Testimony in Opposition to House Bill 407
(Abolish Estate by Dower)
Presented by Eric Johnson, Esq.

Before the Senate Judiciary Committee
December 5, 2018

Chairman Bacon, Vice Chair Dolan, Ranking Member Thomas, and members of the Senate Judiciary Committee:

Thank you for allowing me to present this testimony in opposition to House Bill 407. I am Eric W. Johnson, OSBA Certified Specialist in Family Relations Law and current Chairman of the Family Law Committee of the Ohio State Bar Association. I have maintained in good standing my license to practice law in the State of Ohio since 1995 and have practiced almost exclusively in the field of family law since 2004. I submit this testimony in opposition to H.B. 407 as a practicing family law attorney in Columbus, Ohio.

I regret I cannot be present to offer in-person testimony at this time, but encourage this committee to consider the following written testimony rejecting the rationale advanced in favor of this bill.

The arguments in support of this legislation fall mainly into three categories. (1) it's "archaic," (2) "everyone else is doing it," and (3) "it is inconvenient." None of these justifications are reasons for abolishing the protection dower provides the innocent, non-titled spouses in this state. This bill has engendered much animated discussion within the OSBA Family Law Committee, which stands resoundingly opposed to its passage. Please allow me to elaborate.

History

This is not the first attempt to completely abolish dower in the state of Ohio. The concept of dower as a method of protecting a non-titled spouse, by recognizing a right to a livelihood from the estate of that person's spouse, is as old as the common law. The State of Ohio provided statutorily for vested dower until the nature of dower was changed by Section 10502–1 of the Ohio General Code in 1932. The subsequent statute resulted from a movement to abolish dower. Resistance to the abolishment of dower caused the legislature to moderate the change in its concept. In the amended dower provision, the Ohio legislature preserved inchoate dower and abolished vested dower (except as provided in certain subsections). Section 10502–1, Ohio General Code, was amended again in 1935 to limit the computation of vested dower to an amount not exceeding the sale price of the property.

The Supreme Court of Ohio addressed the right of dower in *Geiselman v. Wise,* 137 Ohio St. 93, 28 N.E.2d 199 (1940), establishing that General Code Section 10502–1 provided for inchoate (but not vested) dower and that vested dower was abolished. The decision demonstrates the near sanctity in which Ohio regards the dower right. In its decision, the Supreme court held that an inchoate right of dower cannot be reached by a creditor's bill.

In the case of *In re Castor*, 99 B.R. 807 (Bankr.S.D.Ohio 1989), the U.S. Bankruptcy Court summarized numerous Ohio decisions regarding dower, concluding, "The foregoing review of many significant cases dealing with dower demonstrates the protection the courts have afforded the spouse in Ohio by the dower right in statute and in common law."

Dower is Crucial in Protecting Non-Titled Spouses

The fact that the concept of dower (or numerous other legal ideals, for that matter) has persisted through time is a testament to the strength of its importance. The mere passage of years does not render it "archaic" or—more particularly—unnecessary. And the conclusory recitation that the need for dower's protections have dissolved through the years does not make it so.

With due respect to testimony previously received by this committee, the repeal of dower can indeed substantially affect the rights of a non-titled spouse in domestic relations cases. Even if titled in one spouse's name, real property can consist of both "marital" and "separate, premarital" property.

For example, imagine one spouse, a year prior to the marriage, purchased a house for $150,000 and put down $10,000, with the remaining $140,000 subject to a mortgage. Then imagine after 15 years of marriage, the mortgage is reduced to $90,000 and the value of the property increased to $190,000. There would be $100,000 of equity in the home, $90,000 of which would be considered "marital" under Ohio's laws. If dower was eliminated, the titled spouse would have sole, unilateral authority to access all the marital equity, diminishing the value of the marital estate, especially in cases where the equity is dissipated or hidden. Dower ensures the non-titled spouse is aware of, and an active participant in, transactions directly affecting his or her interest in a substantial marital asset.

Or imagine a situation whereby the titled spouse transfers rental or commercial property to an "insider" third party in anticipation of a pending divorce. Or even the situation where the marital residence itself is transferred to an "insider" third party. Can these transactions be undone by order of a court? Perhaps—and only perhaps—but only after years of litigation and tens (or hundreds) of thousands of dollars of attorney fees that are often not available to a financially-disadvantaged spouse.

The existence of temporary restraining orders issued during a *pending* divorce case provides little assistance. A titled spouse intending to alienate his or her spouse's interest in real estate might design to do so well before the commencement of litigation (and issuance of any restraining order). Even after a divorce case is filed, the adage "it is better to ask forgiveness than permission" often applies. It is well-known the threat of actual jail time in a civil contempt case is virtually non-existent. And a contempt finding itself will not undo the transfer of the real estate, creating an additional issue if the court intended to exercise its equitable powers to award the non-titled spouse the marital home.

What Have Other Jurisdictions Really Done?

Supporters of this legislation are quick to create the impression Ohio is behind the times, holding onto a legal principle other states have seemed fit to abolish. What has never been conveyed, however, is whether other states have decided to provide other protections in lieu of those formerly afforded by dower.

For example, the Commonwealth of Virginia eliminated dower and curtesy years ago. In its place, though, Virginia has created the concept of the "augmented estate." According to Virginia's estate planning statutes, a share of the augmented estate goes to the other spouse, regardless of whose name is on the title to a particular item of property, be it real estate or otherwise. Thus, title companies will always require a consent from a spouse on mortgages or conveyance deeds, in order to waive any rights under the augmented estate statutes. This, in turn, tends to stop any effort by one spouse to sell or mortgage property alone.

Community property states can also provide alternative protections to non-titled spouses. Under Louisiana's Civil Code, for example, neither spouse (with narrow exceptions by court order) can alienate or encumber community real estate acting alone. A second code article makes a spouse liable for fraud or bad faith in administering community property. Another code article makes a spouse liable to reimburse excessive donations made during marriage without consent. There are currently nine community property states in this country, with an additional two (Tennessee and Alaska) being considered "opt-in" states.

On the other hand, H.B. 407 proposes nothing short of the complete, unequivocal elimination of dower. Its proponents, for reasons based solely on their own convenience, would have Ohio remove the protections it has long provided to its non-titled, and often financially disadvantaged citizens. As one proponent pointed out, "Repeal of dower would benefit Ohio landowners, lenders, and all real estate professionals." I am sure it would … heedless of the need for any alternative protections afforded to those who would be most detrimentally affected by its elimination. Let Ohio not "be like everybody else" at the expense of those individuals who are often the most powerless to protect themselves.

Conclusion

There are very good, practical, public policy reasons to retain estates in dower. Dower protects a non-titled spouse from having real estate sold unilaterally by the spouse who holds title in his or her name alone (one can easily imagine a divorcing spouse doing exactly that). Dower protects a non-titled spouse from learning too late that his or her spouse has obtained a loan secured by a 2nd mortgage, reducing or eliminating years of marital equity built up in a home (one can easily imagine a divorcing spouse doing that as well). Dower protects a non-titled spouse from his or her spouse secretly transferring ownership of the parties' marital home to another person, even in cases where the couple remains in the home (imagine such a secret transfer not being discovered until shortly after the funeral of the spouse who executed the transfer deed).

In the world of family law, where we often must struggle with significant power imbalances between spouses. The protections afforded by dower are vital to the spouses who are financially disadvantaged in the parties' relationship. As a result, I ask that you oppose HB 407 as it would eliminate these necessary protections.

Thank you for permitting me to offer this written testimony in opposition to H.B. 407. As such, I encourage this Committee to not favorably report this bill.

I remain available to answer questions at any time should the Committee have any for me.

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