



The Demise of Dower

By Thomas H. Anthony and Jill N. Lauderman

In 2008, the Michigan Supreme Court upheld the concept of dower in the case of *In Re Estate of Miltenberger*.¹ The Court emphasized the need for its continuation despite the clear gender distinction in that only widows were eligible for this benefit, which allows a wife to have a one-third interest in all land owned by her husband. At the time, Michigan was the only state maintaining this particular form of dower.² Other states like Ohio, Arkansas, and Kentucky retain dower, but grant widowers a reciprocal right in their wives' property.³

In 2015, when the United States Supreme Court decided *Obergefell v Hodges*,⁴ it set aside the previous state bans against

same-sex marriages.⁵ The Court went on to opine that the various states would be required to recognize as valid any same-sex marriages that were properly solemnized in other states.⁶ This *Obergefell* ruling brings into question the continued validity of the Michigan dower statutes and common law.

History of dower

At common law, dower was created as a means of supporting a man's wife and family after his death.⁷ Upon the death of the husband, property was passed down via primogeniture,

Fast Facts

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or the right of succession belonging to the first-born child or eldest living son.⁸ Dower gave a widow an entitlement to one-third of the lands in which her deceased husband had an ownership interest during his lifetime.⁹

Michigan has had some form of dower dating back to the ordinances of 1787.¹⁰ In the mid-1800s, the state legislature granted women the right to own property.¹¹ The understanding was that dower was still needed as a way to provide economic support for widows.¹²

During the 1961 Michigan Constitutional Convention, the concept of dower was reaffirmed by its adoption into the new state constitution. The 1963 Michigan Constitution, Article 10, Section 1, states that “[d]ower may be relinquished or conveyed as provided by law.”¹³

A similar decision to continue dower was made when the Estates and Protected Individuals Code was adopted in 1998. The statute provides:

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.¹⁴

Recent developments of caselaw

The validity of dower was again addressed in 2008 in *Miltenberger*.¹⁵ Justice Maura Corrigan’s concurring opinion sheds some insight into the Court’s rationale for upholding the dower statute despite its obvious favoritism for females. Justice Corrigan defended the continuation of dower when she opined:

I conclude that the gender discrimination in Michigan’s dower scheme is adequately justified by the well-documented

relative economic positions of widows and widowers in this state. Therefore, the Court of Appeals correctly concluded that dower survives equal protection review and declined to deprive the Legislature of this historical tool to aid widows, who, as a group, continue to occupy less favorable economic positions than their male counterparts.¹⁶

Subsequently, the 2013 decision in *Zaber v Miotke*¹⁷ also validated the concept of a wife’s dower rights as one of the various remedies for the protection of women:

First, an inchoate dower interest might never ripen into a consummate possessory interest. If a wife dies before her husband, her dower rights die with her.... A husband might bequeath an inheritance to his wife in his will and the wife could elect to accept that inheritance in lieu of her dower. See MCL 700.2202(1)(a) and (b), (2)(a) (the surviving widow of an intestate decedent may elect to take her intestate share or her dower right and the surviving spouse of a testate decedent may elect to “abide by the terms of the will,” take her dower right, or take a modified intestate share).¹⁸

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Thus, a widow basically has three choices available under Michigan law.¹⁹ First, she has the option to abide by the terms of her husband’s will, or, if he has no will, to take what will pass to her through intestacy, the default provided by law.²⁰ The amount of the intestate share will be determined by which surviving relatives remain, but the minimum the widow will receive is the first \$100,000 of the estate plus half of the remainder.²¹ Second, the widow can decide to take her elective share of the decedent’s estate.²² Michigan’s elective share amounts to one-half of what the surviving spouse would have received if her husband had died intestate, reduced by one-half the value of any property she received from her husband as a transfer outside of the will.²³ Lastly, a widow can exercise her dower rights and receive a life estate in one-third of all the lands her husband possessed during their marriage.²⁴

Because dower rights only attach to real property and most wealth today is retained in various forms of personal property such as stock, insurance policies, and retirement plans, a widow will generally receive more through her husband’s will or her elective share.²⁵ However, dower rights afford protection in the event that the husband transfers all his property away as a means to disinherit his wife.²⁶

Effect of the *Obergefell* decision

Justice Anthony Kennedy authored the United States Supreme Court's opinion in *Obergefell*. He indicated that the two issues before the Court were:

The first is... whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second... is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.²⁷

While the *Obergefell* Court determined that the respective states could not use gender or sex as a basis for marriage eligibility, it went on to recognize that there are still some areas of family or marriage laws left to the states' discretion. As the Court opined, states may vary the benefits conferred or accorded to married couples:

Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have... made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation, inheritance and *property rights; rules of intestate succession;....*²⁸

Thus, the Court acknowledged that the respective states retained the ability to determine various rights, obligations, and privileges that accompanied one's marital status in that particular state,²⁹ including a spouse's privileges in the areas of property rights, inheritance laws, and the rules of intestate succession.³⁰

In view of this dichotomy, the question then arises as to the continued validity of any gender-based statutes, such as dower rights in Michigan.

Reference is made again to Justice Corrigan's opinion in *Miltenberger*, in which she defends the need to continue dower based on the superior economic position of males and to protect females from financial hardships.³¹

The Michigan and federal constitutions require that no person be denied the equal protection of the law. The Michigan Supreme Court ruled that the state's Equal Protection Clause is coterminous with the federal Equal Protection Clause, so that the same analysis applies to both.³² The fundamental idea of the Equal Protection Clause is that when a statute—such as a gender-based statute like a widow's dower rights—separates persons into different classes, that classification *must* rest on criteria directly related to purpose(s) of the statute.³³

It is significant to point out that the ruling in *Miltenberger* was rendered when marriage in Michigan was still defined and limited to a "union between one man and one woman." Per *Obergefell*, marriage may now reflect a union between two men or two women.

While dower has a long history and has provided protection to numerous widows, the adoption of same-sex marriages has created a situation in which dower can no longer be justified.

Under the various scenarios that now exist to form a married couple, it becomes increasingly problematic to administer dower rights and justify the continuation of dower as discussed in Justice Corrigan's ruling in *Miltenberger*. For example, does this mean that courts will be forced to rely on an income test to determine if dower is appropriate? That is, if the inferior income earner in a same-sex marriage dies first, is dower not appropriate? Does a marriage between two females create a dower right in both partners when one dies? Or should the presumption of dower relied on in *Miltenberger* continue to protect the traditional definition of "wife"—due to her lesser economic status—when her "husband" dies? Has dower outlived its usefulness and purpose in our modern society?

Interestingly, Justice Corrigan was almost prophetic in her comments in *Miltenberger*, defending the need for dower, stating:

Most significantly, dower serves important, constitutionally sound governmental objectives that are *not* equally served by hypothetical gender-neutral schemes without additional burdens on the state.... Indeed, I am not convinced that the Legislature could feasibly adopt a gender-neutral dower scheme.... First, no mechanism exists to determine whether a spouse is sufficiently dependent to justify a dower right in property owned by a third party. Most significantly, gender-neutral dower for husbands in land already transferred would compromise vested property rights; although a woman's right to dower has always been embedded in Michigan law pertaining to real property, a man's right to dower has never been recognized or taken into account during past transactions involving real property.³⁴

Remember that before *Obergefell*, Michigan was the only state that still maintained dower in its current form.³⁵

Summing it up

The 2015 United States Supreme Court decision in *Obergefell* clearly settled that one's gender or sex could not be used as a factor in determining an individual's right to marry, calling into question the future validity of gender-based statutes. The Court acknowledged that states are entitled to determine the various rights, obligations, and privileges accompanying one's marital status—including a spouse's privileges in the areas of property rights, inheritance laws, and the rules of intestate succession. Thus, at first blush, it appears that dower may be able to survive post-*Obergefell* with the Court's acknowledgment that certain areas of law are left for the states to decide.

The *Obergefell* Court redefined the concept of the marital union, expanding it to include same-sex couples. The feasibility of adopting a gender-neutral dower statute to fit the new definition of marriage was addressed in *Miltenberger*.³⁶

The *Miltenberger* Court's decision to uphold dower rights was justified in part on the economic inferiority of the surviving female spouse. But support for this position is called into question with the legalization of same-sex marriages and the resulting combinations that ensue from gender-neutral marriage statutes.

Dower is not only a statutorily adopted right,³⁷ but was granted constitutional protection in the Michigan Constitution.³⁸ Accordingly, the process to eliminate dower is more complicated than passing a new gender-neutral statute that sets aside dower rights; that requires an amendment to the state constitution or a court decision determining that dower is no longer constitutional. The difficulties in setting aside dower rights should not be a reason to continue an outdated concept that is no longer warranted.

Thus, while dower has a long history and has provided protection to numerous widows, the adoption of same-sex marriages has created a situation in which dower can no longer be justified. It should be abolished in Michigan. ■



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ENDNOTES

1. *In re Estate of Miltenberger*, 482 Mich 901; 753 NW2d 219 (2008).
2. Dukeminier, Sitkoff & Lindgren, *Wills, Trusts, and Estates* (8th ed, 2009), p 476 n 1 (stating that common-law dower rights survive only in Ohio, Arkansas, Kentucky, and Michigan).
3. *Id.*
4. *Obergefell v Hodges*, 576 US __; 135 S Ct 2584; 192 L Ed 2d 609 (2015).
5. *Id.*
6. *Id.* at 2607.
7. Haskins, *The Development of Common Law Dower*, 62 Harvard L Rev 42, 47 (1948).
8. *Id.* at 47.
9. *Id.* at 48–49.
10. See *May v Rumney*, 1 Mich 1 (1847).
11. *Id.*
12. Meyers, Moseng & Stone, *Dower: Important Protection or Sexist Anachronism*, 23 Mich Real Prop Rev 5, 6 (1996).
13. Const 1963, art 10, § 1.
14. MCL 558.1.
15. *Miltenberger*, 482 Mich 901.
16. *Id.* at 902.
17. *Zaher v Miotke*, 300 Mich App 132; 832 NW2d 266 (2013).
18. *Id.* at 142–143.
19. Explaining that three choices are available to widows; however, only two choices are available to widowers, as dower is not an option for a surviving male spouse.
20. See MCL 558.1.
21. See MCL 700.2202 (this assumes that the estate contains more than \$100,000 after the decedent's creditors have been paid off).
22. See MCL 700.2202.
23. *Id.*
24. MCL 558.1.
25. Meyers, p 6.
26. *In re Estate of Shroh*, 151 Mich App 513; 392 NW2d 192 (1986).
27. *Obergefell*, 576 US __; 135 S Ct at 2593.
28. *Id.* at 2601 (emphasis added).
29. *Id.*
30. *Id.*
31. *Miltenberger*, 482 Mich at 902.
32. *Doe v Dept of Social Servs*, 439 Mich 650, 671–672; 487 NW2d 166 (1992); Leiby, *Last One Standing: Michigan's Dower Law*, MSU College of Law (Spring 2010).
33. *Reed v Reed*, 404 US 71, 75–76; 92 S Ct 251; 30 L Ed 2d 225 (1971).
34. *Miltenberger*, 482 Mich at 917–918.
35. Dukeminier, p 476 n 1.
36. *Miltenberger*, 482 Mich at 915.
37. MCL 558.1.
38. Const 1963, art 10, § 1.