

# MICHIGAN SUPREME COURT



## *Office of Public Information*

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FOR IMMEDIATE RELEASE

### **WIDOW'S RIGHT TO DOWER CHALLENGED AS UNCONSTITUTIONAL; MICHIGAN SUPREME COURT TO HEAR CASE IN ARGUMENTS NEXT WEEK**

**State constitution, statutes allow widow to use one-third of land husband had at time of death; provisions violate equal protection because they don't apply to widowers, appellant argues in estate challenge**

LANSING, MI, April 3, 2008 – Does a widow's right to dower – the option to use one-third of the land her husband held at the time he died – violate the Equal Protection Clauses of the U.S. and Michigan constitutions? That is one of the issues the Michigan Supreme Court will consider in oral arguments next week.

In *In re Miltenberger Estate*, the widow asserted her dower rights to real estate that her late husband had transferred by quit-claim deed to his daughter by a previous marriage. A state statute, MCL 558.1, provides that "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." Article 10, section 1 of the Michigan constitution, as well as MCL 700.2202(2), also provide for the right to dower. The deceased's daughter, who served as personal representative of his estate, opposed the dower request, arguing that the dower provisions violate the Equal Protection Clauses of the Michigan and federal constitutions because dower rights are awarded only to women. But both the trial court and Michigan Court of Appeals rejected the constitutional challenge, with the appellate court noting that it "remains an unfortunate fact that there are still circumstances in which the surviving wife may be significantly disadvantaged, in a way that surviving husbands generally are not, in the absence of dower, and the Legislature may properly consider such circumstances through the enacted dower statute."

Also before the Court is *People v Taylor*, in which a shooting victim – who seemed initially reluctant to identify his attacker – named the defendant after police told the victim that he might die, which he did a few weeks later. The defendant, who was convicted of first-degree murder, contends that the victim's statements should not have been allowed into evidence. But the Court of Appeals disagreed, holding that the statements were not "testimonial" in nature and that they could be admitted as "dying declarations."

The remaining cases involve procedural, no-fault insurance, and criminal law issues.

Court will be held on **April 9 and 10** in the Supreme Court's courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin at **9:30 a.m.** each day.

*(Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's web site at [http://www.courts.michigan.gov/supremecourt/Clerk/msc\\_orals.htm](http://www.courts.michigan.gov/supremecourt/Clerk/msc_orals.htm). For further details about the cases, please contact the attorneys.)*

**Wednesday, April 9**  
**Morning Session Only**

**PEOPLE v SARGENT (case no. 133474)**

**Prosecuting attorney:** Douglas E. Ketchum/(269) 673-0280

**Attorney for defendant Dennis Mervyn Sargent:** John D. Roach, Jr./ (313) 963-4740

**Attorney for amicus curiae Prosecuting Attorneys Association of Michigan:** Cheri L. Bruinsma/(269) 383-8900

**Trial court:** Allegan County Circuit Court

**Link to briefs:**

<http://www.courts.michigan.gov/supremecourt/Clerk/04-08/133474/133474-Index.htm>

**At issue:** In sentencing criminal defendants, trial courts use statutory “offense variables,” which assign a number of points based on various factors in the crime; the number of points is used to determine the length of the sentence. Offense Variable 9 (number of victims), MCL 777.39, requires 10 points to be assessed if there were two to nine victims. At the time, the instructions provided that “each person who was placed in danger of injury or loss of life” was counted as a victim. MCL 777.39(2)(a). Does the number of “victims,” for purposes of scoring OV 9, include persons who testify as to uncharged, similar acts committed by the defendant? Should the analysis of OV 6 scoring under the former judicial sentencing guidelines, set forth in *People v Chesebro*, 206 Mich App 468 (1994), be applied to OV 9 scoring?

**Background:** Dennis Sargent was charged as a second habitual offender for sexually abusing a 13-year-old girl; the charges against him included one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. The victim testified at trial; the prosecutor called two other witnesses, who testified that Sargent also abused them. Sargent testified at trial and denied committing the alleged acts. After deliberating for two hours, the jury convicted Sargent as charged. At sentencing, the trial judge ruled on Sargent’s objections to the manner in which the statutory offense variables were scored. The score of OV 9 depends on the number of victims, which was defined at the time as “each person who was placed in danger of injury or loss of life.” MCL 777.39(2)(a). Sargent argued that OV 9 should be scored at zero because there was “just one victim.” But the trial court determined that OV 9 should be scored at 10 points because, when the testimony of the two other witnesses was considered, there were two to nine victims. With OV 9 scored at 10 points, the sentencing guidelines provided that Sargent’s minimum sentence for first-degree criminal sexual conduct could range from 108 to 180 months. If OV 9 had been scored at zero, the sentencing guidelines would have called for a minimum sentence of 81 to 135 months. The trial court sentenced Sargent to 180 months (or 15 years) to 44 years for the first-degree criminal sexual conduct conviction, the maximum sentence available under the guidelines. Sargent was sentenced to five years, 11 months to 15 years for the second-degree criminal sexual conduct conviction. The Court of Appeals affirmed Sargent’s convictions

and sentences in an unpublished opinion, concluding that the evidence adequately supported the trial court's scoring of OV 9. Sargent appeals.

**PEOPLE v TAYLOR (case no. 134206)**

**Prosecuting attorney:** Joshua D. Abbott/(586) 469-5350

**Attorney for defendant Geracer Raphael Taylor:** Lawrence S. Katz/(586) 979-9090

**Attorney for amicus curiae Richard D. Friedman, Counsel of Record Pro Se:** Richard D. Friedman/(734) 647-1078

**Attorney for amicus curiae Prosecuting Attorneys Association of Michigan:** Timothy A. Baughman/(313) 224-5792

**Trial court:** Macomb County Circuit Court

**Link to briefs:**

<http://www.courts.michigan.gov/supremecourt/Clerk/04-08/134206/134206-Index.htm>

**At issue:** The defendant was convicted of first-degree murder. The victim identified the defendant as the perpetrator; the victim's statements were made after the victim was told he might die. Are these statements testimonial within the meaning of *Crawford v Washington*, 541 US 36 (2004)? Are they dying declarations? Does the Sixth Amendment incorporate an exception for testimonial dying declarations?

**Background:** Buel Lasater was shot four times while in bed early in the morning; the shots came from outside the bedroom window. When the police arrived, they asked Lasater, who was bleeding profusely from his wounds, to identify his assailant. When Lasater seemed reluctant, the officers told him that he "might not make it." Lasater then identified Geracer Taylor as the shooter, using Taylor's nickname. Lasater had been involved in a fight with Taylor earlier that night. Minutes later, as Lasater was being treated by emergency medical personnel, another police officer told Lasater that he might not live much longer and asked him to identify his attacker. Lasater again identified Taylor as the shooter. Lasater then went into an induced coma; he died a few weeks later. Taylor was charged with and convicted of first-degree premeditated murder and felony-firearm. He was sentenced to life in prison without the possibility of parole. Taylor appealed his convictions, arguing that the trial court erred in allowing Lasater's statements into evidence. Taylor relied on *Crawford v Washington*, 541 US 36 (2004), in which the United States Supreme Court held that the Confrontation Clause excludes otherwise admissible evidence in criminal cases if 1) the statement at issue is "testimonial" in nature, 2) the person who made the statement is unavailable, and 3) the defendant did not have a prior opportunity to cross-examine the person regarding the statement. The Court of Appeals rejected Taylor's *Crawford* argument and affirmed the trial court's ruling in a published opinion. The Court of Appeals agreed with the trial court that Lasater's statements to the police were not "testimonial" under *Crawford*. Even if Lasater's statements were testimonial, the Court of Appeals said, they were admissible as "dying declarations." Historically, a "dying declaration" has been treated as an exception to the Confrontation Clause, the appellate court noted. Taylor appeals.

**IN RE CREDIT ACCEPTANCE CORPORATION (case no. 133292)**

**Attorney for plaintiff Credit Acceptance Corporation:** Stephen W. King/(248) 203-0700

**Attorney for defendant 46<sup>th</sup> District Court:** Karen M. Daley/(734) 261-2400

**Attorney for amicus curiae Michigan Creditors Bar Association:** Michael H. R. Buckles/(248) 647-5050

**Trial court:** Oakland County Circuit Court

**Link to briefs:**

<http://www.courts.michigan.gov/supremecourt/Clerk/04-08/133292/133292-Index.htm>

**At issue:** A judgment creditor filed verified statements with a district court, asking the court to issue writs of garnishment. But the court refused, instructing the creditor to provide more information to support each verified statement. The creditor argued, and the Court of Appeals agreed, that the verified statements satisfied the requirements of MCR 3.101(D) and that the district court lacked the authority to require further documentation. Did the district court exceed its powers?

**Background:** In 2004, Credit Acceptance Corporation, as judgment creditor, filed approximately two hundred verified statements under MCR 3.101(D), asking the 46<sup>th</sup> District Court to issue writs of garnishment. But the district court rejected many of the verified statements for several reasons; the court repeatedly instructed Credit Acceptance Corporation's counsel to refile the statements and to provide a supporting statement of post-judgment interest, costs, and payments for each one. Credit Acceptance Corporation protested this additional requirement, and filed this suit for superintending control in the circuit court. Credit Acceptance Corporation argued that the district court exceeded its powers in imposing additional requirements beyond those set forth in MCR 3.101(D). But the circuit court dismissed Credit Acceptance Corporation's complaint without prejudice, finding that the district court had not exceeded its jurisdiction. In a published opinion, the Court of Appeals reversed the circuit court's ruling and remanded the case for further proceedings. The Court of Appeals held that, because the verified statements had satisfied the requirements of MCR 3.101(D), the district court had no authority to require further documentation as a condition for issuing the writs of garnishment. The district court appeals.

**Thursday, April 10**

*Morning Session Only*

**MILLER v ALLSTATE INSURANCE COMPANY, et al. (case nos. 134393, 134406)**

**Attorneys for defendant, cross-defendant Allstate Insurance Company:** David B. Landry, Michelle E. Mathieu/(248) 476-6900

**Attorney for cross-plaintiff PT Works, Inc.:** Barry A. Steinway/(248) 645-8202

**Attorney for amicus curiae Attorney General of the state of Michigan:** David W. Silver/(517) 373-1160

**Attorney for amicus curiae International Association of Special Investigation Units, The Michigan Chapter of the International Association of Special Investigation Units, and Property Casualty Insurers Association of America:** Karen W. Magdich/(248) 489-8600

**Attorney for amicus curiae Preferred Medicine, Inc., Joanna Rohl, and Fatmeh Chehab:** Allan Falk/(517) 381-8449

**Attorney for amicus curiae Business Law Section of the State Bar of Michigan:** James L. Carey/(248) 751-7800

**Attorney for amicus curiae Health Care Law Section of the State Bar of Michigan:** Margaret Marchak/(248) 740-7505

**Attorney for amicus curiae Michigan Physical Therapy Association:** Richard C. Kraus/(248) 539-9900

**Trial court:** Wayne County Circuit Court

**Link to briefs:**

<http://www.courts.michigan.gov/supremecourt/Clerk/04-08/134393-134406/134393-134406-Index.htm>

**At issue:** Allstate Insurance denied the plaintiff's claim for physical therapy services, arguing that the services were "unlawful" because the service provider is incorporated under the Business Corporations Act rather than the Professional Services Corporation Act. Must the plaintiff incorporate under the PSCA? Was the physical therapy lawfully rendered under the no-fault act?

**Background:** William Miller was insured by Allstate Insurance under a no-fault automobile insurance policy. After he was injured in automobile accidents, Miller was referred to PT Works for physical therapy. PT Works billed Allstate \$29,150 for these services, but Allstate refused to pay. Allstate argued that PT Works is unlawfully engaged in the corporate practice of medicine because it is incorporated under the Business Corporations Act instead of the Professional Services Corporation Act (PSCA), and because PT Works' shareholders are not licensed therapists as required by the PSCA, although PT Works employs licensed therapists. Miller sued Allstate for no-fault benefits, then assigned his claim to PT Works which, in turn, sued Allstate. Allstate moved to dismiss the case. Because a no-fault carrier is obligated to pay only for "lawful" medical treatment, Allstate argued that it was not required to pay PT Works for its services to Miller. But the trial court denied Allstate's motion, ruling that physical therapy services are not "professional services" as defined in the PSCA. As a result, the company was properly incorporated under the Business Corporations Act, the trial court concluded. The Court of Appeals affirmed the lower court ruling on alternate grounds in two published opinions. The appeals court concluded that PT Works was required to be incorporated under the PSCA because physical therapists are required to be licensed under the public health code, and the PSCA defines "professional services" to include any person who is required to be licensed. But the Court of Appeals also concluded that Miller's physical therapy treatment was not "unlawful" under the no-fault act because the therapy itself was performed by a duly licensed physical therapist employed by PT Works. The court found that the essence of lawful treatment is whether the person providing the treatment is licensed, and "*treatment itself* has nothing to do with corporate formation issues." Both Allstate and PT Works appeal to the Supreme Court.

**IN RE ESTATE OF JAMES W. MILTENBERGER, DECEASED (case no. 133847)**

**Attorneys for petitioner Sharon Miltenberger:** Jeffrey A. Schubel, Jennifer O. Ward/(269) 968-6146

**Attorneys for respondent Sandra Swartz:** Michael J. Toth, J. Ryan Conboy/(269) 324-3000

**Trial court:** Calhoun County Probate Court

**Link to briefs:**

<http://www.courts.michigan.gov/supremecourt/Clerk/04-08/133847/133847-Index.htm>

**At issue:** In Michigan, a widow may, upon the death of her husband, elect to exercise her right to dower, which is set forth in art 10, § 1 of the 1963 Michigan constitution as well as MCL 700.2202(2) and MCL 558.1. Dower provides a widow with the right to use one-third of the land that her husband possessed at the time of his death. No such rights are provided for a widower following his wife's death. Does a widow's right to dower violate the Equal Protection Clauses of the Michigan and federal constitutions as set forth in Const 1963, art 1, § 2 and the Fourteenth Amendment to the United States Constitution?

**Background:** Sharon Miltenberger filed for divorce from James Miltenberger, but the divorce was not finalized at the time of his death. Before his death, Miltenberger had transferred two parcels of real estate to Sandra Swartz, his daughter from a previous marriage, by quit-claim deed. Days before his death, Miltenberger executed a Last Will and Testament that eliminated Swartz, his son, and another daughter as beneficiaries of his estate. Swartz was named personal

representative of Miltenberger's estate. Before the estate proceedings were finalized, Sharon Miltenberger filed a motion seeking her dower rights under MCL 700.2202(2) and MCL 558.1. MCL 558.1 describes the right to dower as follows: "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." Swartz opposed Miltenberger's request, arguing that the dower provisions violated the Equal Protection Clauses of the Michigan and federal constitutions because dower rights were awarded only to women. But the trial court granted Miltenberger's motion and rejected Swartz's constitutional challenge. The Court of Appeals affirmed the trial court in a published opinion. The appeals court noted that it "remains an unfortunate fact that there are still circumstances in which the surviving wife may be significantly disadvantaged, in a way that surviving husbands generally are not, in the absence of dower, and the Legislature may properly consider such circumstances through the enacted dower statute." The Legislature has a legitimate interest in "protecting the economic interest of widows and protecting them from becoming impoverished," the Court of Appeals said. Accordingly, Michigan's statutory dower provisions do not violate the Equal Protection Clause of the Michigan or federal constitutions, the appellate panel concluded. Swartz appeals.

**PEOPLE v SMITH (case no. 134682)**

**Prosecuting attorney:** Ana I. Quiroz/(313) 224-0981

**Attorney for defendant Gary Smith:** Jacqueline J. McCann/(313) 256-9833

**Trial court:** Wayne County Circuit Court

**Link to briefs:**

<http://www.courts.michigan.gov/supremecourt/Clerk/04-08/134682/134682-Index.htm>

**At issue:** The defendant sexually abused a 10-year-old girl who was in his care and lived at his house. The sentencing guidelines provided that the defendant's minimum sentence should fall in the range of 108 months to 15 years. But the trial court exceeded the guidelines, sentencing the defendant to 30 to 50 years in prison. Was the upward departure from the sentencing guidelines proportionate to the offense, as required by *People v Babcock*, 469 Mich 247, 264, 273 (2003)? Did the trial court fulfill its obligation under *Babcock* to "articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies *that* departure"?

**Background:** Following a jury trial, Gary Smith was convicted of three counts of first-degree criminal sexual conduct for assaults on a 10-year-old girl who was in his care and lived at his house. The sentencing guidelines provided that Smith's minimum sentence should fall in the range of 108 months to 15 years. But the trial court concluded that there were substantial and compelling reasons to depart upward from the guidelines. The trial court explained that this "is the type of case that . . . manifests the absolute worst type of exploitation," noting that the victim was placed in a position of "trust and care" with Smith and his wife. Smith exploited his relationship with the victim for a period of about 15 months, the trial court concluded, and caused her to be fearful that, if the exploitation was discovered, her family might be thrown out of Smith's home. The trial court also noted that, as a result of the abuse, the victim was forced to endure an invasive gynecological examination. The trial court concluded that the guidelines did not take into account these facts, and that a 15-year upward departure from the guidelines was warranted. Accordingly, the trial court sentenced Smith to a prison term of 30 to 50 years. Smith appealed, but the Court of Appeals affirmed his sentence in an unpublished opinion, concluding

that the trial court articulated “objective and verifiable” reasons for the upward sentence departure. The appeals court explained that it was objective and verifiable that Smith served as the victim’s child care provider for a period that spanned nine years, and that Smith kept in close contact with the victim during the time that she was not residing in his home. Moreover, it was objective and verifiable that the abuse occurred over a 15-month period, that Smith threatened to evict the victim and her family, and that the victim was forced to undergo a physical examination as a result of the abuse, the appellate court said. Accordingly, the Court of Appeals held, the trial court did not abuse its discretion in determining that these factors constituted substantial and compelling reasons for an upward departure from the guidelines. The appellate court also agreed with the trial court that the sentencing guidelines “were not capable of adequately accounting for the true seriousness of these offenses.” Smith appeals.

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