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Need for a Replacement Statute to Correct Existing Inequities

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thoughtfully added such a clause to the 1955 amendment to the income tax statutes.⁵¹ While it seems clear, from what has already been said, that the valid portions of the statute will stand alone without a savings clause, the addition of such a clause should eliminate all doubt. It is the final manifestation of the legislative intent on the question of severability.⁵²

It may be said that the intended effect of the amendment has been substantially accomplished, even if the phrase incorporating the prospective federal changes is declared to be invalid. But, as pointed out by Judge Pope in the *Alaska Steamship* case, *supra*, in order for the law to be fully effective, that phrase must be included.⁵³ Since the Montana legislature convenes only once every two years, the interim revisions in the federal code cannot currently be included in the Montana law, unless it remains as it was written.

TOM HENDRICKS

NEED FOR A REPLACEMENT STATUTE TO CORRECT EXISTING INEQUITIES

Suppose Mr. A. B. White, a business man, and Mr. C. D. Black, a rancher, had both died the same day, each leaving an estate valued at \$60,000. If you were the widow of Mr. Black, would you expect to receive the same amount of inheritance as Mrs. White? You probably would, especially if you had the same number of children and your husband owed no more debts than Mr. White. You can also imagine Mrs. Black's surprise when the court awarded her a life interest in \$16,667 and \$5,000 outright as her share, while Mrs. White received \$30,000.

How could the same court arrive at such divergent amounts? The answer to this question requires an analysis of the assets of the two estates. Mr. White, the business man, lived in a rented house which he furnished himself. The furniture, appliances, and personal effects were valued at \$5,000. He owned an automobile with a market value of \$3,000, and his bank balance read \$2,000 when he died. The shares of stock which he held, had a value of \$50,000. This gave Mr. White an estate of \$60,000. Mr. Black's estate reached the same total. The land and buildings on his ranch were worth \$50,000. He had a pickup and a tractor, each worth about \$1,500. The livestock was quoted at \$4,000. Mr. Black had \$2,000 in personal effects and \$1,000 in the bank.

⁵¹Section 84-4941 reads: If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act.

⁵²Hill v. Wallace, 259 U.S. 44, 66 L. Ed. 822, 42 Sup. Ct. 456 (1922).

⁵³It should be noted that there are certain distinct differences between the Alaska and Montana laws. The Alaska law requires the payment of a certain percentage of the tax paid to the federal government, whereas the Montana law merely includes the definitions of income and deductions. The tax rate is set by the Montana statutes; only the income subject to the tax is subject to variation by prospective federal enactments. The Alaska tax could not be effectively administered without inclusion of current federal changes, since it would otherwise be necessary to recompute the federal tax to eliminate the effect of federal changes which had not become a part of the Alaska law, before applying the fixed percentage. On the other hand, the exclusion of current federal changes from the Montana law would not have so harsh an effect, since it is already necessary to make a recomputation to allow for additions and exclusions from income referred to in note 2 *supra*.

Although these two men and their worldly belongings are hypothetical, neither presents an abnormal type estate. The following table will show the effect of current Montana law, under varying fact situations, upon the dispositions of these two estates. For purposes of comparison, the table includes the share a widower would receive, and the treatment offered by the Model Probate Code, as well as a proposed modification to the Montana law.

SITUATIONS ¹	Widow of Mr. White (Business-man) takes under Present Montana Statutes:	Widow of Mr. Black (Rancher) takes under Present Montana statutes:	Widower of either Mrs. Black or Mrs. White would take under Present Montana statutes:	Widow or widower of either Black or White under Model Probate Code Alternative number one would take:	Widow or widower of either Black or White under Model Probate Code, Alternative number two would take:	Widow or widower of either Black or White under Proposed Amendment to Montana Statutes would take:
I. No will: spouse is sole survivor	\$60,000	\$60,000	\$60,000	\$60,000	\$60,000	\$60,000
II. No will: spouse and one child survive	\$30,000	\$30,000	\$30,000	\$30,000	\$30,000	\$30,000
III. No will: Spouse and two or more children survive	\$20,000	\$20,000	\$20,000	\$30,000	\$30,000	\$20,000
IV. Inadequate will: Spouse is sole Survivor	\$40,000	\$35,000	\$20,000	\$32,500	\$30,000	\$20,000
V. Inadequate will: Spouse and one child survive	\$30,000	Life interest in \$16,667 and \$5,000	\$20,000	\$18,750	\$30,000	\$20,000
VI. Inadequate will: Spouse and two or more children survive	\$20,000	Life interest in \$16,667 and \$3,333	\$20,000	\$18,750	\$30,000	\$20,000

The figures presented in the table bring into sharp focus certain inconsistencies in the treatment of a spouse's inheritance under our present law. The most glaring example exists in situations V and VI. Here one widow is in a far better position than the other. Can this difference be justified? It is also obvious that the husband is in a generally inferior position under the present law. Should a widow be assured more protection by the law as a forced heir? In order to answer these questions it is necessary to understand the basis for these figures. They are obtained by the application of certain statutes.

Situations I, II, and III pose no difficult problems. They are all governed by one statute on intestate succession.² Both spouses are treated

¹In situations I, II, and III, the deceased has been presumed to have died intestate. In situations IV, V, and VI, the testator is presumed to have left a will which the surviving spouse has elected to renounce. The amount involved have been rounded to the nearest dollar.

²REV. CODES OF MONT. § 91-403 (1947).

equally according to the number of issue surviving. The table clearly demonstrates the effect of this equal and consistent treatment.

Situation IV requires the study of several statutes. The widow of Mr. White would take under section 22-107, as amended by the 1955 legislature.³ We are assuming Mr. White left a will which Mrs. White found unsatisfactory and elected to renounce. Upon making this election, Mrs. White is entitled to take:

. . . her share in the personal estate under the the succession statutes, as if there had been no will, but not in excess of two-thirds (2/3) of the husband's net estate . . .⁴

Mr. White's net estate was \$60,000, made up entirely of personal property. As sole survivor, Mrs. White is entitled to the entire \$60,000 under the succession statute, but section 22-107 limits her to two-thirds, or \$40,000.

Section 22-107 would provide Mrs. Black:

. . . her dower in the lands and her share in the personal estate . . .⁵

In order to translate this into a dollar value, it will be necessary to define dower as it has been interpreted in Montana. A very broad definition is found in *Corpus Juris Secundum*:

Dower may be defined as the provision which the law makes for a widow out of the lands or tenements of her husband for the support and nurture of her children.⁶

Section 22-101 of the Montana Code defines dower as follows:

A widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate at any time during the marriage, unless the same shall have been relinquished in legal form.

Montana cases have consistently held that this statute preserves the dower right as it existed at common law.⁷ A clear statement by the Montana Supreme Court is found in *Rosenow v. Miller*.⁸ Mr. Justice Holloway, in his opinion discusses the statute providing for dower. He states:

But what is the character of the right? (1) She has the common-law right of dower—a life estate in one-third of the land.

In the light of this interpretation, Mrs. Black is entitled to a life estate in one-third of Mr. Black's real property. The ranch was valued at \$50,000, which means that Mrs. Black is entitled to a life interest in \$16,667. She would also be entitled to her share in the personal property as by intestacy. Since Mrs. Black was the sole heir, she would take all of the personal property. This amounts to \$10,000.

However, Montana statutes offer Mrs. Black, as sole survivor, an alternative settlement. Section 22-109 provides:

³REV. CODES OF MONT. § 22107 (1947), Mont. Sess. Laws 1955, c. 231, § 1.

⁴*Ibid.*

⁵*Ibid.*

⁶28 C. J. S., *Dower* § 1 (1941).

⁷Mathy v. Mathy, 109 Mont. 467, 98 P.2d 373 (1939); Swartz v. Smole, 91 Mont. 90, 5 P.2d 566 (1931); Rosenow v. Miller, 63 Mont. 451, 207 Pac. 618 (1922); Dahlman v. Dahlman, 28 Mont. 373, 72 Pac. 748 (1903).

⁸63 Mont. 451, 458, 207 Pac. 618 (1922).

If a husband die, leaving a widow, but no children, nor descendants of children, such widow may, if she elect, have, in lieu of her dower in the estate of which the husband died seized, whether the same shall have been assigned or not, absolute and in her own right, as if she were sole, one-half of all the real estate. . . .⁹

It is obviously to Mrs. Black's advantage to elect this method. She takes \$25,000 in fee from the real estate plus the \$10,000 personalty.

Situation V differs from IV only in that the widow is not the sole survivor, but, in addition, a child also survives. Mrs. White's intestate share is reduced to one-half the personal estate, or \$30,000. Mrs. Black can no longer claim under 22-109, but must take her dower under 22-107. Therefore, as explained for situation IV, Mrs. Black gets a one-third interest in the real property for life. This comes to \$16,667. In addition, Mrs. Black would get \$5,000 as her share in the personal estate.

In situation VI, the widow and two or more children survive. Mrs. White's share is cut to one-third the personal estate, or \$20,000. Mrs. Black still gets the same dower as in situation V, but her share in the personal estate is reduced to \$3,333, one-third of the \$10,000.

In situations IV, V and VI, the widower gets \$20,000. Here we assume the widow did not have her husband's consent to will more than two-thirds of her property. Section 91-102 provides:

A married woman may make a will in the same manner and with the same effect as if she were sole, except that such will shall not, without the written consent of her husband, operate to deprive him of more than two-thirds of her real estate, or of more than two-thirds of her personal estate.¹⁰

This statute is the only protection offered the husband. Section 36-131 expressly abolishes the old common law tenancy by curtesy.¹¹

The difference in the handling of the two estates can be attributed to a single factor, dower. Simply by eliminating dower the inequality of treatment would be ended. Should dower be abolished in Montana? Dower has existed in the common law for centuries. Let's examine its advantages, disadvantages, and the effect of its abolition.

Montana cases have included language of glowing praise and utmost respect for dower. Such a quote is found in *Mathews v. Marsden*:

'Dower being a cherished and immediate jewel of the common law, preserved for and presented to us in a statutory setting, all doubts are to be resolved in its favor; courts will not allow the right of dower to be wasted and frittered away in piecemeal by sour or austere construction, by overnice refinement in gloss. In short, nothing except a plain mandate of the statute, or a statutory command deduced by necessary implication, will suffice to set dower to one side. And this is so because dower, as seen above, keepeth excellent company in the law, to wit, the company of life and liberty, (the three abiding together in favor). So that the law lifts the light of comfortable countenance thereon out of tender regard for the widow.'¹²

⁹REV. CODES OF MONT., § 22-109 (1947).

¹⁰REV. CODES OF MONT., § 91-102 (1947).

¹¹REV. CODES OF MONT., § 36-131 (1947).

¹²71 Mont. 502, 230 Pac. 775 (1924).

What prompted the courts to take such a high regard for dower? Protection of the widow has long been a prime concern of the law. An interesting treatment of the history of dower by George L. Haskins is found in the *American Law of Property*.¹⁸ He says that although dower is a word of French origin, the provisions in the English law antedate the coming of the Normans, and its precise beginnings are lost in the dim antiquities of German Law. In its earliest form dower included both personal and real property. This changed during the last half of the 13th century. At this time dower in personal property disappeared. Probably this was a result of the recognition of land as the primary source of wealth. From that day until this, dower has applied only to realty. In an agrarian society, such as existed in the middle ages, where land was of chief importance, this assured the widow of maximum protection. Since dower has existed in the common law for centuries, and has been the best source of protection for the widow, there is small wonder that it finds warm support in courts steeped in deep-rooted precedent.

The concept of dower was born and developed in an agrarian society. It undoubtedly performed a valuable service to that society. However, today, we are primarily an industrial society. Although land is a valuable source of wealth to some, to most others it is not. This change in society has defeated much of the original value of dower. In fact, standing alone, as the sole protection afforded a widow, dower would be unacceptable today. If we agree, in principle, with the general theory of all our various states and England, that a widow should be a forced heir and is entitled to protection, then it is obvious that unfortunate women whose husbands own only personal property, should not be totally excluded by the very method designed to aid them. This would indeed be an anomalous situation.

Naturally, Montana has not allowed such an extreme injustice to exist. Where the husband dies intestate, the wife receives an adequate share under the intestate succession statutes. When he excludes her, or makes inadequate provision for her in his will, then she must resort to her dower right. In the latest legislation on this subject, dower is clearly supplemented by a share in personal property based on the intestate succession laws.

When the legislature of Montana decided to revise section 22-107, they had a twofold problem. First, they had to provide adequate protection for the widow. Second, they had to recognize a husband's right to dispose of his property according to his own desires. In order to achieve the desired result, the revised section 22-107¹⁹ combines the ancient concept of dower with the modern statutory treatment of intestate succession. However, the total benefit to the widow is subject to a limitation. The widow may take only up to two-thirds of the total net estate.

In drafting a two-thirds limitation on the net estate, with the retention of the old dower right, the Montana Legislature has created a difficult problem which may lead to litigation in the future. The following example will serve to point out the hiatus which exists in the present statute. Suppose the testator (*T*), in his will, leaves his entire personal estate,

¹⁸1 AMERICAN LAW OF PROPERTY, : 5.3 (Casner ed. 1952).

¹⁹See note 3 *supra*.

valued at \$120,000, to a personal friend (*A*), and all his real property, worth \$60,000, to his wife (*W*), who is his sole heir. The wife may elect to renounce the will and take under sections 22-107 and 22-109. If she makes this election she is entitled to one-half the real estate, or \$30,000 in fee, under section 22-109, as her share in lieu of dower, and all of the personal estate, \$120,000, under section 22-107. This gives her a total of \$150,000. However, section 22-107 limits her to two-thirds of the net estate, which is \$120,000. At this point the first serious difficulty in the application of section 22-107 becomes evident. Since the wife can take only \$120,000, there is a sum of \$30,000 which she must leave in the estate. Should this \$30,000 be left in the form of real estate, personal estate, or should some allocation be made? It is essential to determine this point as the personal estate withheld from *W* would pass under the will to *A*, but the realty withheld from *W* could not pass to *A*, nor could it pass to *W* as she has elected to renounce all her rights under the will. This dilemma could be averted by withholding only personal property. However, the same problem exists in connection with the one-half realty which does not go to *W* under sections 22-107 or 22-109. She takes only one-half the realty. The other half is left in the estate. What disposition can be made of this remaining half? *A* can't take it under the will, and *W* can't take as she has renounced the will. It would appear that this one-half of the realty has become intestate property. If it is treated as intestate property it will pass to *W* under section 91-403 as she is the sole heir. Surely this is not what the legislators intended when they enacted section 22-107. Here, the wife has taken far more than the two-thirds to which she was to be limited, and the husband's will has been utterly defeated. This awkward situation and its attendant problems could be avoided by the abolition of dower.

Dower was abolished in England in 1925.¹⁵ In the United States dower has been treated in a variety of ways. The statutes of sixteen states have abolished dower.¹⁶ The eight community property states have expressly or impliedly abolished it.¹⁷ Only one-half the states retain dower and most of them have modified the old common law concept of dower. Where dower has been abolished, the legislature has usually provided a substitute for it.¹⁸ North Dakota and South Dakota are the only notable exceptions. They allow the husband complete testamentary control of his property.¹⁹ In seven states dower has been replaced by a share in fee of the husband's estate, which the husband cannot defeat by will without the wife's consent.²⁰ In ten other states the wife is entitled to one-third or one-half in fee, based upon an intestate share.²¹

Abolition of dower would give the husband freedom to will his property as he pleased. He could leave his widow absolutely nothing. This is contrary to the tradition in the law, which has lasted for centuries. Therefore statutory substitutes have normally been supplied where dower has been abolished. When the Montana Legislature decided curtesy was ob-

¹⁵15 GEO. 5, c. 23, § 45(c) (1945).

¹⁶3 VERNIER, AMERICAN FAMILY LAWS, § 189, at 352 (1935).

¹⁷3 *id.* at 351.

¹⁸3 *id.* at 352.

¹⁹*Ibid.*

²⁰3 *id.* at 353.

²¹3 *id.* at 354.

solete, and put it to rest, they passed a new statute²² which prohibited a wife from willing away more than two-thirds of her property without her husband's consent.

The Model Probate Code Committee of the American Bar Association has abolished dower and curtesy in section 31 of the Model Probate Code.²³ They propose two alternatives each numbered 32.²⁴ Each of these is designed to provide a substitute in the place of dower and curtesy. The Model Probate Code differentiates between large estates and smaller ones. When a surviving spouse elects to take against the will, under the first alternative, he may receive the share that would have passed to him had the testator died intestate until that share reaches \$5,000. Of the residue which remains over and above the \$5,000, the survivor can take only one-half of that share which he would have received if the testator had died intestate. The second alternative is more complicated. It sets up a dividing line at \$20,000. If the estate is valued at less than \$20,000, the surviving spouse can take one-half of the estate absolutely. However, if the estate exceeds \$20,000, the survivor is given one of two elections, but not both. The first election requires a valuation of all legacies and devises under the will at actual value, with the exception of life beneficiary trusts. Although the survivor is merely a life beneficiary under a trust, he must value his interest at full principal value. If this valuation is less than one-half the value of the net estate, the survivor may take the difference between the value of such legacies and devises and the one-half, as a forced heir. The second election allows the survivor to treat the estate, no matter how large, as if it did not exceed \$20,000 and take \$10,000 absolutely. If the survivor chooses this second alternative he may take no more than \$10,000. The drafters of the Model Probate Code have attempted to meet a threefold responsibility: protecting the widow, achieving equal treatment for spouses, and allowing the testator freedom of testamentary disposition.

Would it be desirable to adopt either of the alternatives of the Model Probate Code in Montana? The first step in either event would be the abolition of dower. Alternative number one assures the survivor of a small estate the most protection. The survivor takes a full intestate share until \$5,000 is reached. It should be noted that this share would be subject to creditor's claims and taxes,²⁵ if the Montana intestate succession statute²⁶ were utilized to determine this share. The drafters of the Model Probate Code evidently felt that once the survivor received \$5,000, the bare minimum of protection had been met. From that point the survivor takes only one-half of his intestate share. When the amounts were computed for alternative number one under the Model Probate Code in the table,²⁷ the intestate succession statute of the Model Probate Code was used. Application of the Montana succession statutes would change the figure found in situation VI. Here, the amount would be \$14,167, rather than \$18,750. Protection of the widow should be the primary purpose of a statutory sub-

²²Mont. Comp. Stat., § 435, c. XVI, Sec. Div., *Probate Practice Act* (1897); Rev. CODES OF MONT., § 91-102 (1947).

²³MODEL PROBATE CODE, § 31, at 68.

²⁴*Id.*, § 32, at 68, 70. For effect of this section see table at page

²⁵REV. CODES OF MONT., § 91-403 (1947).

²⁶*Ibid.*

²⁷See p. *supra*.

stitute for dower. The amount the widow receives under section 32 depends upon the number of issue surviving. Take Mrs. White, for example. Under section 32, as applied with the Montana intestate succession statute,²⁸ she takes \$32,500 as sole survivor, \$18,750 if there is one child, and \$14,167 should there be two or more issue. We assume the will to be objectionable to Mrs. White in all three instances. It is conceivable that this will expressly disinherits the children. It hardly seems reasonable to cut Mrs. White's share in half merely because the marriage was blessed with children. Should these children be minors this result is even more unjustifiable. Alternative number two is more complex. The Model Probate Code explains it as follows:²⁹

If the value of the net estate does not exceed \$20,000, the surviving spouse is entitled to take absolutely one-half the net estate. This amount is first satisfied by crediting to the surviving spouse any part of the net estate which is undisposed by the will and which comes to him or her by intestate succession. The surviving spouse is also credited with all legacies and devises given absolutely. These are regarded as being received under the will. If this does not make up one-half, the surviving spouse can elect to take against the will a sufficient additional amount to equal one-half. In so doing the surviving spouse renounces all legacies and devises not given absolutely, such as leases, legal life estates, determinable fees, and future interests. If the value of the net estate exceeds \$20,000, the surviving spouse may elect against the will in either of two ways. He may elect to take \$10,000 absolutely, in the same manner as if the estate were valued at \$20,000. In that case, he receives no more, regardless of how large the estate is. The other election against the will gives the surviving spouse one-half of the net estate; but he must take all interests given under the will even though they are not absolute interests. Furthermore, if the will gives the surviving spouse a beneficial interest for life in a trust, that gift is credited to the share of the surviving spouse at the value of the principal from which the life income is payable, and not at the value of the life estate. Thus, it is possible for a testator in an estate in excess of \$20,000 in value, however large it may be, to set up a trust with half his estate, giving his wife only the income for life from that half. The wife must then either accept the beneficial interest under the trust or be limited to taking \$10,000 absolutely.

The creators of this section of the Model Probate Code were attempting to give adequate protection to the surviving spouse and leave the provisions of the will undisturbed, if possible. Unfortunately, in their effort, they have created a section which cannot be readily understood by the average testator or his heirs. The administration of an estate under this section will require complicated computations and adjustment, and may even necessitate litigation to achieve final settlement.

If it is decided to abolish dower and provide a modern statutory provision to fulfill its time-honored function, the following requirement should be met: (1) The surviving spouse should be afforded an ample share of his support out of the estate of his deceased spouse. (2) The right of

²⁸REV. CODES OF MONT., § 91-403 (1947).

²⁹MODEL PROBATE CODE, § 32, at 71.

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an individual to dispose of his own property by will must be recognized to dispose of his own property by will must be recognized and given effect.

(3) The statute should accomplish these ends as simply and directly as possible. The following statute is proposed to meet these requirements:

1. A surviving spouse may elect to take against the will:

(a) When a married person dies testate as to any part of his estate, a right of election is given to the surviving husband or wife solely under the limitations and conditions hereinafter stated:

(1) Extent of election. The surviving spouse may elect to receive one-half of the net estate, until the value of the one-half shall amount to \$10,000, and of the residue of the estate above the part from which the one-half share amounts to \$10,000, one-fourth of the remaining net estate.

(2) Effect of election. When a surviving spouse elects to take against the will, he shall be deemed to take by descent, as a modified share, such part of the net estate as comes to him under the provisions of this section.⁸⁰

This proposed section gives the surviving spouse one-half the testator's estate until \$10,000 has been reached. This share is subject to creditor's claims. However, the homestead⁸¹ and family allowance provisions⁸² of the Montana Code provide certain allowances to the surviving spouse free from the claims of creditors. The share received under this proposed section is not based upon the intestate succession formula. Since the testator has full opportunity to provide for his surviving heirs, or to disinherit them expressly, in his will, the amount guaranteed the surviving spouse should not depend upon the number of surviving children. The children are not forced heirs. The share which the testator leaves to them should be left to his own discretion. The share of the surviving spouse should not depend upon whether the testator is survived by one, two, or more issue. This is especially true, in the usual case, where the issue are adults and able to provide for themselves. The testator of a small estate is given an opportunity to will 50% of his property as he wishes. It is felt that once the surviving spouse has received \$10,000, that his minimum protection has been met. From that point the testator is given the right to dispose of 75% of the remaining estate in any manner he desires.

When this proposed formula is applied in the estates of Mr. Black and Mr. White, an equal and consistent amount is given the survivor of either estate. In every situation, where the will is rejected by the surviving spouse, he is entitled to \$20,000. This proposed statute would end the inequality which exists today and would provide a workable substitute for the ancient and outmoded theory of dower.

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⁸⁰The implementation of this proposed section would necessitate the repealing of all statutes now contained in Title 22 of the Montana Codes and also Chapter 26 of Title 91. This could be accomplished by a provision such as the one abolishing curtesy or by a single section abolishing both dower and curtesy. The abolition of dower would greatly simplify conveyancing of real estate. It would no longer be necessary to join both spouses in the instrument of conveyance.

⁸¹REV. CODES OF MONT., § 33-101 through § 33-129 (1947).

⁸²REV. CODES OF MONT., § 91-2401 through § 91-2407 (1947).