

IN THE SUPREME COURT  
APPEAL FROM THE COURT OF APPEALS  
PER CURIAM OPINION  
(MARKEY, P.J., SAAD AND WILDER, JJ)

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In Re:

ESTATE OF JAMES W. MILTENBERGER,  
Deceased.

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SUSAN EIFLER, Personal Representative of  
the Estate of JAMES W. MILTENBERGER,  
Deceased,

and Appellee,

SC: 133847  
COA: 270716  
Calhoun Probate Ct: 2004-000287-DE

SHARON MILTENBERGER,

Petitioner-Appellee,

v

SANDRA SWARTZ,

Respondent-Appellant.

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**REPLY BRIEF OF APPELLANT SANDRA SWARTZ**

**ORAL ARGUMENT REQUESTED**

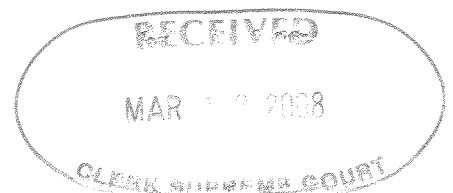


TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii
Summary of Argument .....	1
Re-Statement of Facts .....	4
Argument .....	5
 <b>A. DOWER IS UNCONSTITUTIONAL BECAUSE CONTEMPORARY REALITIES PRESENT NO ACTUAL HARM; THEREFORE, THERE IS NO LONGER AN IMPORTANT GOVERNMENT OBJECTIVE THAT SUBSTANTIALLY RELATES TO THE PURPOSE OF THE STATUTE.</b>	
Conclusion and Relief Requested .....	10

**TABLE OF AUTHORITIES**

**Michigan Supreme Court**

*North Ottawa Hosp. v Kieft*, 457 Mich 394, 400;  
578 NW2d 267 (1998)..... 1, 2, 6, 7, 8, 9, 10

*Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 144-148;  
253 N.W. 114 (1977))..... 10

*Tong v Marvin*, 15 Mich 60; 1862 Mich LEXIS 112 (1862)..... 6

**Michigan Court of Appeals**

*Citizens Commercial & Savings Bank v Raleigh*, 159 Mich App 110, 117;  
406 NW2d 479 (1987) ..... 7

*Hall v Novik*, 1997 Mich App Lexis 3200 (1997) ..... 10

*Wendland v Citizens Commercial & Sav. Bank*, 92 Mich App 150;  
284 NW2d 776 (1979) ..... 1

**Constitutional Provisions**

Michigan 1963 Constitution, art 10 §1 ..... 8

**Michigan Compiled Laws**

MCL 557.21 ..... 2

MCL 557.21(1) ..... 2

MCL 558.1 ..... 5, 6, 10

MCL 700.2202 ..... 10

MCL 700.2202(2) ..... 5

**Reference Authority**

*Blacks Law Dictionary* (7<sup>th</sup> Ed. 1999, pg. 373) ..... 1

John Cameron, *Michigan Real Property Law, Third Edition*..... 1

Marylynn Salmon, *Women and the Law of Property in Early America* 145  
(G. Edward White ed., *The University of North Carolina Press* 1986)..... 6

## I. SUMMARY OF ARGUMENT

Dower is unconstitutional for a simple reason: times and laws have changed. Before addressing why the lapse resulted in dower's unconstitutionality, it is important to note the following: (1) Dower rights only apply to married women, i.e. neither unmarried women, unmarried men nor married men have the opportunity to claim dower; and (2) dower attaches only to real property owned by the husband. It does not attach to a lessee's interest, a life estate, tenancy by the entireties, joint tenancies, partnership property, or land held by the husband in a fiduciary capacity.

Introduced in England about the time of the Magna Carta, dower established a means of providing for a surviving widow, who by marriage (or "coverture"<sup>1</sup>) lost most of her rights to own and control property and generally stood to inherit none of the marital estate. This all changed with the evolution of woman's rights, including most notably the adoption of Michigan's 1963 Constitution ("1963 Constitution") and the Married Women's Property Acts (MWPAs), which resulted in the abolition of coverture. *North Ottawa Hosp v Kieft*, 457 Mich 394, 400; 578 NW2d 267 (1998).

Although the 63 Con Con struck a debilitating blow to the archaic and impractical rules toward women's dower rights by amending the Michigan Constitution, it should have been the MWPAs that signaled the mortal blow to dower. Under the initial MWPA<sup>2</sup>

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<sup>1</sup> Coverture has been defined as "[t]he condition of being a married woman." <under former law, a woman under coverture was allowed to sue only through the personalty of her husband>. Black's Law Dictionary (7th Ed. 1999 pg. 373).

<sup>2</sup> The initial MWPA was actually composed of three separate statutes enacted in 1855, 1911, and 1917. *The Impact of Michigan's Common-Law Disabilities of Coverture on the Married Women's Access to Credit*, 74 Mich L. Rev. 76, 79-80 (1975) cited in John Cameron, *Michigan Real Property Law*, Third Edition §10 at 296 et seq. The 1855 statute "granted married women significant control over their separate property and the concomitant power to contract with regard to that property." *Wendland v Citizens Commercial & Sav. Bank*, 92 Mich App 150, 254; 284 NW2d 776 (1979). The 1911 and 1917 acts granted married women the right to work outside of the household; personally sue for earnings, and expanded a wife's ability to contract jointly with her husband.

the Legislature provided married women with the power to contract with regard to their property; the right to work outside of the household; the right to personally sue for earnings; and expanded a married woman's ability to contract jointly with her husband. In 1981, the MWPA was amended and codified under MCL 557.21 et. seq.

The MWPA took the underlying idea behind dower, which was to balance against coverture, and instead, put married women on equal footing as men in terms of real property rights. MCL 557.21(1) states:

“If a woman acquires real or personal property before marriage or becomes entitled to or acquires, after marriage, real or personal property through gift, grant, inheritance, devise, or other manner, that property is and shall remain the property of the woman and be a part of the woman's estate. She may contract with respect to the property, sell, transfer, mortgage, convey, devise, or bequeath the property in the same manner and with the same effect as if she were unmarried. The property shall not be liable for the debts, obligations, or engagements of any other person, including the woman's husband, except as provided in this act.”

The codification of the MWPA, together with the 1963 Constitution, stands for the principal that married women and their husbands are to be treated equally. As this Court has recognized, including in its *North Ottawa* decision, once justifiable provisions, including dower, must be reexamined, not with historical standards, but in a contemporary light. Dower is an obsolete principal, outdated, and more importantly, unconstitutional.

Miltenberger advocates that dower serves an important government purpose and that it is substantially related to serving that purpose. To support her position that dower should remain constitutional, Miltenberger provides statistics, dissenting opinions from foreign jurisdictions, and more statistics. Although her statistics are interesting, it seems statistics are better suited to convince a legislative body that creates public policy rather

than a court of law that determines constitutionality. Miltenberger argues that dower serves three important objectives: (1) the estate administration process provides no administrative remedy for those most susceptible to poverty against the financial impact of the loss of spouse, (2) it provides some remedy to the economic discrimination of women; and (3) it recognizes the non-economic contribution of wives to the marital estate.

Miltenberger's position is flawed. Miltenberger ignores almost 50 years of changing societal prejudices and stereotypes for married women. Miltenberger's position marginalizes the sacrifices and accomplishments of the women over the course of time, i.e. the fact that more married women are now balancing a home life as well as a professional life. Miltenberger's position is entrenched in the pathology that married women that stay at home must rely on their husbands as providers.

Despite Miltenberger's assertions, a simple hypothetical demonstrates how dower is discriminatory without having a legitimate purpose. If a single woman owns real property and then she marries, or even if she acquires real property after she marries, this real property is not subject to her husband's claims, i.e. if the wife predeceases the husband, the husband cannot claim interest in the real property under dower. However, if a man owns real property and then he marries, this real property is subject to his wife's claims, i.e. if the husband predeceases the wife, the wife can claim dower rights to the real property.

As stated in Swartz's initial brief to this Court and re-emphasized here, there is no legitimate governmental interest to discriminate against married men in favor of married women in light of contemporary society. Although at one time dower's purpose had

legitimacy, this is no longer the case thanks largely in part to the 1963 Constitution, and the codification of the MWPA.

Dower discriminates arbitrarily against married men, unmarried men, and unmarried women. There is no legitimate governmental interest behind this discrimination other than pure speculation that a married woman presumptively will not have the means to financially support herself because of a reliance on her husband.

## II. RE-STATEMENT OF FACTS

The relevant facts to this case are as follows:

1. Petitioner-Appellee, Sharon Miltenberger (“Miltenberger”), the widow and individual electing dower, was married to James Miltenberger (“James”), though they were in the middle of divorce proceedings at the time of James’ death. (Transcript, April 27, 2006 Probate Hearing at 4, 10-11, 73a).
2. Before he married Miltenberger, James solely owned two parcels of real property. Even though he eventually married Miltenberger, James never conveyed any interest in this real property to her.
3. Instead, James conveyed the two parcels of real estate to his daughter from a prior marriage, Appellant, Sandra Swartz (“Swartz”). (Transcript, April 27, 2006 Probate Hearing at 4, 20-25, 73a).
4. During his divorce proceedings with Miltenberger, James executed a Last Will and Testament (“Will”), eliminating Miltenberger as a beneficiary under his Will. (Transcript, April 27, 2006 Probate Hearing at 5, 1-5, 74a).

5. The two parcels of real property that James conveyed to Swartz were therefore not part of his probate estate. (Transcript, April 27, 2006 Probate Hearing at 8, 21-25, 77a).
6. Despite James' ongoing divorce proceedings with Miltenberger as well as his elimination of her as a beneficiary under his Will, because James died before the divorce proceedings were final, Miltenberger was left with several options under EPIC. She had the option under MCL 700.2202(2) to abide by James' Will; obtain a reduced intestate share of his estate, or elect her dower interest.
7. Under current Michigan law, if the above facts were reversed, unlike Miltenberger, James would not have any right to pursue Miltenberger's real estate under a dower claim, as dower is only available to married women and widows and not married men or widowers.

### III. ARGUMENT

#### A. **DOWER IS UNCONSTITUTIONAL BECAUSE CONTEMPORARY REALITIES PRESENT NO ACTUAL HARM; THEREFORE, THERE IS NO LONGER AN IMPORTANT GOVERNMENT OBJECTIVE THAT SUBSTANTIALLY RELATES TO THE PURPOSE OF THE STATUTE.**

Enacted in the late 1700s and principled in the colonial and national ideal enforcing a married woman's dependency, Michigan's dower provisions have remained relatively unchanged since inception. Although common law curtesy was abolished in Michigan, the State's common law dower provisions were codified (now at MCL 558.1 et seq), providing "[t]he 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." MCL 558.1.

When introduced, dower balanced one set of legal rights (a wife's loss of property rights to her husband under coverture) for another (a wife's 1/3 life estate interest in the lands of which her husband was seized). This Court described those former disabilities of coverture, stating:

[t]he control which a husband has over the person and estate of his wife at the common law is so great and so liable to abuse that it has for a long time been the subject of complaint, and of frequent imposition by courts of equity. He had (1) The control of her person, and the right to appropriate her earnings to his own use; (2) He became by the marriage the owner of such personal estate as she then possessed, and of all that she should thereafter acquire during coverture; (3) He had a right to reduce her chooses in action to possession, and to dispose of her chattel interests in lands to his own use; (4) He became vested with her estate of inheritance during coverture, and if he survived her, and issue capable of inheriting it had been born to them, he had a life estate therein . . . [*Tong v Marvin*, 15 Mich 60, 66; 1862 Mich LEXIS 112 (1862).]

The necessity of dower's balancing of rights against coverture has disappeared with the evolution of women's rights, including most notably the adoption of Michigan's 1963 Constitution and the Married Women's Property Acts, which resulted in the abolition of coverture. See *North Ottawa*, 457 Mich at 400.

Beginning principally in the mid 1800s, American women actively pursued and rightfully received inheritance reforms which provide increased financial security. Marylynn Salmon, *Women and the Law of Property in Early America* 145 (G. Edward White ed., The University of North Carolina Press 1986), supra note 19, at 14 n.1 (quoting 1 William Blackstone, *Commentaries on the Laws of England* 430 (Oxford 1765-69)). Michigan's legislative history concerning the abrogation of coverture reflects a stepped introduction of rights.

In 1963, Michigan revised its 1908 constitution, guarantying equal protection for the first time. *Citizens Commerical & Savings Bank v Raleigh*, 159 Mich App 110, 117;

406 NW2d 479 (1987). The 1963 Constitution provides in part: “The disabilities of coverture as to property are abolished... Dower may be relinquished or conveyed as provided by law.” Mich. Const. art 10, §1. This Court has since found that art 10, §1 of the Michigan Constitution is “a clear expression that all disabilities of coverture are abolished.” *North Ottawa*, 457 Mich at 399 n6 (emphasis in original). Reinforcing this fact is the 1981 MWPA (1981 PA 216).

Miltenberger’s assertion that dower is intended as the panacea for all financial disparities which may exist between men and women is wholly without basis, and the Court of Appeals failed to recognize that the concern of poverty for widows it notes in its Opinion was the direct result of their loss of property rights under coverture. Illustrating the fact that dower was intended only for the very limited purpose of balancing against the now extinguished disabilities of coverture, versus Miltenberger’s claim that dower is broadly intended to compensate for “a disparity between...those individuals who are male and those individuals who are female” (Transcript, April 27, 2006 Probate Court Hearing, p. 39: 7-9, 108a), of whatever generation (Transcript, April 27, 2006 Probate Court Hearing, p. 36: 25-40:6, 105a), is that dower is not available for unmarried women, of any generation, who may similarly experience disparities in earning potential or professional opportunities as a result of their gender. Nevertheless, with the passage of the 1963 Constitution and the MWPA, there is no longer a harm that married women, any more than married men, could be left unprotected.

This Court has a history of invalidating remedies for which there is no longer a harm, finding that the remedy itself violates Equal Protection guarantees. See *North Ottawa*, 457 Mich at 407-408. Following the US Supreme Court’s heightened scrutiny

analysis, this Court in *North Ottawa* properly reversed the Court of Appeals and upheld the 1981 MWPA and Michigan constitutional provisions at issue which prohibited extension of the necessities doctrine to a widow. See *North Ottawa*, 457 Mich at 407. Doing so, the *North Ottawa* Court recognized that the common-law necessities doctrine, if only applied to husbands, “may cause a disparate effect on married men” in the absence of similar statutory or constitutional protections available to married women under the 1981 MWPA and art 10, §1 of the Michigan Constitution. *Id.* at 407.

Acknowledging that “the underlying governmental objective of the common-law [necessaries] doctrine [like that of dower] was to provide for a dependent wife who surrendered all her property rights to her husband at the time of marriage [coverture]”, *Id.* at 407, while recognizing that it could not equalize obligations among husbands and wives by extending the necessities doctrine to apply to women in light of the 1981 MWPA and Const 1963, art 10 §1 (which together protected a wife from her husband’s debts), the *North Ottawa* Court struck the common-law necessities doctrine as “gender-based discrimination offend[ing] the principle of equal protection of the law.” Doing so, this Court found that the support burden only on a husband could be justified in the past because it was substantially related to the important governmental objective of providing necessary support to dependant wives.

However, the contemporary reality of women owning property, working outside the home, and otherwise contributing to their own economic support calls for the abrogation of this sex-discriminatory doctrine from early common law. As such, this Court properly recognized that what once may have been constitutional can later violate Equal Protection guarantees when circumstances have changed.

Lastly, Exhibit 1 (attached) lays out one final hypothetical demonstrating the inequality of dower. It is implausible to find any important government interest in the outcome as illustrated in Exhibit 1.

#### IV. CONCLUSION AND RELIEF REQUESTED

There is a long and unfortunate history of discrimination against married women, including the disabilities forced upon them by coverture. Legislative and constitutional action has been taken to remedy such unfair treatment, including the abrogation of coverture, the recognition that all persons are to receive equal protection under the law and introduction of the MWPA.

Dower is now a vestigial concept in a contemporary society where married women are no longer burdened by coverture; most wealth is now concentrated in personalty, not land, and gender-neutral provisions included in the Estates and Protected Individuals Code (“EPIC”) provide substantially improved protection for both surviving spouses without presuming a woman’s dependence on her husband, or ignorance of his dealings.

The Court of Appeals’ errors appear grounded ultimately in its apparent failure to properly consider established precedent, including this Court’s *North Ottawa* decision. The Court of Appeals’ March 27, 2007 decision upholding dower leaves Michigan alone among the 50 states in its approval of gender-based dower.

In holding that dower is unconstitutional, this Court has an opportunity to finish what the 63 Con Con and the 1981 MWPA did not apparently do well enough to make it clear that husbands and wives are equal.

For the reasons stated above, this Court must reverse the Court of Appeals' decision on this principle of major significance in this State's jurisprudence and determine that Michigan's gender-based statutory dower provisions, including those at MCL 700.2202 and MCL 558.1 et seq., violate federal and/or Michigan Equal Protection guarantees and as such are unconstitutional. In light of this Court upholding the 1981 MWPA in *North Ottawa*, 457 Mich at 408 n14, it is clear that this Court cannot remedy dower's equal protection violation by extending that election to include husbands.

With respect to the case at bar, considering that "decisions finding statutes unconstitutional are applied retroactively," *Stanton v Lloyd Hammond Product Farms*, 400 Mich 135, 144-148; 253 N.W.114 (1977) cited by *Hall v Novik*, 1997 Mich App LEXIS 3200 (1997), Swartz respectfully requests that this Court apply its determination that Michigan's statutory dower is unconstitutional retroactively to matters which are pending and dismiss Miltenberger's claim to a dower interest here, permitting Miltenberger instead to elect one of the remaining gender-neutral options set forth at MCL 700.2202.

Finally, Sandra Swartz requests that this Court grant her all other relief that is reasonable, equitable and just.

Respectfully submitted,

KREIS, ENDERLE, CALLANDER &  
HUDGINS, P.C.

Dated: March 12, 2008.

By: 

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**Exhibit 1**

All other things being equal, husband and wife, both age 57, with no children together or otherwise and no surviving parents. Each came into the marriage with separate real estate valued at \$500,000 titled solely in their respective names. Both have \$100,000 in separately titled bank accounts and have a \$300,000 entireties home and \$100,000 in joint with survivorship investment accounts. Both husband and wife have Wills leaving their respective solely owned assets to third parties. Following are options available to each spouse upon the death of the other.

	Allowances and Exemptions (prioritized left to right if insufficient funds to satisfy each)			Election of Surviving Spouse- Testate Estate (MCL 700.2202(2))-one of available options may be selected			Total Available Compensation (Allowances/ Exemptions plus Maximum Election)
	Homestead Allowance (700.2402)	Family Allowance (700.2403 & .2405)	Exempt Property (700.2404)	(a) Abide by terms of Will	(b) ½ intestate share (700.2102(a) as no children or surviving parents) reduced by ½ of other received property *	(c) Widow's dower rights per MCL 558.1 et seq	
Husband	\$15,000	\$18,000	\$10,000	\$0	\$100,000	\$0 (n/a)	\$143,000.00
Wife	\$15,000	\$18,000	\$10,000	\$0	\$100,000	\$109,311.67 **	\$152,311.67

Please note that for illustration purposes all of the above dollar figures are those in the text of Michigan's Estates and Protected Individuals Code (MCL 700.1101 et seq). These figures are subject to cost of living adjustments pursuant to MCL 700.1210, and in fact have increased.

Even though there are no differences between the married man and married woman, because of dower, the married woman gets more of the estate.

\*  $\frac{1}{2} (\$500,000 + \$100,000) - \frac{1}{2} (\$300,000 + \$100,000) = \$200,000$

\*\* Present Value of Dower =  $\frac{1}{3} [\text{Value of real estate titled only in Husband's name} \times .65587]$   
 (IRS 7520 value for 57 year old woman at 5% interest)]  
 =  $\frac{1}{3} [\$500,000 \times .65587]$   
 = \$109,311.67