

LAST ONE STANDING: MICHIGAN'S DOWER LAW
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Once universally accepted under common law, a widow's dower rights are now only preserved in a handful of states.¹ Even in those states, widowers have generally been granted a reciprocal right in their wives' property.² Michigan is currently the only state which provides dower rights exclusively to women.³ Michigan's dower law has thus far survived challenges in the courts and in the legislature.⁴ Should it continue to stand, or is there a reason why no other state in the nation still follows common law?

The main issue is whether Michigan's statute is even constitutional. Although the Michigan Supreme Court in 2008 refused to hear an appeal that sought to overturn the law, it is not clear that the court made the right decision.⁵ The proponent of the dower statute has the burden of demonstrating that the statute is substantially related to an important government interest.⁶ Other state courts considering similar laws have been split on the issue, and no state other than Michigan has upheld a gender-discriminatory dower law since 1977.⁷

Although Michigan's dower statute serves the important purposes of supporting needy spouses and remedying past economic discrimination against women, it is not substantially related to those purposes.⁸ The statute is vastly over-inclusive while at the same time being significantly under-inclusive.⁹ Furthermore, the law no longer effectively assists those people to

¹ JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS AND ESTATES* 476 n. 1 (8th ed. 2009) (reporting that common law dower rights survive only in Ohio, Arkansas, Kentucky, and Michigan).

² *Id.*

³ *Id.*

⁴ *In re Estate of Miltenberger*, 753 N.W.2d 219, 223-24 (2008).

⁵ *Id.* at 901.

⁶ *See, e.g.,* *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150-51 (1980) (stating the standard of review and noting that the party seeking to uphold the statute has the burden of showing that the statute passes intermediate scrutiny).

⁷ *Compare* *Stokes v. Stokes*, 613 S.W.2d 372 (Ark. 1981) and *Boan v. Watson*, 316 S.E.2d 401 (S.C. 1984) (both holding dower laws unconstitutional) *with* *In re Baer Estate*, 562 P.2d 614, 615-617 (Utah, 1977) and *In re Rincon Estate*, 327 So.2d 224 (Fla., 1976) (both upholding dower laws).

⁸ *See infra*, Part II.

⁹ *See infra*, Section II.B.

whom it does apply.¹⁰ The nature of wealth has changed, so widows in Michigan generally receive more compensation from their husband's will or from Michigan's elective share statute.¹¹ Nor can Michigan's discriminatory statute be justified by a lack of gender-neutral alternatives, since there is in fact a variety of gender neutral options.¹²

Michigan's dower statute is most likely unconstitutional because it is no longer substantially related to an important government purpose.¹³ Even if courts do not abolish dower in Michigan, the legislature can and should take the initiative to replace the law with a more effective measure.

Part I of this paper explains in more detail the origin and operation of the dower law. Part II examines the case law and determines that Michigan's dower provision most likely violates the state and federal constitutions. Part III considers the Uniform Probate Code's elective share as an alternative to Michigan's current law, and finds that the UPC serves the same purposes as Michigan's dower statute, but does so more effectively and without discriminating on the basis of gender.

I. Background

The dower right was originally a common law creation.¹⁴ During feudal times, property passed via prima geniture from the husband to the eldest son, and real estate was the primary source of wealth.¹⁵ Dower provided a method of supporting a man's wife and children after his death.¹⁶ The widow took a life estate in one third of the real property owned by her husband

¹⁰ See *infra*, Section II.B.

¹¹ Margaret A. Meyers, Willard G. Moseng, and Clarence A. Stone, *Dower: Important Protection or Sexist Anachronism*, 23 MICH. REAL PROP. REV. 5, 10 (1996).

¹² See *infra*, Part III.

¹³ See *infra* Part II.

¹⁴ THOMAS E. ATKINSON, LAW OF WILLS 104 (2d ed. 1953).

¹⁵ George L. Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42, 47 (1948).

¹⁶ *Id.* The eldest son could not always be counted upon to fill this need because high mortality rates in child birth meant that a man's widow frequently was not the mother of his eldest son. Meyers, *supra* note 11, at 6.

during the marriage, from which she could support herself.¹⁷ This right attached to more than just the land held by the husband at his death. The wife retained dower rights even in property that the husband disposed of, unless she signed off on the transfer of the property as well.¹⁸ The wife's right to dower remained inchoate until the death of her husband, at which point the rights attached.¹⁹

Statutory forms of dower in Michigan stretch as far back as an ordinance from 1787.²⁰ The 1787 ordinance actually provided for the widow to receive a life estate in one third of her spouse's personal property as well as the traditional life estate in a third of his real property.²¹ Later statutes once again removed the right to take personal property.²² Early forms of dower were justified partly by the fact that women could not own their own property while they were married, and thus could not build up any independent resources.²³ The state legislature gave women the right to own their own property in the mid-1800s, but merely ending coverture did not put women on an even economic footing with men. Thus, the legislature continued to retain dower as a means of supporting widows.²⁴

By 1961, though, some of the delegates to Michigan's constitutional convention favored abolishing dower because in most cases it no longer provided the most support for the widow.²⁵ In the end, the majority chose not to abolish dower because it still provided the most protection in cases where the husband attempted to completely disinherit his wife by transferring away

¹⁷ Haskins, *supra* note 17 at 48-49.

¹⁸ *See, e.g.,* In re Estate of Shroh, 392 N.W.2d 192, 194 (Mich. Ct. App. 1986).

¹⁹ Meyers, *supra* note 11 at 5.

²⁰ May v. Rumney, 1 Mich. 1 (1847).

²¹ *Id.* at 2.

²² MICH. COMP. LAWS § 558.1.

²³ Meyers, *supra* note 9, at 6.

²⁴ *Id.*

²⁵ Miltenberger, 753 N.W.2d 219, 223 (2008).

property without her consent.²⁶ Thus, the Michigan Constitution states that “[d]ower may be relinquished or conveyed as provided by law.”²⁷

Most recently, the Michigan Legislature dealt with dower as part of its project to update Michigan’s probate code in 1998.²⁸ The legislature modeled the new statute, Estates and Protected Individuals Code (hereinafter EPIC), on the Uniform Probate Code (hereinafter UPC).²⁹ The UPC explicitly abolished dower, leaving a widow with the option to accept her share under her spouse’s will or through intestacy, or to claim her elective share.³⁰ The Michigan legislature chose not to follow the UPC in this instance however, and instead enshrined dower in the new probate code.³¹ The statute states:

The widow of every deceased person, shall be entitled to dower, or the use during her natural life, of 1/3 part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof.

When a husband dies, the widow has three choices under Michigan law. The first choice is to take what is left to her in the husband’s will, or if he has no will to take what passes to her through intestacy, which is a type of default-will provided by the law.³² The amount of the intestate share varies depending on what surviving relatives both the husband and the wife have, but the minimum is for the widow to take the first \$100,000 of the estate plus half of the remainder.³³ Note that this assumes the estate contains more than \$100,000 after the decedent’s creditors have been paid off.

²⁶ *Id.* at 905-06.

²⁷ MICH. CONST. 1963, art. 10, § 1.

²⁸ 1998 P.A. 386.

²⁹ MICH. COMP. LAWS § 700.1101, *et seq.*; *see also Miltenberger*, 753 N.W.2d at 224 (explaining that EPIC generally follows the lead of the UPC).

³⁰ UPC § 2-112 (abolishing dower and curtesy); § 2-202 (the UPC’s elective share provision).

³¹ MICH. COMP. LAWS § 558.1.

³² MICH. COMP. LAWS § 700.2202.

³³ MICH. COMP. LAWS § 700.2102.

The second choice is for the widow to take her elective share.³⁴ Michigan's elective share provides the surviving spouse with one half of what she would have received if her husband had died without a will, reduced by one half of the value of any property the surviving spouse received from her husband outside of the will or intestacy.³⁵ Therefore, under the elective share, the minimum the surviving spouse will receive is \$50,000 plus one quarter of the remaining estate, minus half of any other property transferred to her outside of the will.³⁶ For example, if the couple owned a house together, the surviving spouse receives the decedent's share of the house automatically; it does not pass through the will or intestacy. Half the value of the house would then be deducted from the surviving spouse's elective share.

Michigan's elective share provision also differs from the UPC. The UPC elective share provision provides for a surviving spouse (male or female) to take a percentage of the "augmented estate," with the percentage gradually increasing to 50% for spouses who were married 15 years or longer.³⁷ Furthermore, the augmented estate under the UPC includes property transferred outside of probate, including some transactions while the decedent was still alive.³⁸ Michigan's elective share provision, on the other hand, operates only against the property in the probate estate.³⁹ The most important difference here is that by including non-probate transfers in the augmented estate, jurisdictions which employ the UPC's elective share provision protect spouses from disinheritance by making it much harder to pass assets in a way that escapes the reach of the elective share.

³⁴ MICH. COMP. LAWS § 700.2202.

³⁵ *Id.*

³⁶ Since property transferred outside the will only counts against the elective share for half its value, any non-probate transfers to the surviving spouse will decrease the elective share itself, but increase the overall amount of property received by the surviving spouse. Again, note that the surviving spouse will receive less than \$50,000 if there is less than \$50,000 in the decedent's estate.

³⁷ UPC § 2-205.

³⁸ *Id.*

³⁹ MICH. COMP. LAWS § 700.2202.

The last choice for a widow in Michigan is to exercise her dower rights to a lifetime interest in one third of the lands the husband possessed during the marriage.⁴⁰ This right attaches to all real property which the husband held during the marriage, even if he transferred it before his death, unless the widow also released her dower interest.⁴¹ The widow's dower can be assigned to her by dividing the husband's land and giving her a life estate in one third of it, through a division of the rents from the property, or by selling the property and giving her a third of the proceeds.⁴²

Dower attaches only to real property, but most wealth today is held in various forms of personal property, such as stocks, retirement accounts, and insurance policies. Therefore, a widow generally gets more through the husband's will or through her elective share than through dower.⁴³ However, dower does provide some protection against the husband transferring away property in order to disinherit the wife, because the husband cannot destroy the wife's dower interest.⁴⁴

II. Constitutionality

Both the Michigan and Federal constitutions require that no person be denied the equal protection of the laws.⁴⁵ The Michigan Supreme Court has held that Michigan's Equal Protection Clause is coterminous with the federal Equal Protection Clause, so the same analysis applies to both of them.⁴⁶ The fundamental idea of the Equal Protection Clause is that when a statute separates people into different classes, that classification must rest on criteria that are

⁴⁰ MICH. COMP. LAWS § 700.2202; MICH. COMP. LAWS § 558.1.

⁴¹ *In re Estate of Shroh*, 392 N.W.2d 192, 194 (Mich. Ct. App. 1986). "No contract of sale or conveyance by a husband without his wife's signature will operate to divest her of her dower." *Id.*

⁴² 25 AM. JUR. 2D *Dower and Curtesy* § 32 (2010).

⁴³ Meyers, *supra* note 11 at 7.

⁴⁴ *Shroh*, 392 N.W.2d at 194.

⁴⁵ U.S. CONST. amend. XIV, § 1; MICH. CONST. of 1963, art. I, § 2.

⁴⁶ *Doe v. Dep't of Social Servs.*, 439 Mich. 650, 672 (1992).

related to the purpose of the statute.⁴⁷ However, courts subject certain types of classifications to stricter scrutiny than others.⁴⁸ In considering dower, the problem is not which test to apply, but what the outcome of that test should be. The Supreme Courts of several states have applied Equal Protection analysis to similar statutes, but although they generally agreed on which test to apply, their conclusions have diverged widely.⁴⁹

The dower statute is a classification on the basis of gender, because it allows widows to take a one third interest in all lands held by their husbands during the marriage, but does not allow a reciprocal right for widowers.⁵⁰ Precedent is clear that when a statute makes classifications based on gender, the statute “must serve important governmental objectives and must be substantially related to achievement of those objectives.”⁵¹ More recently, the federal Supreme Court stated that the justification for the statute must also be genuine, not created in response to litigation, and it must not rely on overbroad generalizations about the differences between men and women.⁵²

A. We Agree on the Question, But Not the Answer: Dower Statute Case Law

The first state court to consider the constitutionality of a dower law was the Florida Supreme Court, which decided *In re Rincon Estate* in 1976.⁵³ Louise Rincon died on March 5, 1973.⁵⁴ At that time, the Florida probate code provided dower for widows, but not widowers.⁵⁵

However, Ms. Rincon’s widower was not satisfied with the provisions of her will, and attempted

⁴⁷ *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

⁴⁸ *See, e.g., Miltenberger*, 753 N.W.2d 219, 235 (2008) (Corrigan, J., concurring) (noting that laws that discriminate based on race are subject to stricter scrutiny than laws that discriminate based on gender).

⁴⁹ *Compare Stokes v. Stokes*, 613 S.W.2d 372 (Ark. 1981) and *Boan v. Watson*, 316 S.E.2d 401 (S.C. 1984) (both holding dower laws unconstitutional) *with In re Baer Estate*, 562 P.2d 614, 615-617 (Utah, 1977) and *In re Rincon Estate*, 327 So.2d 224 (Fla., 1976) (both upholding dower laws).

⁵⁰ MICH. COMP. LAWS § 588.1.

⁵¹ *Craig v. Boren*, 429 U.S. 190, 197 (1976); *see also Califano v. Webster*, 430 U.S. 313, 316-17 (1977); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

⁵² *U.S. v. Virginia*, 518 U.S. 515, 533 (1996).

⁵³ *Rincon*, 327 So.2d 224.

⁵⁴ *Id.* at 225.

⁵⁵ *Id.* at 225-26.

to elect to take dower under a new statute that took effect on October 1, 1973, which did allow husbands to have dower rights.⁵⁶ Mr. Rincon argued that the old provision was unconstitutional, and that the new one should be applied to him retroactively.⁵⁷

The Florida Supreme Court rejected both of these arguments, but under a standard which differed slightly from the test which prevails today.⁵⁸ Regarding the Equal Protection analysis, the court stated that a statute differentiating between married men and married women would pass muster if it “rest[ed] on some ground of reasonable difference having a fair and substantial relation to the object of the legislation.”⁵⁹ The court took this language from the federal Supreme Court case of *Kahn v. Shevin*.⁶⁰ The court properly required a substantial relation between the classification and the goal of the statute, but instead of requiring an important government objective the court instead asked if the classification was based on “some ground of reasonable difference.”⁶¹

The court then went on to find that the classification was rooted in the disparity between men and women’s economic capabilities.⁶² The federal Supreme Court in *Kahn v. Shevin* upheld a gender classification that aimed at reducing the disparity between men and women’s economic capabilities, and it appears that may have been what the *Rincon* court was getting at.⁶³ The federal Supreme Court has since upheld reducing the economic disparity between men and women as an important government purpose, so if the *Rincon* court had applied the modern analysis it would almost certainly have reached the same conclusion.⁶⁴

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 226.

⁶⁰ 416 U.S. 351, 355 (1974).

⁶¹ *Rincon*, 327 So.2d at 226.

⁶² *Id.*

⁶³ 416 U.S. at 355.

⁶⁴ *Califano v. Webster*, 430 U.S. 313, 317 (1977); *U.S. v. Virginia*, 518 U.S. 515

The Indiana Court of Appeals addressed a similar issue in *Matter of Parson's Estate* in 1976, when a widower sued to recover the statutory allowance granted to widows.⁶⁵ Riley Parson argued that the statutes which provided for a widow's allowance and family allowance violated the Equal Protection Clause.⁶⁶ The *Parson* court applied the same standard as the *Rincon* court.⁶⁷ In upholding the statute, the *Parson* court quoted *Kahn v. Shevin* to the effect that "[t]here can be no dispute" that single women face greater financial difficulties than single men, and "[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs."⁶⁸ The court held that the classification in the statute was substantially related to the goal of reducing this economic inequality.⁶⁹

Following in the same vein, the Utah Supreme Court upheld another gender-based statute in the 1977 case of *Matter of Baer's Estate*.⁷⁰ This case involved a statutory dower provision that provided widows with a right to elect against the will, but not widowers.⁷¹ The Utah Supreme Court followed similar reasoning to the *Parson* court, finding that there was a grave disparity between the economic abilities of men and women, and reducing this disparity through application of dower was a legitimate government purpose.⁷² The court noted that in many cases widows found themselves forced into a job market with which they were unfamiliar, and for

⁶⁵ 344 N.E.2d 317 (Ind. Ct. App. 1976).

⁶⁶ *Id.* at 581-82.

⁶⁷ *Id.* at 584-85.

⁶⁸ *Id.* at 584.

⁶⁹ *Id.* at 585.

⁷⁰ 562 P.2d 614 (Utah 1977). It is interesting to note that in *Parson*, *Rincon*, and *Baer*, the respective state legislature had already replaced the challenged statutes with gender neutral statutes before the cases were decided. *Id.* at 616; *Parson*, 344 N.E.2d at 585 n.1; *Rincon*, 327 So.2d at 226.

⁷¹ *Id.* at 615.

⁷² *Id.* at 615-16.

which they were unqualified because of their previous economic dependence on their husbands.⁷³

In 1981, the Arkansas Supreme Court became the first state court to strike down dower as unconstitutional in the case of *Stokes v. Stokes*.⁷⁴ The court held that it could not see any government function in Arkansas's dower statutes.⁷⁵ Unfortunately, the court did not report what, if any, government purposes it had considered and rejected.⁷⁶ Rather, the court limited its rationale to pointing out that dower gave women rights that their husbands did not possess, thus making a gender-based classification.⁷⁷

The *Stokes* court claimed to rely on *Orr v. Orr*, a U.S. Supreme Court case, in striking down dower.⁷⁸ *Orr*, though, does not perfectly fit the dower cases. In *Orr*, a husband challenged an Alabama statute under which husbands, but not wives, could be forced to pay alimony after a divorce.⁷⁹ The court stated that the statute must be substantially related to achieving an important government purpose, then considered three possible purposes the statute might serve.⁸⁰ First the court held that a goal of reinforcing a family model in which women play a dependent role is not permissible.⁸¹

The other purposes that the court considered were supporting needy spouses and compensating women for past discrimination during marriage.⁸² The court found each of these goals to be important government objectives.⁸³ However, the court held that the statute was not

⁷³ *Id.* at 616.

⁷⁴ 613 S.W.2d 372 (Ark. 1981).

⁷⁵ *Id.* at 304-05.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 304 (citing *Orr v. Orr*, 440 U.S. 268 (1979)).

⁷⁹ 440 U.S. 268 (1979).

⁸⁰ *Id.* at 279.

⁸¹ *Id.*

⁸² *Id.* at 280.

⁸³ *Id.*

substantially related to meeting these valid objectives.⁸⁴ First, if the statute aimed at aiding needy spouses, then it was using gender as a proxy for need, since only wives could receive alimony.⁸⁵ The court found it unnecessary to consider whether gender served as an adequate proxy for need in this instance because a better mechanism already existed.⁸⁶ The divorce process in Alabama included an individualized hearing to determine the parties' relative financial circumstances.⁸⁷ Thus, the courts already had all the information necessary to determine who needed financial assistance, and so it was not necessary to use gender as a proxy for need.⁸⁸ Similarly, those hearings could reveal more accurately than a wife's gender whether or not she had been subject to discrimination during the course of her marriage.⁸⁹ "A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny."⁹⁰

Orr is not perfectly on point for the dower cases, because probate of an estate does not involve a determination of the financial status of the decedent's heirs.⁹¹ Therefore, the *Stokes* case is not helpful because it did not acknowledge the factual distinction, and did not provide any independent justification for overruling dower aside from the reference to *Orr*. Unfortunately, *Stokes* is not the only case with this infirmity.

In 1984, the South Carolina Supreme Court held in *Boan v. Watson* that *Orr* invalidated the right of dower, which in South Carolina still rested on a common law basis.⁹² The court stated that *Orr* deals with the property rights of husbands and wives upon divorce, and therefore

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 281.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 281-82.

⁹⁰ *Id.* at 282.

⁹¹ *Miltenberger*, 753 N.W.2d 219, 230 (2008).

⁹² 316 S.E.2d 401, 402-03 (S.C. 1984). This is another case that was not decided until a law had been passed eliminating dower, or at least making it gender neutral. *Id.* at

should be equally applicable to their property rights upon death.⁹³ There is nothing wrong with this logic, as far as it goes, but the *Boan* court, like the *Stokes* court, failed to recognize that the *Orr* decision rested in part upon the fact that a divorce court already determined the financial status of the parties before it, allowing it to achieve the alimony statute's goals without discriminating on the basis of gender.⁹⁴ The *Boan* court thus did not explain why exactly dower is not substantially related to an important government purpose.

The Alabama Supreme Court provided a more satisfying analysis in *Hall v. McBride*.⁹⁵ In *Hall*, Mary Hall dissented from her husband's will and attempted to take dower.⁹⁶ Mrs. Hall had lived apart from her husband for the previous sixteen or seventeen years, and had filed as single on her last two tax returns.⁹⁷ The Alabama Supreme Court applied the modern version of the Equal Protection test, requiring the dower statute be substantially related to an important government purpose, and noting that statutes that make overbroad generalizations based on gender will generally be struck down.⁹⁸

The *Hall* court noted that the purpose of Alabama's statute was to protect a widow from being left with little or no means of support by her husband upon his death.⁹⁹ The court then stated that one goal of the statute was clearly based on notions of romantic paternalism, because it assumed that women's roles as wives and mothers left them financially helpless.¹⁰⁰ This, the

⁹³ *Id.*

⁹⁴ *Id.* at 403-04 (Lewis, C.J., dissenting); *see also supra*, notes 74-85 and accompanying text.

⁹⁵ 416 So.2d 986 (Ala. 1982). This is another case in which the state legislature had already adopted a gender neutral statute which simply had not taken effect before the husband died. Garrison, Kevin R., *The Ins and Outs of the Alabama Elective Share*, 58 Ala. L. Rev. 1161, 1166 (2007).

⁹⁶ 416 So.2d at 988.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 989.

¹⁰⁰ *Id.*

court stated, announced the government's preference for wives to play a dependent role.¹⁰¹ Such a purpose is not permissible, so the court moved on to consider other possible purposes.

The court found that the dower statute could serve to reduce the economic disparity between men and women that resulted from the history of discrimination against women, or to assist needy spouses.¹⁰² Both of these purposes are legitimate, so the court moved on to consider whether the statute bore a substantial relation to these purposes.¹⁰³

First, the court held that gender is not generally a reliable proxy for need.¹⁰⁴ The statute failed to give any help to widowers who were left destitute by their widows' wills, but did aid some widows who were not needy at all.¹⁰⁵ The court stated that a gender neutral statute could serve the same purpose just as well, and therefore under *Orr* the statute was not justified for the purpose of aiding needy spouses.

With respect to the purpose of reducing economic disparity between husbands and wives, the court declared that similarly to the purpose of assisting needy spouses, the statute was both over- and under-inclusive.¹⁰⁶ That is, some wives had not suffered economic discrimination, and some husbands were worse off economically than their wives.¹⁰⁷ In addition, the court noted that in the realm of estate law, at least, women generally received better treatment than men.¹⁰⁸ Finally, the court stated that the structure of the statute and its legislative history showed that the legislature did not enact it with the goal of reducing economic disparity, but rather intended to provide for widows who had no property rights during their marriage and thus were dependent

¹⁰¹ *Id.*

¹⁰² *Id.* at 989-90.

¹⁰³ *Id.* at 990.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

upon their husbands for support, even after the husband died.¹⁰⁹ For these reasons, the court held that the dower statute was not substantially related to the purpose of reducing economic disparity between husbands and wives.¹¹⁰

The Court of Appeals of Indiana delivered another analysis of dower in 1997 in the case of *Montgomery v. Montgomery*, which reconsidered the result in *Parson*.¹¹¹ In *Montgomery*, the estate attacked a statute which protected assets in a widow's share of the estate from certain creditors but did not extend the same protections to widowers.¹¹² The court stated that the challenge it faced was similar to that in *Parson*, "but is brought in the present day context which is no longer analogous to the cultural climate that existed more than twenty years ago."¹¹³ Although the court conceded that potential economic hardships still existed for widows, it found that "it can no longer be said that 'there can be no dispute' that the widow faces greater financial difficulties."¹¹⁴ The court acknowledged continuing inequality in men's and women's wages, but pointed out that the job market was no longer "inhospitable to the woman seeking any but the lowest paid jobs."¹¹⁵ The court found that the state's policy of providing a surviving spouse with a portion of the decedent's estate in order to relieve the state of the need to support the surviving spouse could be accomplished in a non-discriminatory manner, and extended the protection of the statute to widowers as well as widows.¹¹⁶

Michigan's dower statute first faced appellate review in *In re Estate of Miltenberger* in the state Court of Appeals in 2007.¹¹⁷ James Miltenberger was married to Sharon Miltenberger

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ 677 N.E.2d 571 (Ind. Ct. App. 1997).

¹¹² *Id.*

¹¹³ *Id.* at 581.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 581-82.

¹¹⁷ 737 N.W.2d 513 (Mich. App. 2007).

when he died in 2004, but before he died he transferred the marital home and his office without Mrs. Miltenberger's consent, and left an estate worth less than \$9,000.¹¹⁸ Mrs. Miltenberger elected to take her statutory dower interest, as her husband's will left nothing to her.¹¹⁹ Sandra Swartz, Mr. Miltenberger's daughter from a previous marriage, challenged the election, arguing that Michigan's dower provision violates the Equal Protection Clauses of the state and federal constitutions.¹²⁰ The court first pointed out that the Michigan Constitution expressly allows for dower, and that two provisions of the constitution should not be read to conflict with each other if at all possible.¹²¹ The court applied the proper Equal Protection analysis, asking whether the statute was substantially related to an important government purpose.¹²² The court noted that *Kahn v. Shevin* upheld a statute which provided widows but not widowers a financial benefit, and followed the dissent from *Boan* in distinguishing the dower statute from the statute at issue in *Orr*.¹²³ The court also pointed out the lack of explanation given in *Stokes*, but did not address the Court of Appeals of Indiana's arguments in *Montgomery*.¹²⁴

Turning to the cases which upheld dower, the court stated that it found *Rincon* persuasive because of Florida's similar constitutional provision explicitly allowing for dower.¹²⁵ The court also agreed with *Baer* that the statute serves the purpose of reducing the economic impact of spousal loss "upon the sex for which that loss imposes a disproportionately heavy burden," and that it is a legitimate goal to support widows who would have a difficult time supporting

¹¹⁸ *Id.* at 515; In re Estate of Miltenberger, 753 N.W.2d 219, 232 (Mich. 2008).

¹¹⁹ *Miltenberger*, 737 N.W.2d 513, 515 (Mich. App. 2007).

¹²⁰ *Id.*

¹²¹ *Id.* at 516.

¹²² *Id.* at 517.

¹²³ *Id.* at 517-18.

¹²⁴ *Id.*

¹²⁵ *Id.* at 519.

themselves.¹²⁶ Therefore, the court upheld the dower statute, and Ms. Swartz appealed to the state Supreme Court.¹²⁷

The Supreme Court first granted leave to appeal, then reversed itself and denied leave after hearing oral arguments.¹²⁸ Three justices wrote or joined concurring opinions explaining why they would uphold the dower statute.¹²⁹ A fourth justice wrote in favor of overturning the statute, joined by one other justice, while the remaining two justices did not join any of the opinions.¹³⁰ All of the justices agreed that the dower law is subject to intermediate scrutiny, because it discriminates on the basis of gender.¹³¹ Therefore, the proponent of Michigan's dower statute held the burden of demonstrating that it is substantially related to an important governmental purpose.

Justice Corrigan wrote the chief opinion in favor of upholding the dower statute.¹³² She stated that Michigan's dower provision serves the dual permissible purposes of supporting needy spouses and remedying past economic discrimination against widows.¹³³ Despite the fact that Michigan has retained essentially the common law form of dower, the Justice held that the purposes behind the law have been updated as first the constitutional convention of 1961 and then the state legislature in 1998 considered abolishing dower.¹³⁴

Justice Corrigan conceded that dower is both over- and underinclusive for achieving these objectives, yet argued that dower reflects genuine differences between men and women,

¹²⁶ *Id.*

¹²⁷ *In re Estate of Miltenberger*, 753 N.W.2d 219 (2008).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 220-41.

¹³³ *Id.* at 224-25.

¹³⁴ *Id.* at 223-24.

and is not merely based on stereotypes or overgeneralizations.¹³⁵ She found that women have less earning power than men, tend to live longer, and may have relied on their inchoate dower rights during the course of their marriages.¹³⁶ Furthermore, she noted that women working full time in Michigan on average earned about 71.3% of what men earned, compared to a national average of 77.3%.¹³⁷ For these reasons, Justice Corrigan stated that the distinction between widows and widowers contained in the dower statute is based on more than archaic stereotypes.¹³⁸

Justice Corrigan also emphasized that Michigan's laws are not amenable to gender-neutral application, unlike the statute in *Orr*.¹³⁹ Because the situation in *Orr* already involved individualized hearings, there was no need for generalization, but the same cannot be said of Michigan's dower statute.¹⁴⁰ Justice Corrigan further stated that although the legislature could introduce a gender neutral statute, only the legislature could determine the feasibility of such a law.¹⁴¹

Justice Corrigan then discussed the situations in which dower is a useful option for a widow to have. Those circumstances are limited to cases where the husband transfers real estate without his wife's consent, and leaves a minimal estate for her elective share to operate against.¹⁴² Therefore, Justice Corrigan argued that although dower is underinclusive of the group of needy widows or those who have been discriminated against, it helps in cases where the

¹³⁵ *Id.* at 225.

¹³⁶ *Id.*

¹³⁷ *Id.* at 224.

¹³⁸ *Id.* at 226.

¹³⁹ *Id.* at 230.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 231.

¹⁴² *Id.* at 232. If the real estate is not transferred away, the widow's elective share will count it even if it is left to someone else in the husband's will. MICH. COMP. LAWS § 700.2202. Therefore, dower will almost never be the widow's best option unless the husband transferred property away without her consent so that dower but not the elective share attached to the property.

elective share provision does not protect the widow.¹⁴³ Concerning the statute's underinclusiveness towards the group of needy widowers, Justice Corrigan suggested that a wife transferring property could sell it at a discount in order to reserve a one third life estate in the property for her husband in case she should predecease him.¹⁴⁴

Justice Corrigan concluded that dower serves constitutionally important ends that would not be equally served by a gender neutral statute without additional burdens to the state.¹⁴⁵ She also concluded that dower could not be eliminated without compromising the effort to aid disadvantaged women.¹⁴⁶ While not really satisfied with the dower statute, Justice Corrigan stated that the court could not force upon the legislature a new scheme, and expressed skepticism that a gender-neutral dower system would even be feasible.¹⁴⁷ She pointed out that there is no mechanism in place by which to judge whether a surviving spouse is sufficiently needy to require the assistance of dower, and that extending dower rights to husbands would interfere with vested property rights.¹⁴⁸

Justice Cavanagh's dissent noted the *Orr* court's statement that statutes that discriminate on the basis of gender "carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection."¹⁴⁹ He agreed with Justice Corrigan that the correct level of scrutiny is to ask whether the dower statute is substantially related to an important government purpose, but pointed out that the federal Supreme Court has applied this

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 233.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* Extending dower to men would interfere with vested property rights, if done retroactively, because husbands would be given an inchoate dower interest in lands to which no such interest had been attached at the time they were sold. However, this problem would not exist if dower were extended to husbands prospectively only.

¹⁴⁹ *Id.* at 243 (quoting *Orr v. Orr*, 440 U.S. 268, 283).

test particularly strictly when dealing with marital laws.¹⁵⁰ He also accepted that the statute serves important government objectives.¹⁵¹

Justice Cavanagh did not agree, however, that the dower statute is substantially related to its goals.¹⁵² He argued that statistics showing that twelve percent of women over the age of sixty-five lived in poverty in 2004 compared to only seven percent of men over sixty-five were insufficient justification for using gender as a proxy for need.¹⁵³ He noted that the federal Supreme Court has refused to uphold gender discrimination even when based on statistics.¹⁵⁴ He further pointed out that if twelve percent of women over the age of sixty-five live in poverty, the dower statute is overinclusive by approximately eighty-eight percent of women, while at the same time failing to protect seven percent of men.¹⁵⁵

Justice Cavanagh then attacked the statute's use of gender as a proxy for need. He stated that nondiscriminatory means could provide support for needy spouses.¹⁵⁶ Furthermore, he argued that the statute is poorly crafted to achieve its intended goal, as dower only provides

¹⁵⁰ *Id.* Justice Cavanagh cited to a number of Supreme Court cases striking down gender based laws in the marital arena, including *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (striking down Missouri's workers' compensation provision that forced a widower to prove dependence on his wife's earnings before he could receive death benefits, but did not place a reciprocal requirement on a widow to prove dependence on her husband's earnings in order to receive death benefits); *Orr v. Orr*, 440 U.S. 268 (striking down Alabama's alimony statutes that provided that husbands, but not wives, may be ordered to pay alimony upon divorce); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (striking down the federal Old-Age, Survivors, and Disability Insurance Benefits program, which required a widower to prove dependence on his wife to receive survivors' benefits, but did not require a widow to prove dependence on her husband to receive survivors' benefits); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (striking down the Social Security Act provision that provided benefits to widows with minor children, but not widowers); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down a federal statute that required a servicewoman's husband to prove dependency in order to obtain increased quarters allowances and medical and dental benefits, but did not require a serviceman's wife to prove dependency to obtain these same benefits); and *Reed v. Reed*, 404 U.S. 71 (1971) (striking down an Idaho statute that provided that the husband must be preferred over the wife for the purpose of appointing their son's estate administrator).

¹⁵¹ *Miltenberger*, 753 N.W.2d at 246.

¹⁵² *Id.* at 249.

¹⁵³ *Id.* at 247.

¹⁵⁴ *Id.* (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), which refused to uphold a clause of the Social Security Act favoring widows based on the generalization that men are generally the primary supporters of their spouses, even though this generalization was based on empirical data).

¹⁵⁵ *Miltenberger*, 753 N.W.2d at 249.

¹⁵⁶ *Id.* at 250-51.

assistance in limited circumstances.¹⁵⁷ For these reasons, Justice Cavanagh concluded that Michigan's dower statute is not substantially related to important government purposes.¹⁵⁸

B. An Answer to the Question

The question is whether Michigan's dower statute is substantially related to important government objectives.¹⁵⁹ The best answer is that the statute is aimed at important government objectives, but is no longer substantially related to meeting those goals. The legislature intended for the statute to support needy spouses and remedy past discrimination.¹⁶⁰ The federal Supreme Court has upheld these as important government purposes in the past.¹⁶¹ The problem is that the dower statute is vastly overinclusive, substantially underinclusive, and generally ineffective.

As Justice Cavanagh pointed out in the *Miltenberger* case, any widow can claim dower, regardless of her financial situation.¹⁶² On the other hand, even if a widower has no independent means of support and his wife was wealthy, he cannot take dower. According to the statistics cited in *Miltenberger*, twelve percent of women over the age of 65 live in poverty, and seven percent of the men over sixty-five also live below the poverty line.¹⁶³ As a preliminary matter, these statistics are insufficient to base the dower statute on because they refer to the entire

¹⁵⁷ *Id.* at 251.

¹⁵⁸ *Id.* at 253.

¹⁵⁹ *See supra* Section I.A.

¹⁶⁰ *Miltenberger*, 753 N.W.2d at 224-25, 246.

¹⁶¹ *Orr*, 440 U.S. 268, 280; *Califano v. Webster*, 430 U.S. 313, 317 (1977). It is interesting to note, however, that the circumstances surrounding the economics of gender have gradually changed since the courts first considered whether supporting needy spouses and remedying past economic discrimination against women were important governmental purposes. *See, e.g.* *Montgomery v. Montgomery*, 677 N.E.2d 571, (1997) (declining to follow *Estate of Parson* because of the reduction in economic inequality between men and women over the intervening twenty years). Women have steadily gained more economic power since the 1970s, to the point that a recent study showed that in 2007 women were the primary breadwinners in 22% of married couples, up from 4% in 1970. FRY, RICHARD AND D'VERA COHN, NEW ECONOMICS OF MARRIAGE: THE RISE OF WIVES (January 19, 2010) *available at*: <http://pewresearch.org/pubs/1466/economics-marriage-rise-of-wives?src=prc-latest&proj=peoplepress>. The current recession has only continued the trend, as more men have lost jobs than women. Catherine Rempell, *As Layoffs Surge, Women May Pass Men in Job Force*, N.Y. TIMES, Feb. 5, 2009, at A1. Thus, the reason for having dower at all is gradually disappearing.

¹⁶² *Miltenberger*, 753 N.W.2d at 247.

¹⁶³ *Id.* at 247.

population above the age of sixty-five, rather than to widows and widowers. Also, the legislature's idea of "needy" surviving spouses may include some who are not technically living in poverty.

More importantly though, these numbers point out how grossly inaccurate the dower statute is for reaching its target beneficiaries. The numbers suggest that the vast majority of those for whom taking dower is an option are not those intended to benefit from it. Even if a greater proportion of widows over sixty-five live in poverty than the class of women over sixty-five in general, and even if the legislature intended to help more than just those widows left in poverty when their spouses die, *quadrupling* the twelve percent cited in *Miltenberger* would still mean that half of the women able to claim dower do not need it.

It would be astonishing if only half of the people able to claim dower were actually intended to benefit from it. Yet even fifty percent efficiency does not seem sufficient for a statute to be called "substantially related" to its goal. If welfare were as haphazardly targeted to assist the needy as dower is to assist needy surviving spouses, the government might just pay all African- and Hispanic-Americans, because those two groups have higher poverty rates than whites or Asians.¹⁶⁴ Granted, the dower statute is less absurd because it does not involve direct payments from the government, and it also involves gender which receives less Equal Protection scrutiny than racial distinctions.¹⁶⁵ But aside from any racial aspect, such a policy would be attacked from every side as being grossly inefficient. The fact that it is not the government's money at issue in the probate arena does not justify such inefficiency.

¹⁶⁴ U.S. Census Bureau, Historical Poverty Tables (2010). Available at: <http://www.census.gov/hhes/www/poverty/histpov/hstpov2.html>.

¹⁶⁵ U.S. v. Virginia, 518 U.S. 515, 532 n. 6 (1996) (stating that the strictest level of scrutiny is reserved for classifications based on race or national origin).

In addition to benefitting a large number of people who are not the primary focus of the statute, the dower statute leaves a sizeable portion of those who actually need help with nothing. Granted, a smaller percentage of men over sixty-five live in poverty compared to women, and there are a larger number of women over sixty-five to start with, but surely the population of needy widowers is not so small as to justify overlooking it entirely.¹⁶⁶ Justice Corrigan's suggestion that a wife can reserve a life estate in any property that she transfers during marriage is entirely unhelpful.¹⁶⁷ As she herself points out, dower is chiefly useful when one spouse attempts to disinherit the other.¹⁶⁸ If society could count on all spouses to provide for each other voluntarily, there would be no need for a dower statute at all.

Another problem with the dower statute is that it is based on completely outmoded expectations about how wealth is held. Dower developed in the middle ages when the main source of wealth was land, so it gives the widow an interest in her husband's lands.¹⁶⁹ But today the only land most families own is their home, and they are likely to have more assets in personalty than realty.¹⁷⁰ Even where the husband holds income producing real estate, a one-third life interest is often insufficient to support a widow.¹⁷¹ In most cases then, dower will not provide the surviving spouse with a substantial amount of support. Dower provides a bare minimum amount of protection from total disinheritance in most cases, to be sure.¹⁷² But it is such a small amount of protection that it is almost *only* useful in cases of intentional

¹⁶⁶ See 753 N.W.2d 219, 225-26 (2008) (Corrigan, J., concurring) (discussing the statistics of old age and poverty, pointing out that women tend to live longer than men, and are more likely to live alone).

¹⁶⁷ *Id.* at 232.

¹⁶⁸ *Id.*

¹⁶⁹ See Haskins, *supra* note 17 at 47 (stating that unless she had lands of her own, a widow would have been destitute without her dower).

¹⁷⁰ THOMAS E. ATKINSON, LAW OF WILLS 107 (2d ed. 1953).

¹⁷¹ *Id.*

¹⁷² U.S. CENSUS BUREAU, HOMEOWNERSHIP RATES BY AGE OF HOUSEHOLDER AND FAMILY STATUS FOR THE UNITED STATES (2009) available at <http://www.census.gov/hhes/www/housing/hvs/annual08/ann08ind.html> (showing homeownership rates around 90% for married couples ages 50 and higher).

disinheritance.¹⁷³ In this context, “useful” merely means that dower provides a very small amount of protection in comparison to Michigan’s elective share, which provides almost no protection whatsoever.

Michigan’s dower statute is grossly overinclusive, worryingly underinclusive, and generally unhelpful for those it does include. The only way dower could reasonably be said to bear a substantial relation to its objectives is if there were no non-discriminatory alternatives. Justice Corrigan expressed strong skepticism that just such an alternative exists, but in fact the code upon which Michigan’s legislature based the EPIC statute contains just such an alternative.¹⁷⁴ “Where, as here, the [Government’s] ... purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the [Government] cannot be permitted to classify on the basis of sex.”¹⁷⁵

III. Alternatives

The EPIC statute generally tracks the language of the Uniform Probate Code.¹⁷⁶ The UPC eliminated dower and curtesy, but the UPC’s elective share provision provides a surviving spouse with protection against disinheritance. Under the UPC, the surviving spouse is entitled to take fifty percent of the value of the “marital-property portion of the augmented estate.”¹⁷⁷ The marital property portion is determined by the length of marriage.¹⁷⁸

The key is the composition of the augmented estate, which includes not only the decedent’s probate estate (that is, property still in the decedents name when he or she died) but

¹⁷³ *Miltenberger*, 753 N.W.2d at 232.

¹⁷⁴ *Miltenberger*, 753 N.W.2d at 233; *see infra* Part III discussing the UPC’s elective share provision as a superior means of accomplishing the Michigan Legislature’s goals.

¹⁷⁵ *Orr v. Orr*, 440 U.S. 268, 283 (1979).

¹⁷⁶ *Miltenberger*, 753 N.W.2d at 224.

¹⁷⁷ UPC § 2-202.

¹⁷⁸ UPC § 2-203.

also nonprobate transfers that the decedent made to others.¹⁷⁹ This provision covers property owned or owned in substance by the decedent that transfers outside of probate, including joint tenancies, POD accounts, insurance policies.¹⁸⁰ It also encompasses transfers of property to which the decedent retained the right to possession or enjoyment.¹⁸¹ Therefore, if the decedent kept her assets in a joint account in an attempt to transfer them automatically at death to keep the assets out of probate and away from the surviving spouse, the UPC will still count those assets as part of the augmented estate. Similarly, a spouse cannot transfer away the marital home to avoid leaving anything to the surviving spouse without actually vacating the home.

The UPC's elective share provides protection against deliberate disinheritance, but extends this protection to personal property and not merely real estate. Consequently, it does a much better job of supporting needy spouses than Michigan's dower statute. Additionally, a gender-neutral statute such as the UPC will naturally provide some remedy for past economic discrimination against women. A gender neutral statute gives a surviving spouse a certain percentage of that property, but that same percentage will mean a larger amount of actual property when the husband dies than when the wife dies. Assume that a husband owns seventy-five percent of marital property, and that the marriage has lasted more than fifteen years so that the UPC calls for the surviving spouse to receive fifty percent of the augmented estate, minus the share that the surviving spouse already owns.¹⁸² If the husband dies first, the wife's elective share is twenty-five percent of the augmented estate (fifty percent minus the twenty-five percent

¹⁷⁹ *Id.*

¹⁸⁰ UPC § 2-205(1).

¹⁸¹ UPC § 2-205(2).

¹⁸² *See* UPC § 2-203. Note that the augmented estate includes the surviving spouse's property.

she already owns), but if the wife dies first the husband receives only a supplemental amount because he already owns more than his share of the augmented estate.¹⁸³

Nor is the UPC the only possible solution. As Michigan is currently the only state in the country that has dower but does not extend it to men, there should be as many as forty-nine other models to choose from. For example, Ohio provides the option of dower to both spouses.¹⁸⁴ This is not to suggest that the Michigan courts should force any of the available gender-neutral options upon the legislature. As Justice Corrigan stated, the legislature is in a much better position than the courts to weigh the relative advantages and disadvantages of the various options.¹⁸⁵ However, the fact that there are a variety of non-discriminatory options available means that Michigan's dower statute should not be upheld as somehow representing the best possible solution to a thorny problem.

IV. Conclusion

Michigan's dower statute violates the strictures of the Equal Protection Clause. It simultaneously protects far too many and far too few to achieve its purposes, and what protection it gives is often inadequate. Furthermore, despite Justice Corrigan's protestations to the contrary, there exists in the UPC's elective share provision a workable gender-neutral alternative which would provide greater protection than dower. Although the courts should not press any specific alternative upon the legislature, the existence of a variety of alternatives shows that there is no excuse for continuing to cling to the outmoded, discriminatory relic that is Michigan's current dower statute. Striking down the dower statute will provide the legislature with the necessary impetus to undertake reform and implement a more effective, non-discriminatory law.

¹⁸³ UPC § 2-202(b).

¹⁸⁴ OHIO REV. CODE ANN § 2103.02 (West 2010).

¹⁸⁵ *Miltenberger*, 753 N.W.2d at 233.