finally, I will deal with the 1949 amendment to section 3 of *The Dower Act, 1940*, and section 4(d) of the *HA*. The estate argues that the use of the words "estate or interest" in section 4(d) of the *HA* does not include a specific reference to an "ownership interest", as opposed to a lesser interest, so it should not be interpreted as including an ownership interest by way of joint tenancy.

[28] Section 4 of the *HA* prohibits the disposition of the homestead by the owner without the consent of the owner's spouse, and sets out how that consent is to be given. The effect of section 4(d) is to validate a disposition if "the owner's spouse . . . has an estate or interest in the homestead in addition to rights under this Act" and is a party to and executes the disposition of the property. The essence of what is now section 4 of the *HA* appeared as section 3 in *The Dower Act, 1940*. As already noted, section 3 was amended in 1949, at the same time as section 19 of the *LPA, 1940*, when section 3(*c*) was added. Section 3(*c*) is essentially the same as section 4(d)—it refers to a disposition by a spouse who has "an estate or interest in the homestead in addition to her rights under this Act".

[29] While there is no record in Hansard of the intention of the Legislature in enacting the 1949 amendments because they pre-date the Hansard recordings, this Court in *Fritz* found that the changes to section 19 of the *LPA, 1940*, were made in response to the decision in *Wimmer* (see pp 108, 120). It is reasonable to conclude that the changes in section 3 of *The Dower*

Act, *1940*, were also in response to *Wimmer*, having been enacted together with the change to the *LPA*, *1940*, and dealing with the same subject matter. With this in mind, the most reasonable interpretation of the words "estate or interest" in section 3(*c*), and now 4(d), would include an ownership interest such as a joint tenancy, which was the interest at issue in both *Wimmer* and *Fritz*.

[30] In *Fritz*, Coyne JA stated as follows regarding section 3(*c*) (now section 4(d)) (at p 112):

> The respondent cites particularly the 1949 (c. 12, s. 1) amendment to s. 3 of the *Dower Act*. Its effect, however, is to place in the same position as any other joint tenant, a wife who has an estate or interest in land in addition to dower right, and who signs, as a party, a transfer, agreement of sale or other disposition of the lands made by her husband. It directly provides that it is not necessary that she should also sign a consent under the *Dower Act*. The section is no help to the respondent here.
>
> [emphasis added]

[31] This Court also had occasion to comment on the effect of section 3(1)(*d*) of *The Dower Act*, RSM 1970, c D100, which was formerly section 3(*c*) of *The Dower Act*, *1940*, in *Westward Farms Ltd v Cadieux* (1982), 138 DLR (3d) 137. Matas JA, in reasons concurred in by O'Sullivan and Huband JJA, stated (at p 142):

> In Manitoba, s. 3 of [*The Dower Act*, RSM 1970, c D100] stipulates that an *inter vivos* disposition of a homestead shall be invalid and ineffective unless the wife "consents in writing to the disposition". Section 3(1)(*d*) excepts property in which the wife has an estate or interest in addition to her rights under the Act, *e.g.*, in joint tenancy. …
>
> [emphasis added]

[32] It is clear from these decisions that this Court has interpreted the words an "estate or interest" in the homestead in what is now section 4(d) of the *HA* as including both an estate by way of joint tenancy and an estate by way of tenancy in common, and has included, within the ambit of the dower and homestead legislation, a spouse who is a joint tenant and one who is a tenant in common of homestead property.

(ii) Reconsidering an Earlier Decision

[33] There is a further reason for not adopting the estate's arguments for overruling this Court's decision in *Wimmer*, which relates to the principle of *stare decisis* and this Court's procedure for reconsidering its earlier decisions. This issue has been considered by this Court on several occasions. In *Mellway v Mellway*, 2004 MBCA 119, Monnin JA, speaking for the Court, stated (at paras 26-28):

> Courts of appeal, including this one, may reconsider their prior rulings. Justice may require there to be change where "the social, economic or cultural assumptions underlying a pre-existing decision are no longer valid in contemporary society." See *R. v. Beaudry* (2000), 100 Alta. L.R. (3d) 259, 2000 ABCA 243, at para. 98, *per* Russell J.A. . . . Reconsideration of a prior decision cannot be done lightly. If one panel of the court is at liberty to depart from a pronouncement of an earlier panel, the result is an unacceptable level of uncertainty in the law.
>
> In the end, in this case I adopt Twaddle J.A.'s comments in *Chartier v. Chartier* (1997), 118 Man.R. (2d) 152 (C.A.), rev'd on other grounds [1999] 1 S.C.R. 242 (at para. 35):
>
> > … I agree that we are bound by a previous decision of this court. Although this court may occasionally depart from a previous decision it has made, none of the circumstances in which it is right to do so (such as the previous decision having been made per incuriam) are present here. The fact that other provincial courts of appeal have reached different decisions is

> not a ground for us to review our decision, but rather for the Supreme Court of Canada to do so.
>
> I also note that in the *Chartier* case, the court had specifically been asked to reconsider its previous decision in *Carignan v. Carignan* (1989), 61 Man.R. (2d) 66 (C.A.), and therefore sat with a panel of five members. So, if *Andries* [*Andries v Andries* (1998), 159 DLR (4th) 665 (Man CA)] is to be reconsidered, something which this panel has not been convinced of on these facts, it can only be done in one of three ways:
>
> 1. by a direct rejection of *Andries* by a five-person panel of this court;
>
> 2. a decision from the Supreme Court of Canada; or
>
> 3. a legislative change. . . .

(See also *Gen'l Brake Serv Ltd v WA Scott & Sons* (1975), 59 DLR (3d) 741 at 742-43 (Man CA); *Chartier v Chartier* (1997), 154 DLR (4th) 431 at 439-40 (Man CA); *Simplot Chemical Co Ltd v Manitoba (Municipal) Assessor*, 2003 MBCA 129 at paras 3, 35; *McNaughton Automotive Ltd v Co-operators General Insurance Co* (2005), 255 DLR (4th) 633 at paras 107-145 (Ont CA); and *R v Neves (JA)*, 2005 MBCA 112 at paras 5, 59-60, 100-109.)

[34] The five-member panels in *McNaughton* and *Neves* reviewed factors that would be considered when determining whether an earlier decision should be overruled. Steel and Freedman JJA, for the majority in *Neves* at para 107, adopted the following finding of Laskin JA, for the Court in *McNaughton* (at para 140):

> Fourth, the case for overruling is more compelling because *McNaughton* is of relatively recent vintage. It is less than four years old. It is neither a decision that has stood for many years, nor a decision that has been reaffirmed by the court in later cases.

> Better then to correct an error early than to let it settle in. Moreover, when it was decided, it was the first case of its kind, not just in Ontario but across the country. . . .

[35] *Wimmer* has represented the law in Manitoba on the applicability of homestead rights to property that is co-owned by a husband and wife since 1947. In his lengthy reasons, Bergman JA explained that the homestead provisions were based on earlier American law, and he reviewed a significant number of earlier authorities from both the United States and Canada that state that homestead rights apply to protect an owner spouse who co-owns the property as a joint tenant or a tenant in common with his or her spouse (see pp 62-66). Thus, *Wimmer* is a decision that has stood for many years—decades, in fact—and is based on jurisprudence that is even older.

[36] This aspect of the *Wimmer* decision was not overruled by the Legislature when it amended the legislation, two years later, to give co-owners the right to apply for partition and sale of homestead property without the consent of the other spouse.

[37] The finding in *Wimmer* that co-owning spouses also have homestead rights has been upheld, followed, accepted and/or applied in several cases, including *Fritz*; *Beraskin v Beraskin*, 1950 CarswellMan 35 (KB); *Winspear Higgins Stevenson Inc v Friesen*, 1978 CarswellMan 72 (CA); *Westward Farms* at p 142; *Duck Mountain Outfitters*; and *Hildebrandt v Hildebrandt*, 2009 MBQB 52.

[38] Further, this finding has been accepted as reflecting the current law in Manitoba in academic publications: James G McLeod & Alfred A Mamo, *Matrimonial Property Law in Canada* (Toronto: Carswell, 1993) (loose-leaf

updated 2014, release 3), vol 1 at I-68.2; and Victor Di Castri, *Registration of Title to Land* (Toronto: Carswell, 1987) (loose-leaf updated 2014, release 3), vol 1, ch 9 at para 309.

[39] The Manitoba Law Reform Commission reviewed the dower legislation following the enactment, in 1978, of the new marital property legislation and issued the dower report. In addressing the requisite property interest of a spouse before the property would be considered a homestead, the commissioners stated, "In the case of Wimmer v. Wimmer, it was held that where title to land is held by the spouses as joint tenants or as tenants in common such land properly constituted the homestead" (at p 188). The commissioners noted difficulties that could arise where the co-owners were not married to each other, but one or more had a spouse who could claim homestead rights. They made the following recommendation for a change in the legislation to address that issue (at p 189):

> Second, we would exclude the application of the homestead protections in any joint estate in land which is held by a married person together with another person or persons other than the spouse of that married person. We can see no basis for permitting a spouse to assert a homestead claim in such premises as it may operate to the prejudice of the co-tenant and deprive the co-tenant of the enjoyment of the property. This same approach has been adopted in Alberta. Accordingly, we recommend:
> . . .
>
> *RECOMMENDATION 74*
> *That where a spouse is a joint tenant or tenant in common with a person or persons other than his/her spouse, that land should not be a homestead nor should the spouse have any statutory entitlement to a life estate in such land.*
>
> [footnotes omitted]

[40] The commissioners made no recommendation to exclude as the homestead any land held by the spouses as co-tenants; rather, they implicitly adopted that part of the decision in *Wimmer*. Following the dower report, Manitoba did not amend its legislation to exclude any land that is co-owned from also being a homestead.

[41] The estate argues, based on comments in the dower report (see p 166), that the necessity for joint tenants to have homestead rights is significantly reduced because the surviving joint tenant takes full ownership of the property and has much greater rights to share in the property division and to receive spousal support than in the past. While the commissioners commented on the benefits of joint tenancy, they also recommended that statutory homestead rights for co-owners be retained. In my view, this argument does not assist the estate.

(iii) Conclusion

[42] For the reasons set out herein, I am of the view that *Wimmer* is still applicable and that the estate's argument that the trial judge erred in finding that a co-owner has homestead rights in the homestead property is unlikely to be successful. To find otherwise would require that the decision in *Wimmer* be overturned. The interpretation in *Wimmer* that homestead rights apply to a home that is already co-owned by the spouses has been the law in Manitoba for many decades and has not been overturned by any subsequent legislation or questioned in the jurisprudence. If it is to be reconsidered, that application must be heard and determined by a five-member panel of this Court.

[43] Thus, I would dismiss this ground of appeal in the estate's cross appeal.

IV. SEVERANCE OF THE JOINT TENANCY

The Issue and Standard of Review

[44] The husband states, and the estate agrees, that the trial judge applied the correct law as it relates to the test or standard for severance of a joint tenancy. I agree.

[45] The husband argues that the trial judge erred in her factual findings. Allegations of factual errors are reviewed on the standard of palpable and overriding error. (See *Housen v Nikolaisen*, 2002 SCC 33 at para 10.) The husband also argues that the trial judge erred in her finding that there was a severance in this case. This finding involves the application of the facts to the legal standard or test for severance and is a very fact-specific inquiry which is also reviewed on the deferential standard of palpable and overriding error (absent an extricable error of law, none of which is alleged here). (See *Housen* at paras 26, 36, 37; *Davison v Davison Estate*, 2009 MBCA 100 at para 5; *Gorecki Estate v Gorecki*, 2015 ONCA 845 at para 2; *Zeligs v Janes*, 2016 BCCA 280 at para 55; and *Jansen v Niels Estate*, 2017 ONCA 312 at para 34.)

The Law Regarding Severance

[46] The Ontario Court of Appeal had occasion to review the law of severance of joint tenancies in *Hansen Estate v Hansen*, 2012 ONCA 112. A summary of the law set out therein, as it applies to this case, is as follows:

> (i) Joint tenancy and a tenancy in common are the main forms of co-ownership in property. Joint tenants hold the property as a unified whole, such that each owns an equal interest in the property,

while tenants in common can own different proportionate interests. The major practical difference between the two forms of ownership is that the surviving joint tenant becomes the owner of the entire property (by right of survivorship), while the surviving tenant in common owns only his or her share, and the share of the deceased tenant in common passes to his or her estate. (See paras 29-31.)

(ii) A joint tenancy can be severed in one of three ways, often referred to as the three rules of severance: (1) by one joint owner unilaterally acting on his or her own share, such as by selling or encumbering it; (2) by a mutual agreement between the joint owners to sever the joint tenancy; and (3) by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. (See paras 32-34.)

(iii) At issue in this case is the third mode of severance, often referred to as the "course of dealing" test. Winkler CJO, for the Court, explained this test in *Hansen* as follows (at paras 35-36, 38-39):

> The apposite rule in the present case is rule 3, or the course of dealing rule. As explained by Professor Ziff in Principles of Property Law, [5th ed (Toronto: Carswell, 2010)] at p. 345, severance under this rule operates in equity. Rule 3 operates so as to prevent a party from asserting a right of survivorship where doing so would not do justice between the parties. In the words of Professor Ziff, at p. 345, "the best way to regard matters is to say that equity will intervene to estop the parties, because of their conduct, from attempting to assert a right of survivorship". What is determinative under this rule is the expression of intention by the co-owners as evidenced by their conduct:

see Robichaud [*Robichaud v Watson* (1983), 147 DLR (3d) 626 (Ont H Ct J)], at p. [633].

Rule 3 governs cases where there is no explicit agreement between the co-owners to sever a joint tenancy. In contrast, rule 2 is engaged where a mutual agreement to sever is claimed to exist. This distinction between rule 2 and rule 3 is significant. What follows from this distinction is that the proof of intention contemplated by rule 3 does not require proof of an explicit intention, communicated by each owner to the other(s), to sever the joint tenancy. If such proof were required, then rule 3 would be rendered redundant because a communicated common intention would be tantamount to an agreement. Instead, the mutuality for the purposes of rule 3 is to be inferred from the course of dealing between the parties and does not require evidence of an agreement.

The phrase in rule 3 -- "the interests of all were mutually treated" – requires that the co-owners knew of the other's position and that they all treated their respective interests in the property as no longer being held jointly. Such knowledge can be inferred from communications or conduct. The requirement that the co-owners knew that their interests in the property were being mutually treated as held in common was emphasized in Williams v Hensman [(1861), 1 J & H 546, 70 ER 862 (Ch (Eng))], at p. 867:

> [I]t will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested.

While the determination under the course of dealing test is an inherently fact-specific assessment, the underlying rationale for rule 3 is that it is a means of ensuring that a right of survivorship does not operate unfairly in favour of one owner (or owners) where the co-owners have shown, through their conduct, a common intention to no longer treat their respective shares in the property as an indivisible, unified whole. For example, in the context of negotiations between spouses who are in the midst of a marriage breakdown, even failed or uncompleted negotiations can lead to a severance because "the negotiation of shares and

> separate interests represents an attitude that shows that the notional unity of ownership under a joint tenancy has been abandoned" (emphasis in original): Principles of Property Law, at p. 347.

[47] Winkler CJO did not agree with the parameters of the test in rule 3 that were put forth by Southin JA in *Tompkins Estate v Tompkins* (1993), 99 DLR (4th) 193 at 199 (BCCA), wherein she interpreted that test as "a 'species of estoppel' requiring proof of detrimental reliance" (*Hansen* at para 46). He stated (at para 49):

> . . . [T]he course of dealing test does not require proof that a party relied to his/her detriment on a representation that a co-owner no longer wants to hold the property jointly. The rationale for severing the joint tenancy relates to the inappropriateness of the right of survivorship in circumstances where the co-owners have mutually treated their interests in the property as being held in common. The rationale is not contingent on the fact that one party relied on the representation to his/her detriment.

[48] He also rejected Southin JA's characterisation of rule 3 as requiring the presence of "'facts which preclude one of the parties from asserting that there was no agreement'" (at para 51 citing Southin JA at p 199)". He held that a request for severance in those circumstances would be dealt with under rule 2. He summarised rule 3 by saying that it "relates more broadly to evidence disclosing a course of conduct indicating that the interests in the property were being held in common and not jointly" (at para 51).

[49] In *Zeligs*, the British Columbia Court of Appeal accepted the *Hansen* definition of the test in rule 3 in preference to that in *Tompkins* (see paras 50-54). In my view, the parameters of the test for severance under rule 3 that are

set out in *Hansen* and *Zeligs* are more consistent with the underlying jurisprudence than those in *Tompkins*, and I would adopt the test in *Hansen*.

[50] In the first decision, the trial judge appropriately summarised the test in rule 3 as follows (at para 36):

> Rule 3 requires that the parties were aware of the position of the other and that they treated their interests in the property as no longer being held jointly. In order to determine whether or not the parties actually knew the other's position and how they treated their respective interests, the communications and conduct between the parties is relevant and hence, leads to a specific fact finding mission. The facts relevant to such an inquiry include conduct, common intentions and negotiations, among other things.

[51] The trial judge reviewed a number of Manitoba decisions in which the court was required to determine whether the conduct of parties involved in a family dispute had resulted in the severance of the joint tenancy prior to the death of one of the parties (see *Lam v Le*, 2002 MBQB 31; *Davison*; *Gorski v Gorski; Gorski v Gorski Estate*, 2011 MBQB 125; and *Arnold Bros Transport Ltd v Murphy*, 2013 MBQB 137).

[52] This is the law that the trial judge applied to determine the issue of severance. The parties were of the view that she applied the correct law, and I agree.

The Trial Judge's Decision

[53] The facts that the trial judge found persuasive in determining whether there had been a severance through a course of conduct under rule 3 were as follows (at para 47):

The course of dealing between the [husband and the wife] that is persuasive can be found in the following actions:

(i) [The husband] filed a petition for divorce seeking partition or sale and exclusive occupancy of the marital home;

(ii) [The wife] filed a notice of motion seeking exclusive occupancy of the marital home;

(iii) [The wife] filed an answer opposing partition or sale of the marital home, but indicated in paragraph 3(e) therein that she resisted partition or sale as it would be harsh and oppressive to her, particularly in the fact of the [husband]'s failure or refusal to provide support since the separation. Further, in her answer, [the wife] positioned that in the event the family home was sold, [the husband]'s share of the equity in the marital home should be held in trust to meet his ongoing spousal support obligations. It seems clear from [the wife]'s answer, that her opposition to partition or sale of the marital home had more to do with her desire for some security in the form of spousal support, as opposed to the division of the marital home equally;

(iv) [The wife] filed a motion for and was granted an order of exclusive occupation of the marital home;

(v) The [husband and the wife] lived separate and apart for almost two years during which time they engaged in negotiations respecting the . . . home. As the parties had little communication between them, the negotiations took place, according to [the husband], at case conferences. However, he could not confirm that there was indeed an agreement made to sell the property. Case conference memorandum number two filed before the court, and dated October 11, 2012, does indicate that the parties were engaged in such discussions and that they had progressed to the point where counsel agreed to suggest a list price for the . . . home and [the wife] would allow an appraiser to inspect the . . . home;

(vi) Although no further evidence of negotiations regarding the . . . home were put before the court, [the wife]'s son testified that [the wife] became ill at Christmas of 2012. He said she was hospitalized at the beginning of January 2013 and never left the hospital before she died on March 14, 2013. [The wife]

> would not have been in much of a position to engage in any negotiations regarding the status of the . . . home from the date of her hospitalization until her death;
>
> (vii) [The husband] signed and served a notice of intent to sever the joint tenancy title to the . . . home on October 11, 2012. At that time he presumably wanted [the wife] to know that he was pursuing a tenancy in common interest in the . . . home. He testified that he "probably wanted the house sold at that time", but that nothing was agreed upon. When asked if he understood what severing the joint tenancy meant, he indicated that he did not, but that it was one of "our tactical ploys";
>
> (viii) [The wife] signed a notice of intent to sever the joint tenancy three days before she died. Mr. Brown said that [the wife] had the document in her possession some three months before she died and that she had shown it to him while visiting him for Christmas in British Columbia in December 2012. She became sick while she was there and returned home only to be hospitalized continuously until the time of her death. She signed the document while she was in hospital after having it explained to her by her lawyer. No evidence was put forth that she did not know what she was signing or that she did not have the proper *mens rea* when signing.
>
> (ix) [The wife] executed a will on January 19, 2010, after the [husband and the wife] were married, but before they separated, leaving all of her real and personal estate equally among her three children.

[54] The trial judge further found the following (see paras 48-54):

- the reason that the wife opposed the sale of the home was to protect her right to spousal support, not because she did not want the joint ownership severed or because she did not believe that she had an interest in the home after separation;

- from the moment that the husband filed his petition for divorce and right up until the wife's death, the husband maintained his position that the home should be sold, and at no time prior to the wife's death did he take any steps for an unequal division of the home;

- the husband signed and served a notice of intent to sever the joint tenancy on October 11, 2012, and the wife responded five months later by signing her own notice of intent to sever, an indication that the parties intended to sever the joint tenancy, which the trial judge characterised as a crystallization of their intentions;

- there was no indication in the conduct of either the husband or the wife of any change in intention between October 11, 2012, and the wife's death;

- the husband and the wife had taken steps towards valuing their half interest in the home;

- the wife had executed a will shortly after the marriage leaving her estate to her children and not to the husband, although the trial judge stated that this was "[o]f lesser significance" (at para 53).

[55] The trial judge then concluded (at para 55):

> The "something more" that Manitoba law requires to find a mutual intention to sever referred to by McKelvey J. in ***Arnold Bros.*** was in this case, the entire course of formal and informal dealings between the parties. As noted in ***Hansen Estate*** "giving effect to the asserted right of survivorship would confer a windfall upon the respondent at the expense of Mr. Hansen's estate that would also be contrary to these mutual intentions." (at para. 65).

> Such would also be the inequitable result in this case were the court to agree with the position of [the husband].

The Parties' Positions

[56] The husband argues that the trial judge erred in her understanding of the facts when she stated, at para 9(vii) of the first decision, that the wife's notice of intent to sever the joint tenancy was filed at the land titles office on April 11, 2013. He points out that what was filed on that date was a caveat giving notice of the estate's interest in the home, and that the wife's notice of intent to sever was not sent to the husband's lawyer until May 7, 2013, after the wife's death. He points out that it was not open to the estate to sever after the wife's death.

[57] The husband further argues that the evidence does not support a finding that there was a mutual intention to sever the joint tenancy, given the wife's exclusive occupation of the home until her death. His position is that the trial judge erred in making findings regarding the wife's reason for opposing the partition and sale and her intent in the absence of evidence to support those findings.

[58] Finally, he argues that the trial judge erred in finding that the will signed by the wife on January 19, 2010, was supportive of a decision to sever the joint tenancy. His position is that her lawyer would have told her that the will would have no application to the jointly held asset.

[59] The estate concedes that the trial judge erred in stating that the notice of intention to sever was filed at the land titles office. Its position on this entire ground of appeal is that the trial judge's decision was discretionary. It argues

that the trial judge applied the correct law and set out the facts that led her to the finding that the joint tenancy had been severed by a course of conduct. It argues that she made no palpable and overriding error in the facts and that there was ample evidence apart from the mistaken statement about the wife's notice of intention to sever having been filed at the land titles office to support her finding that there had been a severance before the wife's death.

Analysis—Severance

[60] I agree that the trial judge erred in her finding that the wife's notice of intention to sever was filed at the land titles office in April 2013. The trial judge does not, however, refer to the filing and serving of this document as facts that led her to conclude that there had been a severance. What was important to the trial judge was the fact that the wife had signed the notice of intent to sever before her death, which is factually correct (see para 47(viii)). I would not find that this error affected the trial judge's decision and, therefore, while it was a palpable or clear error, it is not an overriding or material error. (For an explanation of "palpable and overriding", see *Waxman v Waxman*, 2004 CarswellOnt 1715 at paras 296-97 (CA); *Posthumus v Foubert*, 2011 MBCA 43 at paras 19-20; and *Tuteckyj v Winnipeg (City)*, 2012 MBCA 100 at paras 11-12.)

[61] The husband also argues that the trial judge erred in relying on the signing of the wife's will as an indication that the wife intended to sever the joint tenancy (see the first decision at paras 47(ix), 53). I would agree that the signing of the will, some 17 months before the separation, was not indicative of an intention to sever. While the wife left her entire estate to her children, she would presumably have been told by the lawyer who prepared that will

that any jointly owned property, such as the home, was subject to a right of survivorship and did not form part of her estate.

[62] It is of note that the trial judge stated that the signing of the will was "[o]f lesser significance" (at para 53) in supporting her decision. In my view, this was only one factor among many that led the trial judge to a finding that there was a course of conduct that demonstrated that the joint tenancy had been severed and she did not view it as being important. Thus, even if she erred in relying on this as a factor, in my view, based on her weighing of this factor, it was not material to her decision.

[63] Finally, the husband argues that the evidence in its entirety does not support a finding that there was a mutual intention to sever. The weighing of the evidence to determine whether it has met the standard required to find that there has been a severance is clearly within the purview of the trial judge. It is a question of applying the facts to the law, and the Supreme Court of Canada has made it clear that appellate courts are not permitted to reweigh the facts to come to a different decision than did the trial judge. Fish J, for the majority in *HL v Canada (Attorney General)*, 2005 SCC 25, explained the applicable standard as follows (at para 74):

> . . . Not infrequently, <u>different</u> inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot <u>reweigh the evidence</u> by substituting, for the reasonable inference preferred by the trial judge, an equally — or even more — persuasive inference of its own. . . .

[64] In *Housen*, Iacobucci and Major JJ, for the majority, stated, "The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts" (at para 23).

[65] This was later confirmed as follows (at para 37):

> . . . [I]t is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error. . . .

[66] In this case, the applicable standard was that for a severance by a course of conduct, set out in rule 3 (see para 46 herein). The trial judge explained how she arrived at the conclusion that the standard had been met and the evidence upon which she was relying to do so. In my view, she made no palpable and overriding error in coming to that conclusion, and her decision is entitled to deference. What the husband is asking this Court to do is to reweigh the evidence to come to a different conclusion, but there is no basis upon which to do so.

[67] For all of these reasons, I would dismiss this ground of appeal.

V. PARTITION AND SALE

[68] The estate applied for an order that the home be sold pursuant to the *LPA* and that the proceeds be divided between the husband and the estate, which order was granted by the trial judge. The husband has appealed that order.

The Parties' Positions

[69] The husband's appeal alleges three errors: (i) that the trial judge erred in finding that the home could be sold without being subject to the husband's life interest in the estate's interest in the home; (ii) that the trial judge erred in ordering partition or sale under section 19 of the *LPA* which had the effect of overriding the terms of the will through which the estate derived its ownership of the home (due to the wording of section 21 of the *HA*); and (iii) that the trial judge erred in presuming that the estate had a prima facie right to partition or sale.

[70] The estate argues that the trial judge was correct in finding that it was entitled, on a prima facie basis, to an order for partition or sale of the home pursuant to sections 19, 20 and 23 of the *LPA*, unless the husband could show that the order would be oppressive or vexatious. It points out that the husband's petition for divorce requested the partition or sale of the home, and he never withdrew that portion of his pleading, although offered the opportunity to do so. Further, he neither argued that the sale would be oppressive or vexatious to him nor called any evidence in that regard.

[71] The estate's position is that the trial judge made no errors in ordering the sale of the home.

Analysis—Partition and Sale

(i) The Nature of the Husband's Interest

[72] The first and second errors that are alleged by the husband are based on his position that he had a life interest in the estate's interest in the home at

the time of the trial, rather than a homestead interest, and that the court could not dispense with that life interest (although it could dispense with a homestead interest). He argues that, without his consent, any sale of the estate's interest would be subject to his life interest. As the trial judge proceeded on the basis that the husband had a life interest in the estate's interest in the home (see the second decision at paras 28, 32, 43), it is necessary to begin with a review of the exact nature of his interest.

[73] The husband and the wife were joint owners of the home during the marriage. The trial judge found, and I would agree, that the joint tenancy was severed prior to the wife's death. The effect of the severance is explained in *Matrimonial Property Law in Canada* (at p I-68.10):

> If a joint tenancy in homestead lands is severed, the result is that the former joint tenants become tenants in common. Most importantly, with the loss of joint tenant status the right of survivorship is lost. Nonetheless, both before and after the severance, the tenants have equal undivided interests in the lands. The tenants' proportional interests in the lands do not change. Furthermore, each spouse maintains homestead interests in the undivided interests of the other. . . .

[74] Thus, immediately following the wife's death, the husband had an undivided half interest in the home as a tenant in common and he also had a homestead interest in the wife's undivided half interest in the home as the other tenant in common. The exact nature of the husband's interest in the wife's interest in the home was determined by this Court in *Crichton v Zelenitsky*, [1946] 3 DLR 729, pursuant to similar legislation which remains in effect today, specifically what is now section 21(1) of the *HA* and section 17.3(1) of the *LPA*. Those provisions are as follows:

> **Life estate on death of owner**
> **21(1)** Subject to sections 2.1 and 2.2, when an owner dies leaving a surviving spouse or common-law partner who has homestead rights in the property, that person is entitled to a life estate in the homestead as fully and effectually as if the owner had by will left that spouse or common-law partner a life estate in the homestead.
>
> **Descent of land after July 1, 1885**
> **17.3(1)** From and after July 1, 1885, land in the province vested in a person without a right in any other person to take by survivorship, went and hereafter goes, notwithstanding any testamentary disposition, to the personal representative of the deceased owner in the same manner as personal estate goes.

[75] Bergman JA, for the majority in *Crichton*, explained the homestead rights as follows (at pp 751, 753-54):

> . . . The wife and children of the owner of a homestead have no estate or vested interest in the property during his lifetime. And laws forbidding a husband to sell or encumber the homestead without the wife joining do not give her an estate but a mere veto power over his right to convey or mortgage.
>
> . . . [On the death of the husband], [t]he widow takes her life estate in the homestead under the same conditions as if it had been left to her by her husband's will; in other words, she is to be regarded as a mere devisee [i.e., a beneficiary of real property]. The claims of her husband's creditors, therefore, have priority over her life estate, and the homestead, including the life estate, is liable to be sold, if necessary, to pay debts. . . .

[76] Bergman JA explained that the original 1918 dower legislation gave the surviving spouse an immediate vested interest in the homestead, but that was replaced in 1919 with section 12, which is now in essence section 21 of the *HA*. He explained the reason for this change as follows (at pp 754-55):

> . . . I assume that one reason why this change was made was that it was realized that it was incompatible with the whole scheme

> of the *Real Property Act* [*The Real Property Act, 1889*, SM 1889, c 16] to have an unregistered vested life estate outstanding, thereby destroying the conclusive effect of the certificate of title. In the absence of some such provision as [that in the 1918 legislation] the life estate does not vest without a conveyance. I am, therefore, of the opinion that under the present Act a conveyance of the life estate is necessary in all cases, and that until such conveyance the life estate does not vest in the widow. . . .
>
> A conveyance of the life estate is made necessary in all cases, not only because the *Dower Act* [*1940*] does not vest the life estate in the widow, but also because in Manitoba all the real, as well as personal, property of the deceased vests in his personal representative, notwithstanding any testamentary disposition thereof . . . This is by virtue of s. 17(1) of the *Devolution of Estates Act* [RSM 1940, c 53] [now section 17.3(1) of the *LPA*, as amended]. . . .

[77] Finally, Bergman JA explains the effect of this legislation (at pp 756-57):

> . . . I am also of the opinion that the effect of s. 17(1) of the *Devolution of Estates Act* [now section 17.3(1) of the *LPA*] is to make a devise of land, or of an interest in land, ineffective until after a conveyance thereof by the personal representative. . . .
>
> It is suggested that the right of the personal representative to possession of the homestead is limited to cases "when possession is necessary for the proper administration of the estate". I cannot agree that the question whether the homestead is or is not required to be sold to pay the debts of the estate has any bearing on the widow's legal right to possession. Her rights in the homestead depend solely and entirely on the provisions of the *Dower Act* [*1940*]. That Act, to borrow the language of *Morrison v. Morrison*, 34 D.L.R. at p. 685, gives her "no right to any kind of possession". She is merely the devisee of a life estate which does not vest in her until after a conveyance thereof to her by the personal representative. Until then she has, as such devisee, no legal right to enter into, or to remain in, possession, without the sanction of the personal representative. . . .

[78] This interpretation of the legislation was confirmed by this Court in *Holy Spirit Credit Union Ltd v Brown*, 1988 CarswellMan 160, aff'g 1987 CarswellMan 251 (QB). In that decision, Jewers J further explained the decision in *Crichton* and the effect of section 14(1) of *The Dower* Act, CCSM, c D100 (which corresponds to section 21 of the *HA*) as follows (at para 13):

> This provision was also interpreted by the court in *Crichton v. Zelenitsky* and the court held that the life estate conferred by the [*HA*] did not vest in the spouse during the lifetime of the owner. The court held further that even upon the owner's death, the life estate did not vest in the spouse but in the owner's personal representatives who might sell the homestead to satisfy debts. The court said that the life estate would vest, if at all, only upon the conveyance of the estate by the personal representatives to the surviving spouse.

[79] In the present case, the wife's undivided half interest in the home has yet to be transferred to her personal representative. Thus, the husband's right in relation thereto remains that of a homestead claim that has not yet vested as a life interest in the home—he is a mere devisee of the life interest.

[80] Given that, in my view, the husband did not have a life interest in the home at the time of the trial, it is not necessary to determine whether a court is able to dispense with the consent of a life tenant to the sale of his interest. That said, it is of note that the husband did not provide any jurisprudence to support his position. Further, his argument appears to be inconsistent with the wording of sections 19 and 23 of the *LPA*. Section 19 defines who may be compelled to make partition or sale, and it includes "all persons interested in, to, or out of any land in Manitoba" (at section 19(1)), which would include a life tenant. Section 23 deals specifically with the sale of land in which a person holds an estate for life, and sections 23(1)-(2) state:

> **Sales, including estates for life**
> **23(1)** In an action for partition or administration, or in an action in which a sale of land in lieu of partition is ordered, and in which the estate of any tenant for life is established, if the person entitled to the estate is a party, the court shall determine whether the estate ought to be exempted from the sale or whether it should be sold, and in making the determination regard shall be had to the interests of all the parties.
>
> **What to pass to purchaser**
> **23(2)** Where a sale is ordered including such an estate, all the estate and interest of the tenant passes thereby, and no conveyance or release to the purchaser is required from the tenant, and the purchaser holds the premises freed and discharged from all claims by virtue of the estate or interest of the tenant, whether it is to an undivided share or to the whole or any part of the premises sold.

[81] Thus, the husband's argument that his life interest is not able to be sold without his consent is not consistent with the provisions of the *LPA*.

[82] Given that the husband has a homestead interest in the estate's interest in the home, the next issue is to determine what steps are available to the estate to dispose of his interest. Because the disposition of the estate's interest in the home is subject to the husband's homestead claim, section 4 of the *HA* applies to prevent any disposition except in the following circumstances: (a) the husband consents; (b) the disposition is in favour of the husband; (c) the husband has released his homestead rights; (d) the husband is a party to the disposition; or (e) a court dispenses with his consent under section 10 of the *HA*.

[83] Given that the husband is opposed to the sale, the estate must obtain a court order dispensing with his consent before it can sell the home. Section 10 of the *HA* provides a procedure for doing so, stating as follows:

Court may dispense with consent
10(1) If an owner wishes to dispose of the homestead and the owner's spouse or common-law partner

(a) has been living separate and apart from the owner for six months or more; or

(b) is mentally incapable of giving consent;

the court may, on application by any person interested in the disposition, make an order dispensing with the consent of the owner's spouse or common-law partner if it appears fair and reasonable under the circumstances to do so.

Court may terminate certain homestead rights
10(1.1) If

(a) an owner and his or her common-law partner did not register their common-law relationship under section 13.1 of *The Vital Statistics Act* [CCSM c V60];

(b) the common-law partner referred to in clause (a) has homestead rights; and

(c) the owner has been living separate and apart from the common-law partner for three years or more;

the court may, on application by the owner, make an order terminating the homestead rights of that common-law partner if it appears fair and reasonable under the circumstances to do so.

Application by personal representative
10(2) An application under subsection (1) or (1.1) may be made by the personal representative of a deceased owner.

Terms and conditions
10(3) The court may make an order under subsection (1) or (1.1) subject to any terms and conditions relating to notice, payment to the owner's spouse or common-law partner, or otherwise, that the court considers appropriate.

[84] In the second decision, the trial judge addressed section 10, stating (at para 26):

> Section 10(1) of the [*HA*] has no applicability to this case given the death of [the wife]. However, if such an application had been made in this case while [she] was alive, I would have found that it was fair and reasonable to terminate either [the husband]'s or [the wife]'s homestead rights. While [the wife] was alive, the [husband and the wife] were engaged in a course of dealing whereby each intended that the [home] would be sold and the proceeds divided. Such course of dealing is underpinned by the fact that each [of them] must have negotiated their rights with the belief that neither had homestead rights in the [home] or that their homestead rights were each offset by the other's rights which is similar thinking to that employed by Little J. in ***Hildebrandt***. It is not a stretch in this scenario to think that a court faced with an application pursuant to s. 10(1) of the [*HA*] likely would have dispensed with the consent of either spouse given their status of having lived separate and apart for a significantly longer period than six months.

[85] The trial judge erred in finding that section 10 did not apply due to the wife's death. It is clear that her personal representative had the right, under section 10(2), to make an application under section 10(1). That said, it is also clear that, had such an application been made, the trial judge would have granted it on the facts of this case.

[86] Given the trial judge's comments in para 27 of the second decision, it would be appropriate here to clarify the purpose of section 10(1.1) of the *HA*. Homestead rights are extended only to the spouse or common-law partner of an owner (see the definition of "homestead" and section 3 of the *HA*). In the case of spouses, divorce terminates dower/homestead rights. This was explained in *Matrimonial Property Law in Canada* as follows (at p I-62):

> Divorce terminates dower rights. . . . A non-owner spouse may commence litigation respecting an alleged breach of dower [and homestead] rights; but if divorce occurs before judgment is rendered, the cause of action is extinguished — dower rights do not "crystallize" upon the occurrence of an impugned transaction or the commencement of litigation respecting such a transaction. Neither does the registration of a caveat by an enforcement creditor respecting a non-owner spouse's homestead rights "crystallize" those rights. Divorce subsequent to registration extinguishes the rights and the basis for the enforcement creditor's caveat.
>
> [footnotes omitted]

(See also *Daly v Daly* (1980), 114 DLR (3d) 435 at 448 (Man CA).)

[87] While the act of divorcing terminates the homestead rights of a spouse, there is no comparable proceeding for terminating the homestead rights of common-law partners. Thus, section 10(1.1) was enacted at the same time as common-law partners were given homestead rights, to provide a mechanism for terminating those rights in the event that the common-law partnership had been terminated, in the same manner as divorce terminates the homestead rights of spouses.

[88] There is a second procedure that permits a court to dispense with consent to the disposition of a homestead. The sale of the husband's interest as a tenant in common with an undivided half interest in the property must be accomplished under section 19 of the *LPA*, while the estate's right to apply to sell the home is found in section 20, which state as follows:

> **Who may be compelled to make partition or sale**
> **19(1)** All joint tenants, tenants in common, mortgagees and other creditors having any lien or charge on, and all persons interested in, to, or out of any land in Manitoba, may be compelled to make or suffer partition or sale of the land or any part thereof.

> **Partition or sale without Homesteads Act consents**
> **19(2)** Where a person to whom subsection (1) applies is a married person or a person who is a common-law partner, an action for partition or sale of the land may be brought by or against him or her; and
>
> (a) partition; or
>
> (b) where in the opinion of the court, the land cannot reasonably be partitioned, sale thereof in lieu of partition
>
> may be ordered by the court without the consent of any party to the action, and without the consent of his or her spouse or common-law partner having been obtained as provided in [the *HA*].
>
> **Who may take proceedings for partition**
> **20(1)** Any person interested in land in Manitoba . . . may bring action for the partition of the land or for the sale thereof under the directions of the court if the sale is considered by the court to be more advantageous to the parties interested.

[89] The definition of "person" in section 20(1) "includes … the heirs, executors, administrators or other legal representatives of a person". This definition is found in the Schedule of Definitions (Section 17) to *The Interpretation Act*, CCSM c I80, which is made applicable to the *LPA* by section 17 of *The Interpretation Act*. The estate, that is, the executors, administrators or personal representatives, get its interest in the land by operation of section 17.3(1) of the *LPA*.

[90] As part of an order for partition or sale of a homestead under section 19(1), a court can grant the partition or sale without the consent of any party to the action and without the consent of any party's spouse or common-law partner under the *HA*. This authority is provided in section 19(2) of the

LPA, the interpretation and application of which were determined by this Court in *Fritz*, as explained earlier in these reasons at paras 18-23. Thus, while the estate could have applied to dispense with the husband's consent to the disposition of the homestead under section 10 of the *HA*, that separate application was not necessary as the court also had authority to dispense with his consent under section 19(2) of the *LPA* and to determine and order compensation regarding those rights pursuant to section 24 of the *LPA*:

> **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 *HA*] 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 as is provided in section 23, and the payment shall be a bar to any right or claim under [the *HA*].

[91] In this case, the estate is disposing of the interest of the wife, so this provision would apply to determine the value of the homestead rights of the husband in the estate's interest in the home.

[92] The trial judge erred in finding that the husband had a life interest in the home at the date of the trial. For the reasons set out herein (see paras 72-79), the husband was, and remains, a devisee of a life interest in the home and not a life tenant. Thus, to the extent that the husband's arguments rest on him having a life interest in the home, they cannot be sustained.

[93] The distinction between a vested life interest and a devise of a life interest makes little difference for the purpose of determining how to value his

interest in this case. An established or vested life interest is to be valued pursuant to section 23 of the *LPA*, while the husband's interest, being an inchoate homestead right, is to be valued pursuant to section 24.

VI. ORDER FOR SALE

[94] The last issue is that of whether the trial judge erred in ordering that the home be sold, either in her decision dispensing with the husband's consent to the sale or by presuming that the estate had a prima facie right to partition or sale.

The Trial Judge's Decision

[95] In the second decision, the trial judge was addressing both an application for partition or sale of the husband's interest as a tenant in common and the disposition of what she determined to be his life interest under the *HA* in the estate's interest in the home. The trial judge set out the principles that govern the partition or sale of land under the *LPA* and she reviewed a number of cases that applied those principles. I would summarise her findings regarding the applicable principles as follows (see the second decision at paras 52-66):

- the applicant has a prima facie right to an order for partition or sale;

- this right may be denied by the exercise of the court's discretion, although this discretion is a judicial one that is to be exercised according to certain rules;

- the application may be denied by the court if the application itself is vexatious or if the effect of the order would be oppressive to the party resisting; mere hardship or inconvenience to the resisting party is insufficient;

- as the relief sought is equitable in nature, the application may also be denied by the court in its discretion if the applicant does not come to court with clean hands;

- vexatious proceedings are generally those which are pursued without reasonable or probable cause or excuse;

- the conduct required to refuse an order for partition or sale must be fairly egregious for an application to be rejected;

- most cases tend to favour the prima facie right of the applicant to partition and sale unless unusual circumstances exist—those usually involve hardship to a spouse with dependent children who will be displaced or financially affected by a move to a new residence.

[96] The trial judge explained the husband's position regarding the sale of the home as follows (at para 46):

> While it is obvious from the actions of [the husband] that he wants to remain living in the [home] until his death, he did not overtly oppose the partition and/or sale application of the Estate. He was confident in his position that if the Court were to order sale of the [home] it would be subject to his life estate. He submits that no willing purchaser would purchase a property subject to the life estate of a stranger. He may be correct in this belief. He consequently provided no evidence to the Court about the effect that a sale of the [home] would have on him. His current financial

> circumstances are unknown as well as any evidence regarding his use of the [home].

[97] The trial judge then concluded that the home should be sold, noting that the husband did not put forward any evidence of hardship to him if he had to find another place to live or that the estate did not come to court with clean hands. She found that it was not unreasonable for the estate to want to sell the home so that the beneficiaries could realise on their interest and stated that they should not have to wait indefinitely when there was no evidence that the sale would result in oppression or vexation to the husband. In addition, she stated that a sale would end the litigious relationship between the husband and the estate, which would continue indefinitely if the sale were refused. Finally, she noted that there were no issues arising from the needs of dependent children or related to the husband's needs that would militate against a sale.

[98] Dealing specifically with what she called the husband's life interest, the trial judge stated (at paras 73-74):

> . . . This seems to be a fitting case to exercise [the discretion to order a sale of the life tenant's interest] given the history of these proceedings. [The husband] sought sale of the [home] himself when [the wife] was in possession of the [home] after the parties separated. The [husband and the wife] were separated for many months before [the wife] passed and I have previously found that they engaged in conduct sufficient to satisfy the Court that they intended to have their interests in the [home] divided. I have some sympathy for the Estate's position that homestead rights ought not to be engaged when parties own their property as joint tenants although that is not what the current legislation says.
>
> I see no reason to treat this fact situation any differently from the manner in which it would be treated pursuant to a s. 19 application under the *LPA*. Manitoba case law has consistently demonstrated that the party resisting an order for partition and sale

> faces a high threshold in demonstrating to the court why the applicant's *prima facie* right should be denied. I find that [the husband] has not met that threshold. As partition is not an appropriate option for [the home], I exercise my discretion and order that the [home] be sold.

[99] Finally, the trial judge ordered a reference to the Master to conduct the sale of the home and for a valuation of the husband's life interest.

Standard of Review

[100] The standard for reviewing a decision granting or refusing an application for an order of partition or sale was set out by this Court in the recent decision of *Mucz et al v Popp et al*, 2018 MBCA 6 (at para 5):

> Decisions to grant or refuse an order of partition or sale under the [*LPA*] are discretionary in nature (see *Collins* [*Collins (Keith G) Ltd v McKenzie*, 2005 MBCA 35] at para 18; and *Simcoff v Simcoff*, 2009 MBCA 80 at para 50). Accordingly, the standard of review on an appeal is highly deferential; an appellate court may only interfere if there has been a misdirection or the decision is so clearly wrong as to amount to injustice (see *Perth Services Ltd v Quinton et al*, 2009 MBCA 81 at para 25).

(See also *Re Chupryk* (1980), 110 DLR (3d) 108 at 123 (Man CA); and *Fritz* at 120.)

[101] Thus, the ultimate decision to either grant or refuse an application for partition or sale is reviewed on a deferential standard.

Analysis—Order for Sale

[102] The husband's challenge to the order for the sale of the home is tied to his argument that he had a life interest in the home. In particular, he argues

that "the [e]state gets its ownership from the will of [the wife], and therefore the said . . . [e]state must be subject to the terms of [the wife]'s Will." This, he says, is as a result of the application of section 21 of the *HA*. His position is that "the [e]state . . . cannot use the provisions of [t]he [*LPA*] to override the Will through which [its] ownership derives, and therefore it does not [have] a prima facie right for an Order of Partition and Sale like most other co-owners would."

[103] This argument regarding the effect of section 21 is not supported by the jurisprudence or the legislation. As stated at paras 72-79 herein, the *LPA* clearly provides that the deceased's property vests in the personal representatives (see section 17.3(1) of the *LPA*). In *Holy Spirit Credit Union*, following this Court's decision in *Crichton*, Jewers J further explained the effect of section 14(1) (which corresponds to section 21 of the *HA*) as follows (at para 16):

> Section 14(1) of the Dower Act provides that the spouse is entitled to a life estate "as fully and effectually, and to the same effect, and under the same conditions", as if she had been left the life estate by will. The Court of Appeal has said that she is to be regarded as a "mere devisee": see the comments of Bergman J.A. above. A beneficiary under a will has no property interest — not even a future interest — in the estate of the testator until the testator's death. Even then the property interest in the estate vests in the testator's personal representatives and not in the beneficiaries. They have a legal right to compel the personal representatives to convey specific bequests and devises to them, subject to the claims of creditors, but this is a right of action and not a right of property. . . .

[104] In my view, section 21(1) of the *HA* does not give the spouse or common-law partner of the owner a property interest in the homestead

property upon the owner's death and it does not preclude the property from being sold by the owner's estate without the consent of the spouse/common-law partner of the owner, provided that any required court order dispensing with that consent is obtained. For the reasons set out at paras 72-79 herein, I am of the view that the husband's interest at the date of the trial was, and at the present time remains, that of a devisee of a life interest and not that of a life tenant.

[105] The husband has acknowledged that most co-owners would have a prima facie right to partition. I would agree with this statement, and, in my view, that principle applies in this case. As was found by the trial judge, the husband did not present any evidence of either vexation or oppression arising from the sale and, in fact, he petitioned for the sale of the home, which petition had not been amended or withdrawn.

[106] In my view, the trial judge did not err in her statement of the law and legal principles related to the granting of an order of partition or sale and she made no palpable and overriding errors in its application in this case, either to the sale of the husband's interest as a tenant in common or to the sale of his interest in the estate's interest. Further, her decision to order the sale of the home is discretionary and entitled to deference. I can see no errors in her exercise of that discretion and, in fact, I am of the view that she came to the correct decision.

[107] As noted earlier, the trial judge ordered that the home be sold and that the Master have conduct of the sale and the determination of the value of the husband's interest in the estate's interest under the *HA* in the home. This

order will remain in effect, other than to note that the applicable provision for the purpose of the valuation is section 24 of the *LPA*.

[108] As the trial judge noted, the disposition of the home is part of the division of the marital property in proceedings that were commenced on June 6, 2011 (see the second decision at para 82). We have no evidence as to the current status of those proceedings or the value of the marital assets, other than the trial judge's comment that "[t]he assets and debts of the parties to be accounted for are not substantial" (at para 82). To say that these court proceedings, commenced almost eight years ago, have been protracted is an understatement. I note that there have been two contested hearings dealing with only the home, with further contested proceedings if there is no agreement on the value of the assets, including the home. If the parties cannot agree on the value of the assets, including the husband's interest in the estate's interest in the home, they will both be required to retain experts to determine those values, which will come at great cost and further delay.

[109] Taking all of this into account, we endorse the trial judge's strong recommendation that "[i]t would be wise for the parties to continue negotiations guided by the decisions made herein and arrive at an overall settlement without having to incur further expense" (at para 83). In my view, the cost of retaining experts and engaging in further contested proceedings to determine the value of the assets, together with the expenses incurred to date, will result in further substantial delay and would not be at all proportional to the value of the assets.

VII. DECISION

[110] For the reasons set out herein, I would dismiss the husband's appeal and uphold the trial judge's finding in the first decision that the joint tenancy was severed prior to the wife's death. I would also dismiss the estate's cross appeal and uphold the trial judge's decision in the second decision to order the sale of the home on the terms set out at para 85 of that decision.

[111] Given that both the appeal and cross appeal have been dismissed, I would order that each party will bear his or its own costs on this appeal.

Beard JA

I agree: Mainella JA

I agree: Simonsen JA

APPENDIX

The Dower Act, SM 1918, c 21 (at section 9):

> **9.** Every disposition by will of a married man, and every distribution upon his death intestate shall, as regards the homestead of such married man, be subject and postponed to an estate for the life of such married man's wife in said homestead, hereby declared to be vested in the wife so surviving.

The Dower Act, SM 1919, c 26 (at section 12):

> **12.** Upon the death of a married man whose wife survives him, the wife shall be entitled to an estate for her natural life in his homestead as fully and effectually and to the same effect and under the same conditions as if he had left her by will such life estate in the homestead, and every disposition by will of a married man of his homestead, shall be subject to such life estate of the wife.
>
> This section shall be retroactive, and shall be deemed to have come into force in its present form on the 1st day of September, A.D. 1918, and to have been continuously in force since that date, and section 9 of "The Dower Act," cap. 21 of 8 George v, shall be read and construed as if it had always been expressed in the language of this section.

The Dower Act, RSM 1940, c 55 (at sections 2(*c*)(*i*), 3):

> **2.** In this Act, unless the context otherwise requires,
>
> (*c*) "homestead" means
>
> (*i*) a dwelling house in a city, town, or village occupied by the owner as his home, and the lands and premises appurtenant thereto. . . .
>
> **3.** Except as hereinafter otherwise provided, every disposition by act *inter vivos* of any interest in the homestead of any married man made at any time after the coming into force of this Act, shall be

invalid and ineffective, in so far as such homestead is concerned, unless and until his wife consents in writing to such disposition, or unless she has released in favor of her husband all her rights in such homestead as hereinafter provided for C.A. 1924, c. 53, s. 3.

An Act to amend The Dower Act, SM 1949, c 12 (at section 1):

1. Section 3 of The Dower Act, being chapter 55 of the Revised Statutes of Manitoba, 1940, is repealed and the following is substituted therefore:

3. Except as hereinafter otherwise provided, every disposition by act *inter vivos* of any interest in the homestead of a married man made at any time after the coming into force of this Act, shall be invalid and ineffective, in so far as the homestead is concerned, unless

(*a*) his wife consents in writing to the disposition; or

(*b*) she has released in favour of her husband all her rights in the homestead as hereinafter provided; or

(*c*) having an estate or interest in the homestead in addition to her rights under this Act, she is, for the purpose of making a disposition of her estate or interest, a party to the disposition made by her husband, and executes it for that purpose.

The Dower Act, RSM 1970, c D100 (at sections 3(1), 14(1)):

Disposition of homestead invalid without written consent of wife.
3(1) Except as hereinafter otherwise provided, every disposition by Act inter vivos of any interest in the homestead of a married man made at any time after the coming into force of this Act, shall be invalid and ineffective, in so far as the homestead is concerned, unless

(a) his wife consents in writing to the disposition; or

(b) the disposition is in favour of his wife; or

(c) she has released in favour of her husband all her rights in the homestead as hereinafter provided; or

(d) having an estate or interest in the homestead in addition to her rights under this Act, she is, for the purpose of making a disposition of her estate or interest, a party to the disposition made by her husband, and execute it for that purpose.

Wife to have life estate in homestead on death of husband.
14(1) Subject to subsection (4) of section 4, upon the death of a married man whose wife survives him, the wife is entitled to an estate for her natural life in his homestead as fully and effectually, and to the same effect, and under the same conditions, as if he had left her by will such a life estate in the homestead; and every disposition by will of a married man of his homestead, is subject to the life estate of the wife.

The Homesteads Act, CCSM c H80 (at sections 1, 2.1-2.2, 3, 4, 10(1)-10(3), 20(1), 21(1)-21(2)):

Definitions
1. In this Act,

. . .

"homestead" means

(a) in the case of a residence in a city, town or village occupied by the owner and the owner's spouse or common-law partner as their home, the residence and the land on which it is situated. . . .

. . .

Only one spouse or common-law partner with rights
2.1 Only one spouse or common-law partner at a time may have rights in a homestead under this Act.

Homestead rights of second spouse or common-law partner
2.2 A second or subsequent spouse or common-law partner of the owner does not acquire homestead rights in a property previously occupied by the owner and his or her previous spouse or common-law partner until the following conditions are satisfied:

(a) if the previous spouse or common-law partner acquired a homestead right in the property, that right has been released or terminated in accordance with this Act;

(b) if the previous spouse or common-law partner has an ownership interest in the property, that interest has been transferred to the owner or another person;

(c) if the previous spouse or common-law partner has a claim under *The Family Property Act* for an accounting and equalization of assets, that claim has been satisfied.

Application of Act to persons under 18

3 This Act applies to all married persons, and all persons in common-law relationships, whether or not they are under the age of 18 years, and anything done under or by virtue of this Act by a married person, or a person in a common-law relationship, under the age of 18 years is deemed to have been done by an adult.

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 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.

Court may dispense with consent
10(1) If an owner wishes to dispose of the homestead and the owner's spouse or common-law partner

(a) has been living separate and apart from the owner for six months or more; or

(b) is mentally incapable of giving consent;

the court may, on application by any person interested in the disposition, make an order dispensing with the consent of the owner's spouse or common-law partner if it appears fair and reasonable under the circumstances to do so.

Court may terminate certain homestead rights
10(1.1) If

(a) an owner and his or her common-law partner did not register their common-law relationship under section 13.1 of *The Vital Statistics Act*;

(b) the common-law partner referred to in clause (a) has homestead rights; and

(c) the owner has been living separate and apart from the common-law partner for three years or more;

the court may, on application by the owner, make an order terminating the homestead rights of that common-law partner if it appears fair and reasonable under the circumstances to do so.

Application by personal representative
10(2) An application under subsection (1) or (1.1) may be made by the personal representative of a deceased owner.

Terms and conditions
10(3) The court may make an order under subsection (1) or (1.1) subject to any terms and conditions relating to notice, payment to the

owner's spouse or common-law partner, or otherwise, that the court considers appropriate.

Discharge of notice
20(1) A homestead notice may be discharged by the registration in the appropriate land titles office of a discharge in the form approved under *The Real Property Act*.

Life estate on death of owner
21(1) Subject to sections 2.1 and 2.2, when an owner dies leaving a surviving spouse or common-law partner who has homestead rights in the property, that person is entitled to a life estate in the homestead as fully and effectually as if the owner had by will left that spouse or common-law partner a life estate in the homestead.

Disposition subject to life estate
21(2) Any disposition of a homestead by the owner's will is subject to the spouse's or common-law partner's entitlement to a life estate in that homestead under subsection (1).

The Law of Property Act, RSM 1940, c 114 (at section 19):

19. All joint tenants, tenants in common, mortgagees and other creditors having any lien or charge on, and all persons interested in, to, or out of any land in Manitoba, may be compelled to make or suffer partition or sale of the land or any party thereof.

An Act to amend The Law of Property Act, SM 1949, c 32 (at section 1):

1. Section 19 of The Law of Property Act, being chapter 114 of the Revised Statutes of Manitoba, 1940, is amended

(*a*) by numbering the present section as subsection (1); and

(*b*) by adding thereto the following subsection:

(2) Where a person to whom subsection (1) applies is a married man or a married woman, an action for partition or

> sale of the land may be brought by or against him or her; and
>
> > (*a*) partition, or
> >
> > (*b*) where in the opinion of the court, the land cannot reasonably be partitioned, sale thereof in lieu of partition,
>
> may be ordered by the court without the consent of any party to the action, and without the consent of his or her spouse having been obtained as provided in The Dower Act.

The Devolution of Estates Act, RSM 1940, c 53 (at section 17(1)):

> **17(1)** From and after the first day of July, in the year 1885, land in the province, whatever the estate or interest therein, vested in any person without a right in any other person to take by survivorship, went and hereafter goes, notwithstanding any testamentary disposition thereof, to the personal representatives of deceased owners thereof in the same manner as personal estate goes.

The Law of Property Act, CCSM c L90 (at sections 17.3(1), 19(1)-19(2), 20(1), 23(1)-24):

> **Descent of land after July 1, 1885**
> **17.3(1)** From and after July 1, 1885, land in the province vested in a person without a right in any other person to take by survivorship, went and hereafter goes, notwithstanding any testamentary disposition, to the personal representative of the deceased owner in the same manner as personal estate goes.
>
> **Who may be compelled to make partition or sale**
> **19(1)** All joint tenants, tenants in common, mortgagees and other creditors having any lien or charge on, and all persons interested in, to, or out of any land in Manitoba, may be compelled to make or suffer partition or sale of the land or any part thereof.

Partition or sale without Homesteads Act consents
19(2) Where a person to whom subsection (1) applies is a married person or a person who is a common-law partner, an action for partition or sale of the land may be brought by or against him or her; and

(a) partition; or

(b) where in the opinion of the court, the land cannot reasonably be partitioned, sale thereof in lieu of partition;

may be ordered by the court without the consent of any party to the action, and without the consent of his or her spouse or common-law partner having been obtained as provided in *The Homesteads Act*.

Who may take proceedings for partition
20(1) Any person interested in land in Manitoba, or the guardian of the estate of an infant entitled to the immediate possession of any estate therein, may bring action for the partition of the land or for the sale thereof under the directions of the court if the sale is considered by the court to be more advantageous to the parties interested.

Sales, including estates for life
23(1) In an action for partition or administration, or in an action in which a sale of land in lieu of partition is ordered, and in which the estate of any tenant for life is established, if the person entitled to the estate is a party, the court shall determine whether the estate ought to be exempted from the sale or whether it should be sold; and in making the determination regard shall be had to the interests of all the parties.

What to pass to purchaser
23(2) Where a sale is ordered including such an estate, all the estate and interest of the tenant passes thereby, and no conveyance or release to the purchaser is required from the tenant, and the purchaser holds the premises freed and discharged from all claims by virtue of the estate or interest of the tenant, whether it is to an undivided share or to the whole or any part of the premises sold.

Compensation to owners of particular estates

23(3) The court may direct the payment of such sum in gross out of the purchase money to the person entitled to the estate for life, as may be deemed, upon the principles applicable to life annuities, a reasonable satisfaction for the estate; or may direct the payment to the person entitled of an annual sum or of the income or interest to be derived from the purchase money or any part thereof, as may seem just, and for that purpose may make such order for the investment or other disposition of the purchase money or any part thereof as may be necessary.

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 as is provided in section 23; and the payment shall be a bar to any right or claim under *The Homesteads Act*.

The Interpretation Act, CCSM c I80 (at section 17):

General definitions

17 The definitions in the Schedule apply to every Act and regulation.

SCHEDULE OF DEFINITIONS (Section 17)

. . .

"person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person;

. . .