

REFORM OF THE DOWER ACT RIGHTS OF WIDOWS

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Widows do not come off too badly in the law of Manitoba. (What goes for widows goes for widowers too of course,¹ but I hope I may be forgiven for simplifying the discussion by referring throughout to the deceased as the husband and the surviving spouse as the widow). If the husband dies intestate, the widow takes the entire estate, whatever its value, in the absence of surviving issue of the husband;² where there is issue the widow takes the first \$50,000 and half the residue over \$50,000, with the other half of the residue going to the issue *per stirpes*.³ In addition the widow has a right to a life estate in the husband's homestead, if any.⁴ The outstanding feature of the law, however, is that if the husband dies testate and does not leave his widow at least one-half of the estate, she can elect under *The Dower Act* to forego whatever share he left her in his will and take the statutory share of (broadly speaking) one-half of his estate,⁵ in addition to the homestead life estate.⁶ This drastic curtailment of testamentary freedom is unique in Canadian law.

The admirable generosity of this overall approach to the succession rights of widows is marred to some extent by certain significant shortcomings in the details of the legislation, and it is the purpose of this article to attempt to identify these shortcomings and suggest appropriate reforms. We will look first at the homestead life estate, then at the formula for calculation of the statutory share under *The Dower Act*, and finally at some of the other problems which have arisen in connection with the statutory share.

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1. See *The Dower Act*, R.S.M. 1970, c. D100, s. 33; *The Devolution of Estates Act*, R.S.M. 1970, c. D70, s. 17, apart from the curious omission in that Section of a reference to s. 14, an omission which creates a glaring anomaly in relation to partial intestacy: see *infra*, n. 62.

2. R.S.M. 1970, c. D70, s. 7.

3. R.S.M. 1970, c. D70, s. 6. In passing we may note another curiosity of draftsmanship in this Act: s. 6 (2) is expressed to be "subject to subsection (5)" but the section has no subsection (5). The omission does no detectable harm.

4. R.S.M. 1970, c. D70, ss. 3, 14.

5. R.S.M. 1970, c. D100, s. 15 (1). Until 1978, the fraction was one-third. S.M. 1978, c. 27, s. 4.

6. In addition to these "fixed" rights the widow has the possibility of applying under *The Testators Family Maintenance Act*, R.S.M. 1970, c. T50, for an order for (additional) provision out of the estate at the court's discretion for her "proper maintenance and support." Where widows are concerned, as opposed to children of the deceased, the Act has been chiefly resorted to in cases of small estates, e.g., *In re Blackmore Estate* (1948), 56 Man. R. 88 (K.B.), or where the widow had released her rights under *The Dower Act*, e.g., *Pope v. Stevens* (1954), 63 Man. R. 162; [1955] 2 D.L.R. 193; 14 W.W.R. (N.S.) 71 (C.A.), or had been living separate from her husband at his death, e.g., *Dmytriw v. Dmytriw* (1976), 22 R.F.L. 382 (Man. Q.B.). Separation is not, of course, a bar to a *Dower Act* claim unless the widow had no reasonable excuse for living apart from her husband, R.S.M. 1970, c. D100, s. 22, as interpreted in a long life line of cases. Space precludes further consideration of this aspect.

Homestead Life Estate

Section 14 (1) of *The Dower Act* provides:

Subject to subsection (4) of Section 4, upon the death of a married man whose wife survives him, the wife is entitled to an estate for her natural life in his homestead as fully and effectually, and to the same effect, and under the same conditions, as if he had left her by will such a life estate in the homestead; and every disposition by will of a married man of his homestead, is subject to the life estate of the wife.

The opening words — “subject to subsection (4) of Section 4” — are not really a limitation of the scope of the widow’s rights, as one would normally expect such a phrase to indicate,⁷ but rather an extension of them, since Section 4(4) enables the widow to elect to take her homestead rights in a dwelling house other than the legal homestead in certain circumstances.⁸ The general scheme of the *Act* is clear: once a property has become a homestead the owner cannot dispose of it or change its legal status as a homestead without the consent of his wife.⁹ In terms of social policy the aim is thus to ensure that the wife (and the children too) will not be made homeless by the husband’s death or desertion, but the Section raises a number of difficulties.

A homestead is defined as a “dwelling house ... occupied by the owner thereof and his wife as their home, and the lands and premises appurtenant thereto” up to 320 acres outside a city, town or village.¹⁰ This formula does not work well in modern conditions, the main problem being with the husband who lets part of the building to tenants and keeps merely an apartment in the building for himself and his wife. Thus, in *In re Ripstein Estate*,¹¹ where the building contained “six stores and six or seven suites of apartments”¹² the Court of Appeal flatly refused to regard the building as a “dwelling house,” notwithstanding that it was the home, because it was a business block.

While no doubt correct on its own facts, this decision appears to have created the impression that letting out part of a residential building would take the building outside the definition of a homestead.¹³ Fortunately, this impression has now been corrected by

7. *Cf. Smith v. London Transport Executive*, [1951] A.C. 555, at 569 (H.L.) (Lord Simonds, concerning “subject to the provisions of this Act”).

8. The circumstances are that the husband and wife had left the homestead and taken up residence in another dwelling house without the necessary written consent of the wife to a change of homestead. The wife may then elect within 6 months of the grant of probate or administration, or within 1 month of notice being served on her by the executor, to take her life estate in the new dwelling house instead of the old one.

9. R.S.M. 1970, c. D100, s. 3 (1). A purchaser from the husband will however take the property clear of the wife’s rights if the wife’s “consent” is duly proved to him in accordance with s. 8 unless he has actual knowledge of the untruth of any of the statements: s. 8 (7) and see *Chudyj v. Canada Permanent Loan Corp.*, [1937] 3 D.L.R. 261; [1937] 2 W.W.R. 225 (Man. C.A.).

10. R.S.M. 1970, c. D100, s. 2 (e); different size limits apply within a city, town or village, of course. Until 1964, it was not necessary for the wife to make her home there as well.

11. [1929], 38 Man. R. 184; [1929] 2 D.L.R. 935; [1929] 1 W.W.R. 788 (C.A.).

12. *Id.*, at 190; [1929] 2 D.L.R., at 941; [1929] 1 W.W.R., at 794.

13. *In re Barrie Estate* (1945), 53 Man. R. 80; [1945] 2 W.W.R. 384 (K.B.).

the Court of Appeal in *Seroy v. Seroy and Komar*¹⁴ where Miller C.J.M. said: "To hold otherwise would remove from the protection of the *Dower Act* many large homes now being used for residential purposes with renting of parts thereof, as well as duplexes with the owner living in one part and a tenant in the other."¹⁵

The widow in *In re Ripstein Estate* also argued that the apartment occupied as the home constituted a homestead on its own.¹⁶ This approach has more to commend it in principle than seeking to regard the whole apartment block as a homestead, but the Court of Appeal did not accept the argument. Two reasons were given for this: first, "[a] perusal of the whole Act leads to the conclusion that when dower in a homestead is dealt with it refers to an interest in land on which a dwelling house is situate" and it cannot be said that, in the ordinary meaning of the words (and in the absence from the statutory definition of references, e.g., to a building or a part of a building), "an upstairs suite in an apartment block is a 'dwelling house with land appurtenant thereto.'" ¹⁷ Secondly, in Dennistoun J.A.'s words:

The statute contemplates that the dwelling house may disappear and the land remain for use and occupation by the widow for her lifetime. The suite in question has no connection with the land except by way of support in mid-air. If this apartment block should disappear it is difficult to surmise what interest would be left to the widow. *She assuredly would not be entitled to occupy the site to the exclusion of the trustees or their right to rebuild as they saw fit.*¹⁸ (emphasis added).

Of the first reason we may say that it represents a decidedly cautious and restrictive (though not impossible) approach to the interpretation of the statute, but the second runs counter to fundamental notions of the common law as to the nature of estates in land. The orthodox view undoubtedly is that the fee simple estate in an apartment above ground level would continue, after the destruction of the building, as an estate in the space formerly occupied by the apartment and would indeed prevent the trustees rebuilding as they saw fit.¹⁹ The possibility of destruction of the building presents no problem with a dwelling house "on the ground," since the homestead rights continue in the appurtenant land,²⁰ and there is no reason to take this as an argument for excluding freehold apartments from the homestead provisions. The definition should be amended to make clear

14. (1965), 48 D.L.R. (2d) 83; 50 W.W.R. 65 (Man. C.A.), approving *Randall v. National Trust* (1954), 11 W.W.R. (N.S.) 385 (Man. C.A.) (Maybank J.) and *Packer v. Packer* (1959), 24 D.L.R. (2d) 411; 31 W.W.R. 22 (Man. Q.B.) (Monnin J.).

15. *Id.*, at 70, 48 D.L.R. (2d), at 87. It is no objection therefore that the rented portions form self-contained units.

16. *Supra* n. 11.

17. *Id.*, at 192-93; [1929] 2 D.L.R., at 942-43; [1929] 1 W.W.R., at 795-96. (Dennistoun J.A.).

18. *Id.*, at 193; [1929] 2 D.L.R., at 943; [1929] 1 W.W.R., at 796.

19. See e.g., Sir Robert Megarry and H. Wade, *The Law of Real Property* (4th ed. 1975) 69, citing, *inter alia*, Co. Litt. 48b; E. George and A. George, *The Sale of Flats* (3rd ed. 1970) 63-64 and authorities there cited. More difficult problems arise with regard to leaseholds "in the air" following the destruction of the subject matter: see Megarry and Wade, *Id.*, at 675.

20. *Re Brown and Thorsteinson* (1960), 31 W.W.R. (N.S.) 119 (Man. Q.B.) (Williams C.J.Q.B.).

that "dwelling house" is wide enough to include apartments, even in mid-air.

A similar problem occurs in relation to condominium units, but *The Condominium Act*²¹ offers no solutions, merely some not very helpful hints. On the one hand, a unit is declared by Section 7(1) to be "real property for all purposes"²² which offers a little indirect support for the application of the homestead provisions. On the other hand, Section 2(2) provides that: "For the purposes of this Act the ownership of . . . land includes the ownership of . . . space"²³ which implies that ownership of land does *not* include ownership of space for *other* purposes. In principle I would suggest that there is no reason at all for excluding the homestead provisions in these cases, and the *Acts* should be amended to make this clear.

The authorities support the view that the "owner" contemplated in the definition of homestead must be the fee simple owner²⁴ but there is something to be said for the view that where the land which would otherwise be a homestead was held on a lease for a term of years the widow should have the same rights as in a freehold until the lease actually expires.

We may look briefly at some of the other questions posed by the homestead life estate. First, what can the widow do if the homestead is too large for her needs? It has been held that she can consent to a sale of the fee simple by the husband's executor and receive the share of the proceeds which represent the value of her life interest in relation to the value of the remainder,²⁵ but could she grant a lease instead? At common law, of course, she would be unable to grant a lease binding after her death, but it might be argued that the English *Settled Estates Act 1856* is in force in Manitoba,²⁶ under which the court could authorise the granting of leases for, generally, up to 21 years.²⁷

Second, in *Crichton v. Zelenitsky*, the Court of Appeal held that the homestead life estate does not vest in the widow on the husband's death but only upon conveyance to her by the husband's personal representative, and that the widow has no right to take possession of the homestead without a conveyance nor, strictly speaking, even to

21. R.S.M. 1970, c. C170.

22. Emphasis added. "Real property" is not of course precisely the same as "land."

23. Emphasis added.

24. *Re Brereton*, [1945] 3 W.W.R. 24 (Man. Ct. Ct.) (no homestead rights in property held by husband for life estate); *Re Scott*, [1935] 1 W.W.R. 325 (Alta. Dt. Ct.) (unexpired lease insufficient).

25. *Morice v. Davidson*, [1943] S.C.R. 93; [1943] 1 D.L.R. 680; varied (on another point) [1943] S.C.R. 545; [1943] 4 D.L.R. 658. It was also suggested, *Id.*, at 97; [1943] 1 D.L.R., at 682, that she could sell the life interest, but she is not likely to find a buyer.

26. One might cite the decisions holding *The Partition Act*, 31 & 32 Vict., c. 40 (U.K.) to be in force in Western Canada as a reasonably close analogy, *Hicks v. Kennedy* (1957), 20 W.W.R. (N.S.) 517 (Alta. S.C. App. Div.); *Grunert v. Grunert* (1960), 32 W.W.R. (N.S.) 509 (Sask. Q.B.).

27. *Settled Estates Act*, 19 & 20 Vict., c. 120, s. 2 (U.K.). The power to grant leases up to 21 years without authorization from the court (s. 32) would not apply, since the section excludes leases of "the principal Mansion House and the Demesnes thereof, and other Lands usually occupied therewith."

remain in possession after her husband's death except with the consent of the personal representative.²⁸ Unlike common law dower, which was abolished in Manitoba in 1889,²⁹ *The Dower Act* provides no right of quarantine.³⁰

In *In re Kusy Estate*,³¹ Williams C.J.Q.B. questioned whether *Crichton v. Zelenitsky* was consistent with the earlier decision of the Supreme Court of Canada, on appeal from Manitoba, in *Morice v. Davidson* which seems not to have been cited in *Crichton v. Zelenitsky*. However, the Supreme Court did not have this particular point in mind and the passage in Hudson J.'s judgment relied on by the Chief Justice is expressed in somewhat general terms;³² moreover, the Court of Appeal finds strong support in the legislative history of *The Dower Act* for holding that the life estate is not "vested."³³

Although the reason advanced by Bergman J.A. to justify this state of the law, namely the difficulty of reconciling automatic vesting of unregistered estates with the whole scheme of *The Real Property Act*,³⁴ seems persuasive at first sight, it loses much of its persuasiveness when we reflect that the widow's existence will be immediately apparent to a purchaser with a modicum of common sense if the personal representative attempts to sell the land, and that in Alberta they find no difficulty about immediate vesting of the homestead life interest.³⁵ The real problem is not conveyancing at all, but whether the personal representative can safely deliver possession to the widow, or allow her to remain in possession as the case may be, if the rest of the estate may possibly be insufficient to pay the husband's creditors. If the homestead life estate took precedence over the claims of creditors there could be no justification whatsoever for withholding possession from the widow for a single day.

Regrettably, the Court of Appeal in *Chrichton v. Zelenitsky*³⁶ adopted the reasoning and decision in *Re Neuhaus*³⁷ and held that the homestead life estate is subject to the claims of the husband's creditors since it takes effect as a devise by the husband³⁸ and receives no special priority under the terms of the *Act*.³⁹ Other jurisdictions

28. (1946), 54 Man. R. 79; [1946] 3 D.L.R. 729; [1946] 2 W.W.R. 209 (C.A.).

29. *The Real Property Act of 1889*, S.M. 1889, c. 16, s. 30.

30. The right to remain in the house for 40 days, during which her dower would be assigned.

31. (1953), 9 W.W.R. (N.S.) 675 (Man. Q.B.).

32. *Supra* n. 25, at 98; [1943] 1 D.L.R., at 683.

33. See *Supra* n. 28, at 237; [1946] 3 D.L.R., at 754; [1946] 2 W.W.R., at 111. The original *Dower Act*, S.M. 1918, c. 21, s. 9, did indeed provide that the homestead life estate was "hereby declared to be vested in the wife so surviving" but this provision was retrospectively repealed in 1919, *The Dower Act* S.M. 1919, c. 26, s. 12, and replaced by what is now s. 14, which omits any reference to vesting.

34. *Id.*, at 238; [1946] 3 D.L.R., at 755; [1946] 2 W.W.R., at 112.

35. *The Dower Act*, R.S.A. 1970, c. 114 s. 19.

36. *Supra* n. 28.

37. [1923] 4 D.L.R. 1190; [1923] 3 W.W.R. 873 (Man. K.B.) (Mathers C.J.K.B.).

38. R.S.M. 1970, c. D100, s. 14 (1): "as if he had left her by will such a life estate."

39. Even the limited protection enjoyed by a debtor under s. 13 of *The Judgements Act*, R.S.M. 1970, c. J10, was held not to extend to the widow. *Supra* n. 28, at 759, pointing out that the decision to that effect in *London & Canada Loan & Agency Co. v. Connell* (1896), 11 Man. R. 115 (Q.B.) (Taylor C.J.) had stood unchallenged for 50 years.

find it possible to exempt the homestead life estate from the creditors' claims,⁴⁰ and it is after all no more than a postponement of the realisation of this part of the estate. The disadvantage to the creditors in having to wait seems to me to be a small price to exact for a more enlightened treatment of the widow. Why should the creditors not also bear some of the burden caused by the husband's death? The widow need not necessarily have the full estate "for her natural life" where there are debts outstanding; she could have a life interest determinable for example upon remarriage or otherwise at the discretion of the court having regard to all the circumstances, such as the needs of minor children living with the widow, the availability of more suitable accommodation and so on.

For the remainder of this article we turn our attention to the widow's other main right under *The Dower Act*, namely to elect for a statutory share of her husband's rather than take the benefits of the will.

The Statutory Share of the Estate

Reserving until later the position under a *partial* intestacy, we can say in general terms that a widow whose husband's will does not make satisfactory provision for her must consider whether to elect not to take under the will, but to opt for the share of the husband's estate calculated in accordance with Section 15(1) of *The Dower Act*, for convenience called her "*Dower Act* share." Section 15(1) provides:

Notwithstanding anything contained in The Wills Act, the widow of every testator who by his will has not left her property or otherwise provided for her to the value of at least one-half of the value of his net real and personal property, is entitled to receive from his executor such share of his net real and personal property as, together with all moneys paid or payable under or by virtue of any insurance policies on the life of the testator to her or for her benefit and for her own use, and together with any property owned at the time of the testator's death by her for her own use or then held in trust for her, and which is property (or the proceeds or investments of property) which the testator had during his life after marriage conveyed to her or for her benefit as a gift or by way of advancement, and together with any benefit that the widow had received from the testator during his life under The Marital Property Act or had become entitled to receive from the testator by virtue of a division of assets made during his life under The Marital Property Act, shall equal in value one-half of the testator's net estate, and in addition, is entitled to the life estate in her husband's homestead under the provisions of this Act hereinbefore set out.⁴¹

The first point to notice is that the Section only applies where the testator is one "who by his will has not left her property or otherwise provided for her to the value of at least one-half of the value of his net real and personal property." Although the words "otherwise provided for her" in this passage are not free from doubt, it is submitted that as a matter of ordinary English usage the whole of this clause is governed

40. *The Exemptions Act*, R.S.A. 1970, c. 129, ss. 2 (k), 6; *The Homesteads Act*, R.S.S. 1965, c. 118, s. 12.

41. R.S.M. 1970, c. D100, as am. S.M. 1978, c. 27, s. 4.

by the phrase "by his will," so that provision by some means other than through the terms of the will must be ignored for this purpose and "otherwise" must be taken as a reference, *e.g.*, to a bequest to X in trust for the widow, as distinct from a bequest to the widow directly.⁴² The provision of property to the value of half the net real and personal property⁴³ is thus the main escape route provided by the *Act* for the testator who does not wish the dispositions of his will to be upset because of an election by his widow to take her *Dower Act* share. A second escape route exists, for Section 16(1) excludes the application of Section 15(1) where the widow has been "provided for" to the extent of an annual income of \$15,000, or capital of \$250,000, or an annual income of \$10,000 together with capital of \$150,000.⁴⁴ In the long term this clearly benefits only the comparatively rich testator,⁴⁵ but it may also be of use to the not so rich as an estate planning device.⁴⁶

If neither escape route applies, the widow must calculate the value of her *Dower Act* share, in order to compare it with the benefits given by will and so to be in a position to make her decision whether to elect for the *Dower Act* share or not. The calculation has to be made by reference to a series of concepts by varying degrees of artificiality. The central concept is that of the testator's "*net estate*" (which we will call NE), defined in Section 2(h) of *The Dower Act* as consisting of the following four elements:

- (i) the testator's "net real and personal property"⁴⁷ — which we will call NRPP;
- (ii) "all moneys paid or payable after the testator's death under or by

42. The opposite view was taken in *In re McFayden Estate* (1942), 50 Man. R. 165; [1942] 2 W.W.R. 572 (Surr. Ct.), where the words were held to apply to insurance proceeds appropriated by the will to the widow as a preferred beneficiary under *The Insurance Act*, now R.S.M. 1970, c. 140, s. 167.

43. Defined R.S.M. 1970, c. D100, s. 2 (i) as "all the real and personal property wheresoever situated (including the homestead) belonging to a testator at the time of his death and the proceeds or realizations of every part thereof, after all debts, funeral and testamentary expenses, probate fees, succession duties, and inheritance taxes or other charges of a similar nature, and costs of administration, have been paid, provided for, or taken into account."

44. S.M. 1978, c. 27, s. 5. The provision need not be by will, or by will alone: it may be made partly or wholly by insurance policies or by *inter vivos* conveyances as well as by will. The drafting of the section is, with respect, extraordinarily repetitive in relation to the provision of \$250,000, requiring no less than 5 paragraphs, s. 16 (1) (b) - (f), and 35 lines of print to say what could perfectly well be said in one paragraph of 15 lines simply by changing the word "two" in the first line of s. 16 (1) (f) to "one." Section 16 (1) (b) - (e) could then be deleted. If that seems too good to be true, a glance at s. 16 (i) (g) shows that it is not only possible *but has actually been done* in relation to the capital sum of \$150,000. One may perhaps also ask why settlements *before* marriage should be taken into account in relation to the provision of income, but not capital.

45. If the late Sam Nickle had been a Manitoban and not an Albertan he would presumably have been very grateful for s. 16 (1), for it would have been his only way of preventing the second Mrs. Nickle from claiming \$5,000,000 when he clearly wished her to have very much less than that. See *Nickle v. Jones*, [1974] 3 W.W.R. 385 (Alta. S.C.). An attack by Mrs. Nickle on Sam's testamentary capacity (at the age of 81) failed dismally. *Re Nickle*, [1973] 3 W.W.R. 97.

46. The testator may use the \$150,000 capital escape route to "provide for" the widow in the event that she survives him by only a short time, thus preserving the estate from a claim by the widow's successors to her *Dower Act* share of the capital. See R.S.M. 1970, c. D100, s. 18, for election after the widow's death. See also R. Cantlie, "Letter" (1965), 35 Man. B. News 349.

47. See *Supra* n. 43.

virtue of insurance policies on the life of the testator⁴⁸ to or for the benefit of the wife ... of the testator" — which we will call IPW;

(iii) "all moneys paid or payable after the testator's death under or by virtue of insurance policies on the life of the testator⁴⁹ to or for the benefit of ... any child of the testator" — which we will call IPC; and

(iv) "any property owned at the time of the testator's death by the wife for her own use or then held in trust for her, and which is property (or the proceeds or investments of property) that the testator had during his life after marriage conveyed to the wife or for her benefit as a gift or by way of advancement" — which we will call PNG (post nuptial gifts).

From the value of half the net estate ($\frac{NE}{2}$) the widow must then subtract the following "receipts" by her:

(i) the IPW;

(ii) the PNG; and

(iii) "any benefit that the widow had received from the testator during his life under The Marital Property Act, or had become entitled to receive from the testator by virtue of a division of assets made during his life under The Marital Property Act" — which we may call MPD (marital property division).

If we call the sum of these three items the "accountable benefits" (AB) we arrive at the formula $\frac{NE}{2} - AB$ for the value of the widow's *Dower Act* share. A couple of simple examples may help to clarify the operation.⁵⁰

Example 1: T leaves net real and personal property worth \$50,000. He has insurance policies on his life totalling \$20,000 payable to his widow (W) and \$35,000 payable to his children. W owns property worth \$15,000 which T had conveyed to her while they were living together and received a further \$10,000 worth of property on a division of assets under *The Marital Property Act* shortly before T's death. The value of T's net estate is:

NRPP:	\$50,000
IPW:	20,000
IPC:	35,000
PNG:	15,000
NE:	<u>\$120,000</u>

While the value of the benefits for which W must account is:

IPW:	\$20,000
PNG:	15,000
MPD:	10,000
AB:	<u>\$45,000</u>

48. R.S.M. 1970, c. D100, s. 2 (f): the expression 'insurance policies on the life of the testator' includes (i) contracts of life insurance within the meaning of Part V of The Insurance Act effected by the testator on his own life;

(ii) contracts of groups insurance within the meaning of Part V of The Insurance Act, whereby the life of a testator is insured; and

(iii) any contracts or plans entered into by the testator or maintained, under statute or otherwise, by his employer or former employer or by Her Majesty or any other person, whereby on his death or at a fixed or determinable time payments by way of annuity, superannuation, pension or death benefits, become payable.

49. R.S.M. 1970, c. D100, s. 2 (f).

50. It is assumed in the discussion which follows that s. 16 (1) does not apply.

Applying the formula $\frac{NE}{2}$ - AB W's *Dower Act* share is $(\$60,000 - 45,000) = \$15,000$. If the will gives her less than \$15,000, she should elect against the will. If it gives her at least \$15,000, but less than \$25,000 (one-half of NRPP), her right to elect arises but obviously she will not wish to avail herself of it.

Example 2: T leaves net real and personal property worth \$80,000. He has insurance policies on his life totalling \$15,000 payable to his widow (W) and \$30,000 payable to his children. W owns property worth \$5,000 which T had conveyed to her during the marriage, but there has been no division of assets under *The Marital Property Act*. The value of T's net estate is:

NRPP:	\$80,000
IPW:	15,000
IPC:	30,000
PNG:	5,000
<u>NE:</u>	<u>\$130,000</u>

While the value of the benefits for which W must account is:

IPW:	\$15,000
PNG:	5,000
MPD:	0
<u>AB:</u>	<u>\$20,000</u>

Applying the formula $\frac{NE}{2}$ - AB W's *Dower Act* share is $(\$65,000 - \$20,000) = \$45,000$. If the will gives her less than \$40,000 (one-half of NRPP), she should elect against the will. Yet the drafting of the Section produces the paradoxical result that if the will gives her \$40,000 she has no right to elect at all, though her *Dower Act* share would be \$5,000 more than she takes under the will since T will have left her the equivalent in value of one-half of his net real and personal property.

The Need for Re-appraisal

It would not seem far-fetched to suggest that Section 15(1) needs to be reconsidered by the Legislature simply on the ground that the structure of the Section is excessively convoluted and a disproportionate effort is required to unravel the meaning. In truth the trouble is more than mere complexity, however, for several of the underlying concepts are intrinsically unsound, or at least do not appear to have been fully thought out.

In the first place, no sensible purpose is served by the use of *two* points of reference for determining the maximum size of the widow's share of the estate, namely, the testator's net real and personal property and the testator's net estate. Because of this we have the absurd situation that the Section says to the widow: "If the testator has not left you \$X, you may claim \$Y" when X may be greater or less

than Y, depending on the circumstances.⁵¹ Common sense seems to require the abandonment of one of these divergent points of reference, and, since net estate is an indispensable concept for other reasons, it is submitted that the testator's net real and personal property should no longer be used as part of the calculation of the widow's share.

Most of the calculation under Section 15(1) concerns the amounts which the widow must bring into account. By expanding the formula $\frac{NE}{2} - AB$ into its constituent parts it can be shown that the widow must account for three items *in effect*:

- (a) half the proceeds paid or payable to her of insurance policies on the life of the testator;
- (b) half the value of the "post nuptial gifts"; and
- (c) the whole benefit received by her through a division of assets under *The Marital Property Act*.⁵²

As far as (a) is concerned, the definition of insurance policies on the life of the testator is so wide that it appears to include policies maintained by the widow herself,⁵³ and at the very least the *Act* requires amendment to exclude any duty to account for the proceeds of such policies and remove them entirely from the definition of net estate. Otherwise it seems reasonable to enable the husband to discharge the duty to provide for his widow by adopting the medium of life insurance payable to her as a designated beneficiary, and these benefits are properly regarded for this purpose as forming part of the husband's net estate, and should be brought into account, as to 50%, by the widow.

Much greater difficulty arises with regard to the "post nuptial gifts" — property, or the proceeds or investments of property, conveyed to the wife or for her benefit as a gift or by way of advancement by the testator in his lifetime during the marriage and owned by the widow, or held in trust for her at the time of the testator's death. The value is taken as at the death of the testator.⁵⁴

We may presumably read into the Section an exception for necessities, and also for "usual" or "customary" gifts such as wedding anniversary, birthday and Christmas presents appropriate to the parties' station in life — though the *Act* does not mention any of these possibilities. Even if limited in this way the provision will be difficult to apply, and I would suggest that the whole matter of *inter vivos* gifts should be removed from the calculation of the *Dower Act* share. It is a considerable extension of the normal understanding of what "properly" belongs to a deceased's estate to include *inter vivos*

51. See Examples 1 and 2, *Supra*.

52. Since NE consists of (NRPP + IPW + IPC + PNG) and AB consists of (IPW + PNG + MPD) it follows that $(NE/2 - AB)$ is equal to $(NRPP/2 + IPW/2 + IPC/2 + PNG/2 - IPW - PNG - MPD)$. This expression can be simplified to $(NRPP/2 + IPC/2 - IPW/2 - PNG/2 - MPD)$ and then to $(NRPP/2 + IPC/2) - (IPW/2 + PNG/2 + MPD)$, leaving $IPW/2 + PNG/2 + MPD$ as the sum to be brought into account by the widow.

53. See *Supra*, n. 48.

54. *In re Lawther Estate* (1947), 55 Man. R. 142, at 160; [1947] 2 D.L.R. 510, at 526 (K.B.) (Williams C.J.K.B.).

dispositions other than gifts *mortis causa* without setting a short time limit prior to the death beyond which dispositions will be ignored.⁵⁵ It would be simpler and fairer to recognise that *Dower Act* rights attach to what remains of the testator's property at his death, and to treat *inter vivos* provision for the wife as entirely separate and distinct.

Literally, the "post nuptial gift" provision might appear to include part of the third category, namely property received on a division of assets under *The Marital Property Act*,⁵⁶ but it is clear that different considerations apply to property received or receivable on a division of assets under that *Act*. *The Marital Property Act* enables the parties to terminate the economic union while leaving the matrimonial bond intact. If the wife were divorced, she would of course have no claim of any kind as "widow" and it seems logical that the same result should apply on an "economic dissolution" of the marriage. The least that can be required is that she should bring this property into account against a *Dower Act* claim;⁵⁷ it would be more rational perhaps to exclude *The Dower Act* entirely in such a case, subject to the possibility of "reviving" the rights on resumption of cohabitation: this could be achieved by very minor amendments to Section 22.

Does Section 15 Apply to a Partial Intestacy?

Intestacy is nowhere mentioned in the *Act* which (except for the homestead provision) is clearly not intended to apply to a total intestacy, where the widow will in any event receive the major part of the net real and personal property.⁵⁸ The divide which exists between *The Dower Act* and intestacy was emphasised by Bergman J.A. in *Sysiuk v. Sysiuk*:

The *Act* is not concerned with cases of intestacy . . . it is clear that the *Dower Act* does not alter or affect the law of intestate succession in any way, with the single exception of sec. 12 [now s. 14], which gives the surviving spouse a life estate in the homestead in addition to what is given by the *Devolution of Estates Act*.⁵⁹

However, his Lordship was not addressing himself to the possibility of a partial intestacy but to the correctness of an order, under what is now Section 22 of *The Dower Act*, which purported to bar the separated husband of a wholly intestate wife not merely from his homestead life estate but also from any rights in his wife's estate under *The Devolution of Estates Act*. There is at least one case in which it appears to have been assumed that Section 15 could apply to a

55. See e.g., *The Succession Duty Act*, S.M. 1972, c. 9, s. 3 (c).

56. See *In re Barker Estate* (1946), 54 Man. R. 169; [1946] 2 W.W.R. 543 (Surr. Ct.), *Sed quaere*: does not the consideration moving from the wife in a separation agreement mean that the property has not been conveyed as a gift?

57. *But see*, C. Harvey, "Manitoba Family Law Reform and Succession" (1979), 9 Man. L.J. 247, at 250. What is the date at which the value must be determined? The language of section 15 (1) seems to suggest the date of receipt, in contrast with the remainder of the section. An explicit provision would be helpful.

58. *The Devolution of Estates Act*, R.S.M. 1970, c. D70, ss. 6, 7.

59. (1947), 55 Man. R. 501, at 507-08; [1948] 1 D.L.R. 676, at 680; [1947] 2 W.W.R. 897, at 901-02.

partial intestacy⁶⁰ and strange results will follow if Section 15 does not apply to a partial intestacy. For example, if T dies leaving a net estate of \$500,000, all of which he disposes of by will (including a bequest of \$10,000 to his widow), T's widow will have a claim for \$250,000 less the "benefits" for which she must account, but if T makes specific bequests totalling \$490,000 but fails to dispose of the residue the widow would have no claim at all under the Section.⁶¹

Such anomalous results can scarcely have been intended by the Legislature, and since the language of *The Dower Act* is entirely consistent with the application of Section 15 to cases of partial intestacy, it is submitted that in principle the Section should cover partial intestacy. It must be admitted however that this conclusion raises other difficulties in its turn, as can be seen from the following example:

Example 3: T dies leaving net real and personal property worth \$160,000, a widow (W) and two children. By his will T gives \$20,000 to W, \$30,000 to each of the two children and \$40,000 to X, but omits to dispose of the residue and dies intestate as to the remaining \$40,000.

If *The Dower Act* were excluded because of the partial intestacy, W's rights against T's estate would be the sum of (a) \$20,000 under T's will; (b) the balance of the first \$50,000 of the property passing on intestacy after deducting the benefits under the will, i.e., $(\$50,000 - \$20,000) = \$30,000$; and (c) half the residue of the property passing on intestacy, i.e. $(\frac{\$40,000 - \$30,000}{2}) = \$5,000$, making \$55,000 in all.⁶²

Supposing that no other amounts have to be brought into account on the calculation of the *Dower Act* share, this would amount to \$80,000. If W is permitted to elect to take the share, we need to know how this will affect the distribution of the intestate portion of the estate. W's legacy of \$20,000 becomes void⁶³ and the amount passing on intestacy then rises to \$60,000. Applying *The Devolution of Estates Act* W can argue that by Section 13 she is entitled to \$50,000 plus half the residue, i.e., \$55,000 in all, and does not have to bring into account the \$80,000 she obtains under *The Dower Act*, since Section 14(1) of *The Devolution of Estates Act* only refers to "the value . . . of the property left to her under the will of the deceased" — a most inappropriate description for a *Dower Act* share.

On the face of it, by electing for her *Dower Act* share W would receive a total of \$135,000 which would be a very substantial windfall. This fortuitous increase in her entitlement could be mitigated by amendment of the legislation, either by limiting the *Dower Act* share

60. *In re Kennedy Estate*, [1950] 1 W.W.R. 151 (Man. K.B.) (Williams C.J.K.B.), but the husband had not in fact elected to take the *Dower Act* share.

61. She would of course be able to claim under *The Testators Family Maintenance Act*, R.S.M. 1970, c. T50, but may be awarded far less than half of such a large estate. See *Nickle v. Jones*, *Supra*. n. 45.

62. R.S.M. 1970, c. D70, ss. 13, 14 (1). Note that only a 'widow' and not a 'widower' is caught by s. 14 (1) — though this can scarcely have been intended.

63. R.S.M. 1970, c. D100, s. 19.

to the portion of the estate disposed of by the will, or by amending Section 14(1) of *The Devolution of Estates Act* so as to require W to account for the *Dower Act* share in computing her intestate share. The former alternative would give W \$115,000,⁶⁴ the latter \$110,000.⁶⁵ In either case of course there is still a marked difference between W's position based solely on *The Devolution of Estates Act*, her position if T had died wholly testate, and her position applying *The Dower Act* to the partial intestacy; a fairer solution would be to give W the choice, on a partial intestacy, of taking the share which the will and *The Devolution of Estates Act* give her or electing for *The Dower Act* share which she would have obtained if T had died wholly testate, in lieu of all other claims against his estate.

The Dower Act and the Conflict of Laws

Few principles in the conflict of laws are better settled than that succession to movables is governed by the law of the deceased's domicile at death, and that succession to land is governed by the *lex situs*.⁶⁶ *Dower Act* rights are questions of succession, so they should present no particular problem in the conflict of laws, but the two relevant decisions of the courts of Manitoba highlight a quite unnecessary difficulty which *The Dower Act* has injected into this area.

In *In re Elder Estate*, T died leaving movable and immovable property in both British Columbia and Manitoba and his widow claimed her *Dower Act* share of the Manitoba property.⁶⁷ Donovan J. held that since T was domiciled in British Columbia the law of that Province governed the widow's rights in the movable property, to the complete exclusion of the law of Manitoba, *even in respect of the movable property in Manitoba*. The lands in Manitoba, however, were governed by the law of Manitoba as the *lex situs*, since *The Dower Act* does not limit its operation, for example, to husbands domiciled in, or wives resident in, the Province, as it might reasonably have done.⁶⁸ The widow was accordingly entitled to one-third of the Manitoba land.

Up to this point the decision in *In re Elder Estate* represents an orthodox application of established conflicts principles⁶⁹ but the real difficulty is still to come, namely, how to reconcile these principles with the express words of *The Dower Act*, that the widow's share must be calculated by reference to the husband's "real and personal property *wheresoever situated*."⁷⁰ Donovan J.'s solution is that nothing in the statute says "that the general rule of law governing the

64. *I.e.*, half of \$120,000 under *The Dower Act*, plus (\$50,000 + half of \$10,000) under the intestacy.

65. *I.e.*, half of \$160,000 under *The Dower Act*, plus half of \$60,000 under *The Devolution of Estates Act*.

66. 2 J. Castel, *Canadian Conflict of Laws* (1977) 447-48.

67. (1936), 44 Man. R. 84; [1936] 3 D.L.R. 422; [1936] 2 W.W.R. 70 (K.B.).

68. *Id.*, at 91; [1936] 3 D.L.R., at 425-26; [1936] 2 W.W.R., at 74.

69. *Cf. Sinclair v. Brown* (1898), 29 O.R. 370 (Ont. H.C.); *Re Rea*, [1902] 1 Ir. R. 451 (H.C.) *Ostrander v. Houston* (1915), 8 W.W.R. 367 (Sask. S.C.).

70. R.S.M. 1970, c. D100, s. (i) (italics supplied).

distribution or devolution of property according to the *lex domicilii* should be considered abrogated” and that to calculate the share by reference to any property other than the land in Manitoba would be “an infringement of the *lex domicilii* and of British Columbia jurisdiction . . .”⁷¹ In a word, *The Dower Act* must be read in the light of established principles of the conflict of laws.

In the later case of *Morgan v. Altman*, Monnin J. declined to follow this reasoning.⁷² In that case T died *domiciled in Manitoba*, leaving both movables and immovables in Manitoba and Saskatchewan. His widow elected to take the (then) statutory share of one-third and the issue became whether she was entitled to one-third of the value of *all* the property, *including* the land in Saskatchewan, because of the words “wheresoever situated” in *The Dower Act*, or one-third of the property *the succession to which was governed by the law of Manitoba, i.e., excluding the land in Saskatchewan*.⁷³

His Lordship decided in favour of the first alternative, saying that “there is here no conflict of laws and no necessity to apply the *lex loci rei sitae* and the *lex domicilii*” and “no necessity to add after the words, ‘wheresoever situated’ the words ‘in Manitoba’ as did Donovan J. in the *Elder* case.”⁷⁴ It may be suggested, with respect, that this is scarcely an accurate summary of Donovan J.’s *ratio*, since the point of *Re Elder* is *not* the location of the property, but the fact that succession to it is governed by a system of law other than the law of Manitoba. Adverting to this point, Monnin J. continued:

The *lex loci rei sitae* will still apply to the Saskatchewan real property. All that the Manitoba legislature has said is that the calculation of the one-third of the value of the net real and personal property of the estate of the testatrix is made on the basis of all her estate wheresoever situated.⁷⁵

Neither *Elder* nor *Morgan v. Altman* can be regarded as producing an entirely satisfactory result in all situations.⁷⁶ Although they can be “reconciled” on the basis of the difference in domicile of the deceased, *Morgan v. Altman* really involves a total rejection of conflicts principles in this area of the law and is consequently utterly contrary to the spirit of *Elder*. The only satisfactory resolution of the difficulty would be to make the benefit of the *Act* available only to the widows of the husbands who died domiciled in Manitoba: for the policy of *The Dower Act* must surely be the protection of Manitoban widows, and no others. The actual calculation could then reasonably proceed as in *Morgan v. Altman*.

71. *Supra* n. 67, at 92-93; [1936] 3 D.L.R., at 427; [1936] 2 W.W.R., at 75-76.

72. (1961), 34 W.W.R. 452 (Man. Q.B.).

73. Governed by the law of Saskatchewan as *lex situs*.

74. *Supra* n. 72, at 456-57.

75. *Id.*, at 457.

76. *E.g.*, if the *Morgan v. Altman* reasoning is applied to a T not domiciled in Manitoba.

Conclusions

I can state my conclusions briefly. Common law dower was described as "the last relic of feudalism"⁷⁷ but the modern statutory rights are a worthwhile protection of economically vulnerable members of society and should be strengthened and preserved. However the fundamental soundness of the idea should not be allowed to divert attention from numerous shortcomings in the practical operation of the system. I have suggested a few difficulties which could in my view be corrected by straightforward amendments to the legislation. Others will no doubt be able to add to the list. Perhaps the Law Reform Commission will one day take the matter up. I hope so.

77. "Deeds to Uses to Defeat Dower" (1956), 6 Chitty's L.J. 133.

