

**Testimony in Opposition to House Bill 209
(Abolish Estate by Dower)
Presented by Eric Johnson, Esq.**

**Before the Senate Judiciary Committee
February 12, 2020**

Chairman Eklund, Vice Chair Manning, Ranking Member Thomas, and Members of the Senate Judiciary Committee:

Thank you for allowing me to present this testimony in opposition to House Bill 209. I am Eric W. Johnson, OSBA Certified Specialist in Family Relations Law. 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. 209 as a practicing family law attorney in Columbus, Ohio.

The arguments in support of this legislation fall mainly into four categories. (1) it is “archaic,” (2) “everyone else is doing it,” (3) “it is inconvenient,” and (4) “other protections are adequate.” None of these justifications are reasons for abolishing the protection dower provides the innocent, non-titled spouses and their dependents in this state without allowing for reasonable alternatives.

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 changing it by Section 10502–1 of the Ohio General Code in 1932 in response to a movement to abolish it. Amending the law, the Ohio legislature preserved inchoate dower but abolished vested dower. The provisions of dower were later incorporated into Ohio’s Revised Code in 1953.

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 Has Been Crucial in Protecting Non-Titled Spouses

That dower 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 has dissolved through the years does not make it so.

The repeal of dower can indeed substantially affect the rights of non-titled spouses and their children in domestic relations cases. Even if titled in one spouse's name, real property can consist

of both “marital” and “separate, premarital” components. It is critical one of the chief benefits of dower—namely, providing notice to a non-titled spouse—remains in place to protect a spouse’s interest in the marital estate.

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. Further assume after 15 years of marriage the mortgage is reduced to \$90,000 and the value of the property has 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 and spend 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.

Proponents of this bill summarily imply Ohio already offers sufficient protection to spouses from secretive transfers of property, but this is not true. A domestic relations court’s ability to issue a “distributive award” is only effective when there are other marital assets from which to pay the offended spouse. But in the vast majority of cases, the marital home is the only asset of any significant value. *Lis pendens* and temporary restraining orders apply only after a divorce case is already filed—likely long after the titled spouse has squandered the value of the marital home. And the unprecedented, hypothetical use of the Fraudulent Transfer Act to undo a transfer of title would force the non-titled spouse to bring an action after the transfer had already occurred and to bear the burden of proving each and every element of fraud under the statute.

What Have Other Jurisdictions Really Done?

Supporters of this legislation attempt to create the impression Ohio is behind the times, holding onto a legal principle other states have seemed fit to abolish. What is not conveyed, however, is that the vast majority of these “other states” also provide protections in lieu of those formerly offered by dower.

For example, the Commonwealth of Virginia eliminated dower and curtesy years ago. In its place, though, Virginia 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.

And according to Alabama Code §6-10-03, “No mortgage, deed or other conveyance of the homestead by a married person shall be valid without the voluntary signature and assent of the husband or wife, which must be shown by his or her examination before an officer authorized by law to take acknowledgments of deeds”

On the other hand, H.B. 209 proposes nothing short of the complete, unequivocal elimination of dower, with nothing to stand in its place. Its proponents, for reasons based solely on their own convenience, would have Ohio remove all protections dower has long provided to its non-titled, and often financially-disadvantaged, citizens.

As one proponent has 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 alternate protections afforded to those who would be most detrimentally affected by its elimination. Let Ohio not “be like everybody else” if doing so will be 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 maintain the protections dower currently provides to non-titled spouses and their children. Dower protects that non-titled spouse from having real estate sold unilaterally by the other spouse who holds title in his or her name alone. 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 the home. Dower protects a non-titled spouse from his or her spouse secretly transferring ownership of the parties’ marital home to another person.

In the world of family law, where we must often struggle with significant power imbalances between spouses, the protections currently provided by dower are vital to the spouses who are financially disadvantaged in the parties’ relationship. As a result, I ask that you oppose HB 209—as it would eliminate these necessary protections—until such time as reasonable alternative protections are offered to protect non-titled spouses and the children who depend on them.

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

Eric W. Johnson | O.S.B.A. Certified Specialist in Family Relations Law

400 South Fifth Street • Suite 101 • Columbus, OH 43215

(614) 464-1877 • Fax: (614) 464-2035

ejohnson@sowaldlaw.com • www.sowaldlaw.com