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WITH ALL MY WORLDLY GOODS I THEE ENDOW: THE LAW AND STATISTICS OF DOWER AND CURTESY IN ARKANSAS

J. Cliff McKinney[*]

I. INTRODUCTION

Dower and curtesy are ancient doctrines that have been a part of Arkansas law since the dawn of statehood.[1] Though many states have abandoned dower and curtesy, the concepts remain a basic provision of Arkansas law.[2] This article explores the current status of the law in Arkansas including a detailed analysis of the current statutory system along with a sampling of some of the myriad associated common law concepts and interpretative features.[3]

Most importantly, though, this article examines the real life application of dower and curtesy in Arkansas through an empirical study examining more than a decade of deeds filed in fifteen Pulaski County neighborhoods representing a cross-section of socio-economic backgrounds.[4] The study provides statistics that might help policymakers decide the fate of dower and

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1. *See* Hill's Adm'rs v. Mitchell, 5 Ark. 608, 610 (1844), *overruled in part by* Menifee's Adm'rs v. Menifee, 8 Ark. 9 (1847).

2. The issue of which states retain dower and curtesy and which ones do not is extensively discussed in Joslyn R. Muller*, Haven't Women Obtained Equality? An Analysis of the Constitutionality of Dower in Michigan*, 87 U. DET. MERCY L. REV. 533, 555 (2010). I, therefore, decided not to replicate this work. Ms. Muller's article points out that the status of dower and curtesy in some states can be confusing becuase some states have abolished curtesy but not dower, or have adopted an elective share concept that is very similar, if not identical, to dower and curtesy. *See id.* at 543. From Appendix A in her article, it appears that approximately sixteen states retain dower and curtesy in some form, *see id.* at 555, though one could argue for a higher or lower number depending on the interpretation given to how some states have handled the supposed abolition. As pointed out in Appendix A, of the states surrounding Arkansas, dower and curtesy have been abolished in Mississippi, Missouri, Tennessee, and Oklahoma. *See id.* Louisiana never had the concepts of dower and curtesy. *See id.* Texas does not have the concepts either, though it has a similar mechanism for homestead property. *See id.*

3. *See infra* Parts IV, V.

4. *See infra* Part VI.

curtesy in Arkansas.[5] For instance, the study discusses potentially significant findings such as:

> (i) A non-titled spouse joined a deed to release his or her dower or curtesy in 18.6% of conveyances;
>
> (ii) A woman is two and a half times (2.5x) more likely to not have legal title to her husband's property than a man is to not have legal title to his wife's property; and
>
> (iii) Women are more likely to use a risky method of releasing dower rather than a legally safer method used more frequently by men to release curtesy.[6]

Statistics like these might help the Arkansas General Assembly decide the fate of dower and curtesy in Arkansas. The Arkansas General Assembly, hopefully with the aid of these statistics, must decide whether the thousand-year-old concepts of dower and curtesy still have a legitimate role to play in Arkansas's legal system or whether they are concepts that need to be consigned to history.

As a preliminary drafting note, throughout this article I often refer just to "dower" when the reference may be equally applicable to curtesy. Since Act 714 of 1981, which will be discussed in greater detail below, Arkansas treats dower and curtesy exactly the same with the only distinction being that dower refers to the wife's interest and curtesy refers to the husband's interest.[7] In other words, today, the only distinction between dower and curtesy is one of grammar. Another reason for the reference simply to "dower" instead of "dower and curtesy" is that the vast majority of the case law concerns an interpretation of a wife's dower interest. As of the writing of this article, there are 1,389 Arkansas cases including the word "dower."[8] Of these cases, only 337 Arkansas cases also include the word "curtesy."[9] In contrast, only 80 Arkansas cases include the word "curtesy" and exclude the word "dower."[10] In other words, nearly 62% of the cases only concern dower and fewer than 6% are just curtesy cases.

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5. *Id.*
6. *Id.*
7. *See* ARK. CODE ANN. §§ 28-11-101 to -405 (Repl. 2012 & Supp. 2015).
8. This result derives from a WestlawNext search in the database "Arkansas" for cases containing the word "dower" that was conducted on December 4, 2015.
9. This result derives from a WestlawNext search in the database "Arkansas" for cases containing both the word "dower" and "curtesy" (advanced: dower & curtesy) that was conducted on December 4, 2015.
10. This result derives from a WestlawNext search in the database "Arkansas" for cases containing the word "curtesy," but excluding the word "dower" (advanced: curtesy % dower) that was conducted on December 4, 2015.

II. THE ORIGINS

Dower and curtesy are extremely old legal doctrines. The concept of dower was enshrined in English common law more than eight hundred years ago through the seventh clause of the Magna Carta, which reads as follows in modern translation:

> A widow, after the death of her husband, is immediately and without any difficulty to have her marriage portion and her inheritance, nor is she to pay anything for her dower or her marriage portion or for her inheritance which her husband and she held on the day of her husband's death, and she shall remain in the chief dwelling place of her husband for forty days after her husband's death, within which time dower will be assigned her if it has not already been assigned, unless that house is a castle, and if it is a castle which she leaves, then a suitable house will immediately be provided for her in which she may properly dwell until her dower is assigned to her in accordance with what is aforesaid, and in the meantime she is to have her reasonable necessities (estoverium) from the common property. As dower she will be assigned the third part of all the lands of her husband which were his during his lifetime, save when she was dowered with less at the church door.[11]

The doctrines of dower and curtesy have manifested themselves in many ways over the last millennia, even appearing in such revered works as *The Canterbury Tales*.[12] When Geoffrey Chaucer describes the characters in the General Prologue to his late 1300's masterwork, he describes the Friar as:

> A FRIAR there was, a wanton one and merry,
> A Limiter, a very jovial man.
> In all the friars' four orders none that can
> Lead a discussion in fairer language.
> And he had arranged many a marriage
> Of young women, granting each a dower.[13]

Arkansas law imported the concepts of dower and curtesy from English common law by virtue of the state's Reception Statute, which states:

> The common law of England, so far as it is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the

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11. *Featured Document: The Magna Carta*, cl. 7 (Nicholas Vincent trans.), NAT'L ARCHIVES & RECORDS ADMIN., http://archives.gov/exhibits/featured_documents/magna_carta/translation.html (last visited Nov. 13, 2015).

12. *See* Geoffrey Chaucer, The Canterbury Tales: General Prologue (A.S. Kline trans.), http://www.poetryintranslation.com/PITBR/English/CanterburyTalesI.htm.

13. *Id.*

> defects of the common law made prior to March 24, 1606, which are applicable to our own form of government, of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States or the Constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the General Assembly of this state.[14]

The Supreme Court of Arkansas recognized dower as part of the state's common law at least as early as 1844 when the court gave a recitation of the concept's history and application as understood by the court:

> It is difficult to trace the true origin of dower, but all writers admit it to be of great antiquity. It is probable that it first grew out of the customs of the northern nations, who subdued the Roman Empire; and that its introduction into the jurisprudence of England was borrowed from the usages of the Germans or Danes. Like every other species of property, dower underwent a great many changes. It was, however, finally established and confirmed by the law of *Magna Charta*; and from that time to the present the term "dower" has had a legal and technical meaning, which in England it still retains.
>
> Dower at the common law exists where a man seized of an estate of inheritance, dies in the life time of his wife, in which case she is entitled to be endowed, during her natural life, of one-third part of all his lands and tenements, whereof he was seized at any time during the coverture, and which any issue she might have had, could by possibility have inherited. 2 *Black. Com.*, 129; 4 *Kent. Com.*, 35. The reason of this allowance is said to be for the maintenance of the wife and the support and education of her younger children. To constitute a tenancy in dower three things are necessary. 1st. marriage. 2d, seizin of the husband. And, 3d, his death. A seizin in law, as well as in deed, entitled the wife to dower upon the principle that she had no power to reduce her husband's lands into actual possession. The right of dower attached upon all marriages not absolutely void, and existing at the death of the husband. The seizin of the husband for the mere transitory instant, where the estate passes in and out of him at the same time, or where he has a mere naked trustee without any beneficial interest in the inheritance will not entitle the wife to dower.
>
> A widow gave nothing for her dower; and she was allowed to tarry in the mansion house forty days after the death of her husband, and in that time her dower was to be assigned, and during her continuance a reasonable support was allowed her out of the estate.[15]

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14. ARK. CODE ANN. § 1-2-119 (Repl. 2008).

15. Hill's Adm'rs v. Mitchell, 5 Ark. 608, 610 (1844), *overruled in part by* Menifee's Adm'rs v. Menifee, 8 Ark. 9 (1847).

Common law defined curtesy as, "an estate for life which the husband acquires upon the birth of lawful issue of the marriage born alive and capable of inheriting, in the lands or tenements of which his wife is seized in fee simple, or in tail."[16] Common law further provided, "[t]o entitle a husband to an estate by the curtesy it is necessary that the wife be seised[17] during coverture of an estate of inheritance in land."[18]

III. THE CONSTITUTIONAL CRISIS

At common law and as originally codified in Arkansas, dower and curtesy provided different rights to wives than husbands. At common law, curtesy differed from dower in six principal respects:

> (1) curtesy entitled the husband to an estate in all the wife's inheritable freeholds, whereas dower entitled the widow to an interest in only one-third of the husband's; (2) actual seisin on the part of the wife was required for curtesy, whereas seisin in law was sufficient for dower; (3) curtesy attached to the wife's equitable as well as to her legal interests, whereas dower was confined to the husband's legal estates; (4) a requirement for curtesy was the birth of issue, whereas there was no such requirement for dower; (5) before the wife's death curtesy was a present estate, whereas dower was only a protected expectancy before the husband's death; (6) since curtesy attached to all the wife's lands, rather than to a fractional share, there was no necessity for assignment, as in the case of dower.[19]

In 1981, the Supreme Court of Arkansas addressed the constitutionality of the dower and curtesy statutes as they then existed.[20] In *Stokes v. Stokes*, the administrator of Mr. Carl Stokes' estate, the step-son of the widow, challenged the constitutionality of the dower laws on the basis that they violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.[21] At that time, a dower interest conferred more rights on a wife than curtesy conveyed on a husband.[22] Specifically, the law at the time conveyed the following advantages on women:

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16. Sadler v. Campbell, 150 Ark. 594, 605, 236 S.W. 588, 592 (1921).

17. The term seisin can be spelled either as "seisin" or "seizin". For purposes of this article, I use the spelling "seisin" except for quotes where the alternate spelling is used. *Seisin*, BLACK'S LAW DICTIONARY (10th ed. 2014).

18. Owens v. Jabine, 88 Ark. 468, 472, 115 S.W. 383, 384 (1908).

19. George L. Haskins, *Curtesy in the United States*, 100 U. PA. L. REV. 196, 197 (1951).

20. *See* Stokes v. Stokes, 271 Ark. 300, 613 S.W.2d 372 (1981).

21. *Id.* at 301, 613 S.W.2d at 374.

22. *See id.* at 303–05, 613 S.W.2d at 374–76.

> 1. In the context of a spouse electing against the will, the law gave a woman a dower interest plus her homestead rights and statutory allowances while a man only received a curtesy interest in such circumstances and not the homestead rights and statutory allowances.[23]
>
> 2. The law gave a husband a curtesy interest only in the land the wife owned at her death so a wife could dispose of her property at any time during the marriage without her husband's consent.[24] A wife, on the other hand, had a dower interest in all property held by the husband at any time during the marriage meaning that a husband could not dispose of his property during the marriage without the wife's consent.[25]
>
> 3. The law gave a wife a dower interest in one third of her husband's personal property owned at his death but gave a husband no such right.[26]
>
> 4. The law gave a wife a dower interest in bonds, bills, notes, books, accounts and evidence of debt which the husband owned during the marriage meaning that the wife's consent was required to dispose of the instruments. There was no parallel right for men.[27]

The Supreme Court of Arkansas noted that the Supreme Court of the United States consistently struck down all gender based laws unless the laws "serve a legitimate governmental purpose and are reasonably designed to accomplish that purpose."[28] The court found no legitimate basis for the discrimination in these laws and declared them unconstitutional.[29]

The same day as the *Stokes v. Stokes* decision, the Supreme Court of Arkansas issued a companion decision in *Hess v. Wims*.[30] In *Hess*, Hoyt Wims, his father, and his two sisters entered into an apparently unwritten agreement whereby Hoyt was given the proceeds of his mother's estate to purchase fifty-seven acres in St. Francis County, the place where the children had grown up.[31] Under the arrangement, Hoyt agreed to let the father live on the property until his death then leave the land to his two sisters in his will.[32] Hoyt prepared a will leaving all of his property to his sisters.[33] After his father died, Hoyt was diagnosed with a terminal illness.[34] During

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23. *Id.* at 303–05, 613 S.W.2d 372 at 374–76.
24. *Id.*, 613 S.W.2d 372 at 374–76.
25. *Id.*, 613 S.W.2d 372 at 374–76.
26. *Stokes*, 271 Ark. at 303–05, 613 S.W.2d 372 at 374–76.
27. *Id.*, 613 S.W.2d 372 at 374–76.
28. *Id.* at 303, 613 S.W.2d 372, 375.
29. *See id.* at 304–05, 613 S.W.2d at 375–76.
30. Hess v. Wims, 272 Ark. 43, 613 S.W.2d 85 (1981).
31. *Id.* at 45, 613 S.W.2d at 85.
32. *Id.*, 613 S.W.2d at 85.
33. *Id.*, 613 S.W.2d at 85.
34. *Id.*, 613 S.W.2d at 85.

the last year of his life, Hoyt married Geraldine Wims.[35] After Hoyt's death, Geraldine elected to take against the will and petitioned the probate court for her statutory allowances, dower, and homestead interests.[36] Hoyt's sisters challenged the law that allowed Geraldine to elect against the will and claim a dower interest as unconstitutional, using the same arguments asserted in *Stokes* that the law violated the Equal Protection Clause by treating males and females differently.[37]

The court in *Hess* stated that it was ruling the dower laws unconstitutional in the *Stokes* decision being announced the same day but provided additional explanation for its rationale.[38] The court said, "[d]ower is an inchoate right, while curtesy may be defeated."[39] The court further stated that "[n]o valid compensatory purpose or justifiable governmental function can be found to sustain this gender-based discrimination."[40] The court said that the rationale for the discriminatory nature of the law at the time was "the presumption that all males are superior to females in financial matters."[41] The court noted several Supreme Court of the United States decisions invalidating laws based on this presumption, including the *Wengler v. Druggist Mutual Ins. Co.* decision from the previous year, which invalidated a Missouri workers' compensation law denying a widower benefits on a wife's work-related death while granting a widow benefits.[42] The Supreme Court of Arkansas recognized that dower laws had been favored provisions of Arkansas law for nearly 150 years but said, "it is now impermissible to presume that all females are inferior to males in financial matters."[43]

In a separate case decided later the same year as the *Stokes* and *Hess* decisions, the Supreme Court of Arkansas struck down another of the then-existing dower laws.[44] That law allowed a wife to take dower and elect against a will regardless of when the husband executed the will but gave the husband the same right only if the wife executed the will before the marriage.[45]

Two years later, the Supreme Court of Arkansas issued a slight revision to the *Stokes* decision in the case of *Beck v. Merritt*.[46] In *Stokes*, the court

35. *Id.*, 613 S.W.2d at 85.
36. *Hess*, 272 Ark. at 45, 613 S.W.2d at 85
37. *See id.* at 45–46, 613 S.W.2d at 85–86.
38. *See id.* at 46–48, 613 S.W.2d at 86–87.
39. *Id.* at 46, 613 S.W.2d at 86.
40. *Id.*, 613 S.W.2d at 86.
41. *Id.*, 613 S.W.2d at 86.
42. *Hess*, 272 Ark. at 46, 613 S.W.2d at 86 (citing Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 149 (1980)).
43. *Id.* at 48, 613 S.W.2d at 87.
44. *See* Hall v. Hall, 274 Ark. 266, 266–67, 623 S.W.2d 833, 834 (1981).
45. *See id.*, 623 S.W.2d at 834.
46. *See* Beck v. Merritt, 280 Ark. 331, 335, 657 S.W.2d 549, 551 (1983).

invalidated the entire statute that gave widows the right to elect against the will and claim a dower interest.[47] In intestate situations, however, both husband and wife received the equivalent interest under the law that existed at the time.[48] Because there was no gender-based difference in the operation of the statute in the intestate situation, the court clarified its ruling in *Stokes* to preserve the validity of the previously stricken statute.[49] The court reaffirmed this decision again the following month in *Dent v. Rose*.[50]

The Arkansas General Assembly responded to *Stokes* and *Hess* by adopting Act 714 of 1981 ("Act").[51] The Act remains in effect today and is discussed at length in the following section. It should be noted that the Act is not retroactive, though this likely has little or no consequence now that we are thirty-five years removed from the adoption of the Act.[52]

IV. THE ACT

The Act overhauled the system of dower and curtesy in Arkansas in the wake of *Stokes* and *Hess* to make the application of both equal and gender neutral.[53] While the Act completely overhauled dower and curtesy and fixed the constitutional problems, the Act preserved some concepts from older acts and retained significant portions of earlier versions of the Act.[54] Consequently, much of the case law discussed herein interpreting the Act predates the Act, in many instances by well-over a century, but those interpretations were of nearly identical statutory language. As such, those decisions remain good law to this day.

A. The Relationship to Common Law

It is important to focus on the relationship between the Act and common law. Dower is both an equitable and statutory right.[55] In interpreting predecessors of the Act, the Supreme Court of Arkansas has been careful to note that the statutory provisions expand or "enlarge" the common law right of dower rather than supplant the common law.[56] In other words, "[t]he term dower has a common law meaning, importing an estate for life, not to be

47. *See id.*, 657 S.W.2d at 551.
48. *See id.*, 657 S.W.2d at 551.
49. *See id.*, 657 S.W.2d at 551.
50. Dent v. Rose, 281 Ark. 42, 42–43, 661 S.W.2d 361, 361 (1983).
51. ARK. CODE ANN. §§ 28-11-101 to -405 (Repl. 2012 & Supp. 2015).
52. Hall v. Hall, 274 Ark. 266, 268, 623 S.W.2d 833, 834 (1981).
53. *See* ARK. CODE ANN. §§ 28-11-101 to -405.
54. *See, e.g.*, *id.* § 28-11-306 (Repl. 2012).
55. *See* Johnson v. Johnson, 84 Ark. 307, 308, 105 S.W. 869, 870 (1907).
56. *See* Arbaugh v. West, 127 Ark. 98, 104, 192 S.W. 171, 173 (1917).

controlled without a contrary intention clearly manifested by the statute."[57] This is a critical distinction because it means that all common law rights and interpretations of those rights survive except to the extent such may be in direct conflict with the Act.[58] This also means that a repeal of the Act would not necessarily eliminate the common law rights unless the General Assembly specifically abolished the common law rights. Alternatively, if the General Assembly repealed the Act without abolishing the common law rights, the Supreme Court of Arkansas might invalidate the common law rights as unconstitutional because those rights differ for men and women.

In *McGuire v. Cook*, the court outlined its approach to preserving common law principals in interpreting and applying the Act except to the extent of direct conflict.[59] At issue in the case was the question of the husband's seisin to the property being claimed by the widow.[60] The question was whether the statutory provisions regarding seisin abrogated common law requirements or interpretations of this requirement.[61] The court held, "[b]y this enactment [a predecessor of the Act] we do not think the Legislature intended to create in the widow an estate in her deceased husband's lands different in any essential from the estate of dower known at the common law, except as therein expressly provided."[62] The court also held, "[t]he same character of seisin that was required by the common law in the husband is required by our statute in order to entitle the widow to dower."[63]

B. Analysis of the Act and Interpretive Case Law

1. Arkansas Code Annotated Section 28-11-101. Definition, and Arkansas Code Annotated Section 28-11-102. Death of Spouse

The Act begins with a definitions section containing just one definition: "'endowed' means invested and shall apply both to dower and curtesy."[64] The statute then states the foundational principle:

> At the death of any surviving spouse who has dower or curtesy for life in land, the property shall descend in accordance with the will of the first

57. Brown v. Collins, 14 Ark. 421, 421 (1854).
58. *See, e.g.*, Stull v. Graham, 60 Ark. 461, 475, 31 S.W. 46, 50 (1895) (holding that the statutes "enlarge" the widow's common law quarantine rights).
59. *See* McGuire v. Cook, 98 Ark. 118, 135 S.W. 840 (1911).
60. *Id.* at 120, 135 S.W. at 841.
61. *Id.* at 121, 135 S.W. at 841.
62. *Id.*, 135 S.W. at 841.
63. *Id.* at 122, 135 S.W. at 841.
64. ARK. CODE ANN. § 28-11-101 (Repl. 2012).

> deceased spouse or, if the first spouse died intestate, then to descend in accordance with the law for the distribution of intestates' estates.[65]

2. Arkansas Code Annotated Section 28-11-201. Termination of Rights

The next section of the Act states:

> (a) No act, deed, or conveyance executed or performed by one (1) spouse without the assent of the other spouse, evinced by acknowledgment in the manner required by law, shall pass the estate of dower or curtesy.
>
> (b) No judgment, default, covin, or crime of one (1) spouse shall prejudice the right of the other spouse to curtesy or dower, or preclude either spouse from the recovery thereof, if otherwise entitled thereto.[66]

The United States District Court for the Western District of Arkansas summarized this particular section of the statute as standing for the principle:

> Ordinarily, when a married person sells real property, the conveyance thereof contains a relinquishment of the non-owner spouse's right of dower or curtesy. There is, however, no requirement that the non-owner spouse relinquish a dower or curtesy interest when property is conveyed by the spouse who owns it, and a conveyance without the appropriate release does not deprive the non-owner spouse of dower or curtesy with respect to the property in question.[67]

3. Arkansas Code Annotated Section 28-11-202. Alien as Native-Born Citizen

The next provision of the statute provides, "[t]he surviving spouse of an alien shall be entitled to dower in the estate of the deceased spouse in the same manner as if the alien had been a native-born citizen of this state."[68] This portion of the statute has never been subject to judicial interpretation, despite originating in 1939, but it is self-explanatory in that dower and curtesy rights are not reserved just to citizens.

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65. *Id.* § 28-11-102 (Repl. 2012).
66. *Id.* § 28-11-201 (Repl. 2012).
67. United States v. Fincher, Crim. No. 06-50064-001, 2009 WL 485411, at *2 (W.D. Ark. Feb. 26, 2009), *aff'd*, 593 F.3d 702 (8th Cir. 2010).
68. ARK. CODE ANN. § 28-11-202 (Repl. 2012).

4. Arkansas Code Annotated Section 28-11-203. Bar to Inchoate Rights—Time Limitation

The next provision of the statute, which is possibly one of the most functionally important parts of the statute, provides:

> (a) The inchoate right of dower or curtesy of any spouse in real property in the State of Arkansas is barred in all cases when or where the other spouse has been barred of title or of any interest in the property for seven (7) years or more and also in real property or interest conveyed by the husband or wife but not signed by the other spouse when the conveyance is made or has been made for a period of seven (7) years or more.
>
> (b)(1) This section shall affect the inchoate right of dower and curtesy of a spouse in real property in this state only where or when the husband or wife has been barred of title for seven (7) years or more, or when a conveyance by the husband or wife, without the signature of the other spouse, has been made for a period of seven (7) years or more.
>
> (2) However, this section shall not apply unless the instrument of conveyance by the husband or wife has been of record for at least seven (7) years.[69]

This provision is critical because it bars a spouse from asserting dower or curtesy more than seven years after the property is transferred without the spouse's joinder. In other words, if a husband conveys title without his wife's signature, the wife's inchoate dower interest goes away if the husband survives for at least seven years. The case of *Smith v. Smith* illustrates how this concept functions.[70]

In 1963, Mr. Ray Smith agreed to sell 72 acres of land to his brother, Mr. Conger Smith, for $5,490 based on an installment land sales contract that was to be paid out over two years.[71] Ray's wife did not sign the installment land sales contract.[72] Conger failed to make the required payments, but Ray accepted installments off-and-on through 1972.[73] In 1977, Conger, who remained in possession of the land, demanded to know the final pay-off so he could buy the land, though Ray testified that he considered the installment land sales contract void by the long passage of time.[74]

The trial court determined that the installment land sales contract was still in force subject to a remaining debt of $2,181.04 and ordered Ray to

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69. *Id.* § 28-11-203 (Repl. 2012).
70. Smith v. Smith, 268 Ark. 993, 597 S.W.2d 848 (Ark. Ct. App. 1980).
71. *Id.* at 995, 597 S.W.2d at 849.
72. *Id.*, 597 S.W.2d at 849.
73. *Id.*, 597 S.W.2d at 849.
74. *Id.* at 995–96, 597 S.W.2d at 849.

convey the land to Conger upon the payment of the balance.[75] Ray's wife, however, refused to sign and could not be required to do so.[76] The Arkansas Court of Appeals then faced the issue of what to do should Ray predecease his wife at some point.[77] The court had to determine if Ray's wife was already barred from asserting dower by the passage of more than seven years since Ray and Conger signed the installment land sales contract.[78] The court of appeals concluded, "[a] mere contract to convey does not cause the statute [that bars dower after seven years] to become operative."[79]

The court of appeals concluded the appropriate remedy would be to reduce the purchase price by the value of the dower interest that Ray's wife might someday be able to assert should Ray predecease her in fewer than seven years after the actual conveyance of title to Conger.[80] The court of appeals did not provide a formula for determining this but remanded the issue back to the trial court to determine the value.[81] The court of appeals also ordered that Ray be granted a lien on the property in the amount of such deduction with an order that Conger pay such amount to Ray in the event that the wife's inchoate dower interest terminates, which could be because of her predeceasing Ray or the passage of the seven years.[82]

The Supreme Court of Arkansas reached the same outcome in the 1942 case of *Sebold v. Williamson*, where the seller's wife refused to sign the deed after her husband entered into a contract to sell property.[83] The court determined that the purchase price should be abated by the value of Mrs. Sebold's dower interest, with Mr. Sebold retaining a lien against the property to recover such abatement from the purchaser in the event Mrs. Sebold's inchoate dower interest terminates without becoming vested.[84]

The United States District Court for the Western District of Arkansas also reached the same outcome in the case of *Fletcher v. Felker* but added an additional requirement regarding interest on the abated amount.[85] In *Fletcher*, Grace Fletcher refused to sign the deed that her husband had contracted to provide.[86] As with the other described cases, the court ordered the purchase price to be abated by the potential value of Mrs. Fletcher's incho-

75. *Id.* at 996, 597 S.W.2d at 849.
76. *See Smith*, 268 Ark. at 994, 597 S.W.2d at 848.
77. *See id.* at 996, 597 S.W.2d at 849.
78. *See id.* at 997, 597 S.W.2d at 850.
79. *Id.*, 597 S.W.2d at 850.
80. *Id.*, 597 S.W.2d at 850.
81. *Id.*, 597 S.W.2d at 850.
82. *Smith*, 268 Ark. at 997–98, 597 S.W.2d at 850.
83. Sebold v. Williamson, 203 Ark. 741, 742–43, 158 S.W.2d 667, 667 (1942).
84. *Id.* at 743–45, 158 S.W.2d at 668.
85. *See* Fletcher v. Felker, 97 F. Supp. 755 (W.D. Ark. 1951).
86. *Id.* at 756.

ate dower interest.[87] The court granted Mrs. Fletcher's husband a lien against the property to be paid the abated purchase price in the event Grace's inchoate rights terminated without vesting.[88] In the event Mrs. Fletcher's inchoate rights terminated without vesting, then the buyer was ordered to pay the abated purchase price plus 6% interest.[89]

5. Arkansas Code Annotated Section 28-11-204. Murder of Spouse—Effect

The statute voids dower and curtesy in the event that one spouse murders the other.[90] The statute provides the following:

> (a) Whenever a spouse shall kill or slay his or her spouse and the killing or slaying would under the law constitute murder, either in the first or second degree, and that spouse shall be convicted of murder for the killing or slaying, in either the first or second degree, the one so convicted shall not be endowed in the real or personal estate of the decedent spouse so killed or slain.
>
> (b) In the event that a decedent spouse under this section dies without a will, the descendents [sic] of the one so convicted shall not benefit from the estate of the decedent spouse unless the descendents [sic] of the spouse that committed the murder are also descendants of the decedent spouse.[91]

Part (a) of this statute has been the law since at least 1927 and has not changed since 1939, but part (b) was only recently added with the addition of Act 1019 of 2013.[92] This new provision prevents a homicidal spouse from benefiting his or her children, at least when the murdered spouse dies intestate, if those children are not also the children of the murdered spouse.[93] This is consistent with the long-established public policy that one should not profit from committing homicide.[94] This statute does not change the dower or curtesy rights of a surviving spouse in the event that a spouse commits suicide.[95]

An interesting, though sad, question raised by this statute is what happens in the case of a domestic murder/suicide. In *Luecke v. Mercantile Bank*

87. *See id.* at 764.
88. *Id.*
89. *Id.*
90. ARK. CODE ANN. § 28-11-204 (Supp. 2015).
91. *Id.*
92. *Id.*; Barnes v. Cooper, 204 Ark. 118, 122, 124, 161 S.W.2d 8, 10, 11 (1942).
93. *See* ARK. CODE ANN. § 28-11-204(b).
94. *See* Belt v. Baser, 238 Ark. 644, 648, 383 S.W.2d 657, 659 (1964).
95. *See* Phipps v. Wilson, 251 Ark. 377, 382, 472 S.W.2d 929, 932 (1971).

of Jonesboro, Mr. S. L. Simpson murdered his wife, Mrs. Nell Simpson, then tried to kill himself, succumbing the day after killing his wife.[96] The Supreme Court of Arkansas considered what, if any, effect this type of death had on the estates of the respective parties.[97] The court confirmed that Mrs. Simpson did not receive any dower rights since she predeceased her husband even though her husband intentionally caused her death.[98]

The most interesting case interpreting this statute is the unfortunate case of *Barnes v. Cooper*.[99] In this case, Mrs. Minnie Maude Cooper killed her husband, Mr. D. O. Cooper, then killed herself about thirty minutes later.[100] There were no children born of their marriage, though both had children from prior relationships.[101] Mr. Cooper's estate contained $2,478.93 in personal property, and Mrs. Cooper's family asserted that she was entitled to approximately half as her separate property, plus her one-third dower interest and $450 in statutory allowances.[102] After all of the deductions that Mrs. Cooper's children claimed, it left Mr. Cooper's children with just $344.65, which also had to be used to pay the expense of administering the estate.[103] The Supreme Court of Arkansas described this situation as leaving Mr. Cooper's children with "everything the hen laid except the egg."[104] For reasons not relevant to this article, the court determined that Mrs. Cooper was not entitled to half of the estate as her separate property or to a spousal allowance leaving the primary question before the court as to Mrs. Cooper's dower rights.[105]

The court had to decide if Mrs. Cooper was entitled to dower in light of killing her husband because she was not convicted of murder having never faced trial becuase she committed suicide just thirty minutes after the killing.[106] The court considered case law from several states and concluded that states with similar statutes require the spouse to be convicted before forfeiting dower.[107] The court observed,

> All the courts hold that a sane beneficiary who unlawfully and feloniously kills the insured cannot recover as beneficiary. But the courts [refer-

96. Luecke v. Mercantile Bank of Jonesboro, 286 Ark. 304, 305, 691 S.W.2d 843, 844 (1985).
97. *Id.*, 691 S.W.2d at 844.
98. *See id.* at 308, 691 S.W.2d at 846.
99. Barnes v. Cooper, 204 Ark. 118, 161 S.W.2d 8 (1942).
100. *Id.* at 119, 161 S.W.2d at 9.
101. *Id.*, 161 S.W.2d at 9.
102. *Id.*, 161 S.W.2d at 9.
103. *Id.* at 120, 161 S.W.2d at 9.
104. *Id.*, 161 S.W.2d at 9.
105. *See Barnes*, 204 Ark. at 121, 161 S.W.2d at 9–10.
106. *See id.*, 161 S.W.2d at 10.
107. *See id.* at 121–22, 161 S.W.2d at 10.

> ring to other state decisions] are divided as to whether the beneficiary, in such case, may share in the proceeds, which go to the estate, as heir or take dower as widow. As to the ordinary estate of a deceased spouse who was murdered by the other spouse who was convicted thereof, the legislature has said that such a spouse shall not be endowed. Having stated the conditions on which dower will be denied, it follows that, such conditions excepted, the spouse will be endowed in the real and personal property of the deceased spouse.[108]

Put another way, the court stated, "[s]ince Minnie Maude Cooper was not tried or convicted of murder for the killing of her husband, but committed suicide shortly thereafter, the above statute does not exclude her or her heirs from asserting dower in her husband's property."[109] Arguably, this outcome seems to violate the basic public policy that one should not profit from committing homicide.[110] The legislature, however, has had more than seventy years to modify the statute to change this outcome but has never decided to do so.

6. Arkansas Code Annotated Section 28-11-301. Third Part of Land

One of the most essential parts of the Act provides:

> (a) If a person dies leaving a surviving spouse and a child or children, the surviving spouse shall be endowed of the third part of all the lands for life whereof his or her spouse was seized, of an estate of inheritance, at any time during the marriage, unless the endowment shall have been relinquished in legal form.
>
> (b) A person shall have a dower or curtesy right in lands sold in the lifetime of his or her spouse without consent of the spouse in legal form against all creditors of the estate.[111]

This portion of the Act addresses two key issues: the allotment of dower when the decedent had children and the concept that dower is superior to creditors without the consent of the spouse[112] (though a later portion of the Act modifies this concept for premarital debts and purchase money debts)[113]. A subsequent portion of the Act deals with situations where the decedent did not have children.[114]

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108. *Id.* at 124, 161 S.W.2d at 11.
109. *Id.* at 123, 161 S.W.2d at 10.
110. *See* Belt v. Baser, 238 Ark. 644, 648, 383 S.W.2d 657, 659 (1964).
111. ARK. CODE ANN. § 28-11-301 (Repl. 2012).
112. *See id.*
113. *See id.* § 28-11-303 (Repl. 2012).
114. *See id.* § 28-11-307 (Repl. 2012).

Adopted children are treated exactly like natural children for the purpose of triggering this portion of the Act.[115] A question, though, is whether "child or children" extends to grandchildren in the scenario where the decedent leaves no surviving children but leaves grandchildren instead. The Supreme Court of Arkansas addressed this issue prior to the current Act and determined that grandchildren are treated as children in this scenario.[116] The Arkansas Court of Appeals addressed this question under the current Act and affirmed that grandchildren are still treated as children under this scenario.[117]

Per this provision of the Act, if the decedent had issue, then the surviving spouse's dower or curtesy interest is limited to one-third of all lands, of an estate of inheritance, seized during endowment.[118] This provision codifies the long-standing common law concept, summarized by the Supreme Court of Arkansas as follows:

> Dower at the common law exists where a man seised of an estate of inheritance dies in the lifetime of his wife, in which case she is entitled to be endowed, during her natural life, of one-third part of all his lands and tenements, whereof he was seised at any time during the coverture, and which any issue she might have had could by possibility have inherited.[119]

There are two critical concepts to determining where the dower vests: 1. Seisin is required; and 2. The land must be an estate of inheritance.[120]

A dower interest vests immediately upon the husband's death, but only to the extent the husband was seised at his death.[121] Seisin is a complicated topic worthy of its own discussion far larger than the scope of this article.[122] As the Supreme Court of Arkansas once noted, "[a] treatise might be written on sufficiency of seisin to sustain dower."[123] An 1876 decision by the court described the seising requirement by stating, "[s]eizin is either in deed, or in law; seizin in deed, is actual possession; seizin in law, the right to immediate possession. Unless such seizin existed during coverture there can be no dower, because it is an indispensable requisite to her right to dower, so de-

115. *See* Sanders v. Taylor, 193 Ark. 1095, 109–99, 104 S.W.2d 797, 798 (1937).

116. *See* Starrett v. McKim, 90 Ark. 520, 522–23, 119 S.W. 824, 825 (1909).

117. *See* GMAC Mortg. Corp. v. Farmer, 101 Ark. App. 113, 125, 270 S.W.3d 882, 890 (2008).

118. ARK. CODE ANN. § 28-11-301 (Repl. 2012).

119. Arbaugh v. West, 127 Ark. 98, 104, 192 S.W. 171, 173 (1917).

120. *See id.*, 192 S.W. at 173.

121. Maloney v. McCullough, 215 Ark. 570, 575, 221 S.W.2d 770, 772 (1949).

122. For a more detailed discussion of the concept of seisin, *see* Lynn Foster & J. Cliff McKinney, II, *Deed Covenants of Title and the Preparation of Deeds: Theory, Law, and Practice in Arkansas*, 34 U. ARK. LITTLE ROCK L. REV. 53, 58 (2011).

123. Pfaff v. Heizman, 218 Ark. 201, 204, 235 S.W.2d 551, 552 (1951).

clared by statute."[124] The law presumes that a decedent is seized of an estate that he or she possesses at death, unless proven otherwise, and possession is *prima facia* evidence of seisin.[125]

An estate of inheritance can apply to an equitable estate.[126] For instance, in *Fletcher v. Felker*, the wife was deemed to have a dower interest in lands where legal title was in the name of three of her husband's relatives but equitable title remained with her husband.[127] Holding an interest as a remainderman, though, does not qualify as an estate of inheritance for purposes of dower.[128] Likewise, an unvested reversion in land is not a sufficient estate for purposes of dower.[129] As a matter of law, a spouse does not hold a dower or curtesy interest in property held in a life estate.[130]

There exists a corollary to this, the concept that a husband cannot by any means deprive his wife of her dower interest in any personal property of which he is seised at his death, though he may dispose of such assets free of her interest at any time during his life.[131] The Supreme Court of Arkansas faced a unique question in this regard in *Hatcher v. Buford*.[132] Mr. T. A. Hatcher gave a substantial amount of bank stock to his nephew while he was on his deathbed.[133] Mr. Hatcher's widow asserted a dower interest in the stock, even though Mr. Hatcher conveyed it to his nephew during his lifetime, asserting that the stock transfer was a *donatio causa mortis*.[134] The court held that title to personal property transferred as a *donatio causa mortis* does not pass until the moment of death because the gift could be invalidated if the donor survives his illness.[135] As such, Mr. Hatcher remained seized of the stock at his death so his widow's dower interest attached.[136] The court concluded,

> Under our law, a man may deprive his children of their inheritance by his will if he names them. So, also, he may deprive them by a donatio causa mortis. But he cannot deprive the widow of her dower rights by either. And this for the reason, in both instances, that he dies "seised" of the property so conveyed. This, in our opinion, is the only consistent and

124. Tate v. Jay, 31 Ark. 576, 579 (1876).
125. Carnall v. Wilson, 21 Ark. 62, 68 (1860).
126. Fletcher v. Felker, 97 F. Supp. 755, 761 (W.D. Ark. 1951); *see also* Kirby v. Vantrece, 26 Ark. 368, 370 (1870).
127. *Fletcher*, 97 F. Supp. at 760.
128. Field v. Tyner, 163 Ark. 373, 376, 261 S.W. 35, 36 (1924).
129. McGuire v. Cook, 98 Ark. 118, 121, 135 S.W. 840, 841 (1911).
130. Evans v. Seeco, Inc., 2011 Ark. App. 739, at 6, 2011 WL 5974368, at *3.
131. *See* Hatcher v. Buford, 60 Ark. 169, 180, 29 S.W. 641, 644 (1895).
132. *See Hatcher*, 60 Ark. 169, 29 S.W. 641.
133. *Id.* at 173, 29 S.W. at 642.
134. *Id.* at 175, 29 S.W. at 642.
135. *Id.*, 29 S.W. at 643.
136. *Id.* at 177, 29 S.W. at 643.

> logical conclusion; for if the title passes during the donor's life, and he has the absolute right to dispose of his personalty as he pleases, which he has, how can it be said that the donee's rights are inferior to those of the widow, except upon the doctrine above enunciated?[137]

7. Arkansas Code Annotated Section 28-11-302. Election Involving Exchanged Lands

The next portion of the Act provides:

> If a person seized of an estate of inheritance in lands exchanges it for other lands, the surviving spouse shall not have curtesy or dower of both, but shall make an election to curtesy or dower in the lands given or of those taken in exchange. If the election is not evinced by the commencement of proceedings to recover curtesy or dower of the lands given in exchange within one (1) year after the death of the deceased spouse, the surviving spouse shall be deemed to have elected to take the curtesy or dower of the lands received in exchange.[138]

There is no case law interpreting this particular portion of the Act.

8. Arkansas Code Annotated Section 28-11-303. Rights Involving Mortgaged Land

A critical portion of the Act deals with the relationship between dower rights and the rights of mortgage holders.[139] This portion of the Act provides:

> (a) When a person seized of an estate of inheritance in land shall have executed a mortgage of the estate before marriage, the surviving spouse, nevertheless, shall be entitled to dower or curtesy out of the lands mortgaged as against every person except the mortgagee and those claiming under him or her.
>
> (b)(1) When a person shall purchase lands during coverture and shall mortgage his or her estate in the lands to secure the payment of the purchase money, the surviving spouse shall not be entitled to dower or curtesy out of the lands as against the mortgagee or those claiming under him or her, although he or she shall not have united in the mortgage. However, he or she shall be entitled to dower or curtesy as against all other persons.

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137. *Id.* at 180, 29 S.W. at 644.
138. ARK. CODE ANN. § 28-11-302 (Repl. 2012).
139. *Id.* § 28-11-303 (Repl. 2012).

> (2) When, in such a case, the mortgagee or those claiming under him or her, shall, after the death of the mortgagor, cause the land mortgaged to be sold, either under a power contained in the mortgage or by virtue of the decree of a circuit court and any surplus shall remain after the payment of the moneys due on the mortgage and the costs and charges of sale, then the surviving spouse shall be entitled to the interest or income of one-third (⅓) part of the surplus for life, as his or her curtesy or dower.
>
> (c) A surviving spouse shall not be endowed of lands conveyed to the deceased spouse by way of mortgage unless the deceased spouse has acquired an absolute estate therein during the marriage.[140]

Somewhat surprisingly, this portion of the Act is also nearly bereft of case law interpretation with no cases citing the law in the current form adopted by the legislature as part of the Act. Rather, the only references are to older versions of the law.[141] The *Stokes* case that is discussed at length elsewhere mentions the concept of the mortgage holder's rights but only in the context of the validity of the then-existing version of the law that was struck down as unconstitutional because of the disparate treatment of men and women.[142]

The other case interpreting this provision is the 1937 case of *Harris v. Mosley*.[143] In this case, Mr. Gilbert Walker, a widower, delivered a deed of trust on eighty acres to secure a $1,435.88 loan.[144] About a month after signing the deed of trust, Mr. Walker married Miss Lucy Ford.[145] In 1930, Mr. Walker, without his wife's joinder, increased the indebtedness to $1,935.88 and extended the term of the loan but did not modify the deed of trust.[146]

Mr. Walker died in 1933.[147] In 1935, the bank sued to foreclose the lien of the deed of trust but did not make the widow or Mr. Walker's minor son a party or serve either with process.[148] In 1936, the chancery court granted the foreclosure decree but then continued the case until service could be made on the minor child.[149] The minor child answered the suit through a guardian ad litem, but the court ordered the sheriff to dispossess the family from the

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140. *Id.*
141. *See* Stokes v. Stokes, 271 Ark. 300, 613 S.W.2d 372 (1981); Harris v. Mosley, 195 Ark. 62, 111 S.W.2d 563 (1937).
142. *See Stokes*, 271 Ark. at 305, 613 S.W.2d at 376.
143. *Harris*, 195 Ark. 62, 111 S.W.2d 563.
144. *Id.* at 63–64, 111 S.W.2d at 563.
145. *Id.* at 63, 111 S.W.2d at 563.
146. *Id.* at 64, 111 S.W.2d at 563.
147. *Id.*, 111 S.W.2d at 563.
148. *Id.*, 111 S.W.2d at 563–64.
149. *Harris*, 195 Ark. at 64, 111 S.W.2d at 564.

property.[150] Two days later, the widow entered her appearance and the bank amended its complaint requesting an order that any dower or homestead rights of the widow be foreclosed or barred.[151]

The Supreme Court of Arkansas considered the then-current version of the statute, which read, "[w]here a person seized of an estate of inheritance in land shall have executed a mortgage of such estate before marriage, his widow shall nevertheless be entitled to dower out of the lands mortgaged as against every person, except the mortgagee and those claiming under him."[152] This version of the statute is identical to the current version in substance, slight wording changes and the inclusion of a husband's curtesy interest notwithstanding.[153]

The court's decision is somewhat confusing as it also considered a statute of limitations issue, but the court held, because the debt was created before marriage:

> The widow acquired no rights in the land superior to those of the mortgagee, but took whatever rights she had in the land subject to the mortgage, and, as against the widow, the mortgagee had a right to foreclose the mortgage and bar her dower . . . . Her rights were subject to the mortgage existing at the time of the marriage, but any increase in the indebtedness secured by the mortgage made after the marriage would be void as against her because it is conclusively shown that she did not join in the mortgage, and, this being a homestead, no increase in the mortgage debt would be binding on her, unless she agreed to it and joined in the execution of a mortgage.[154]

In other words, the bank was superior to the widow as to the original $1,435.88 indebtedness but not as to the $500.00 increase made during the marriage.[155] The court, though, leaves a little doubt as to the outcome in future cases with the use of the phrase "this being a homestead" in the last sentence of the quoted passage.[156] Presumably, this outcome should be the same regardless of whether the property is homestead, though the court's phraseology leaves some doubt as to that question.

Of interesting note, this is the only portion of the Act that still uses the archaic term "coverture."[157] Black's Law Dictionary defines coverture as, "[t]he condition of being a married woman <under former law, a woman under coverture was allowed to sue only through the personality of her hus-

150. *Id.*, 111 S.W.2d at 564.
151. *Id.*, 111 S.W.2d at 564.
152. *Id.* at 65–66, 111 S.W.2d at 564.
153. *See id.*; ARK. CODE ANN. § 28-11-303 (Repl. 2012).
154. *See Harris*, 195 Ark. at 66, 111 S.W.2d at 564–65.
155. *Id.*, 111 S.W.2d at 564–65.
156. *See Harris*, 195 Ark. at 66, 111 S.W.2d at 564.
157. *See* ARK. CODE ANN. §§ 28-11-101 to -405 (Repl. 2012 & Supp. 2015).

band>."[158] An older version of Black's Law Dictionary added to the definition, "[s]ometimes used elliptically to describe the legal disability which formerly existed at common law from a state of coverture whereby the wife could not own property free from the husband's claim or control."[159]

As part of the clean-up of the dower and curtesy laws necessitated by *Stokes* and *Hess*, the General Assembly should have used the term "marriage" instead of coverture in (b)(1).[160] The General Assembly's use of a term that refers only to women conjures the equal protection concerns of *Stokes* and *Hess* and could give rise to a challenge. Given, however, the General Assembly's use of the pronouns "his or her" and "him or her," it appears the intent was to be gender neutral so a court would likely overlook the archaic term's literal meaning in favor of a more expansive interpretation that would preserve the constitutionality of this portion of the Act.[161]

9. Arkansas Code Annotated Section 28-11-304. Sales of Leases, etc.

The next provision of the Act provides:

> (a) If a person dies leaving a surviving spouse and a child or children, the surviving spouse shall be entitled, absolutely and in his or her own right, to one-third (⅓) of all money received from the sale of timber, oil and gas or other mineral leases, oil and gas or other mineral royalty or mineral sales, and to one-third (⅓) of the money derived from any and all royalty run to the credit of the royalty owners from any oil or gas well or to royalty accruing from the production of other mines or minerals in lands in which he or she has a dower, curtesy, or homestead interest, unless the surviving spouse shall have relinquished same in legal form.
>
> (b)(1) All persons, firms, partnerships, or corporations now engaged in the production of oil and gas or other minerals shall immediately withhold payments to the royalty interests until the rights of the surviving spouse are determined, as defined by this section, and shall thereafter pay the surviving spouse separately his or her one-third (⅓) part of all royalty accruing to the royalty interest unless he or she shall have relinquished the royalty interest in legal form.
>
> (2) In the sale of timber, the purchaser shall pay one-third (⅓) of the purchase price directly to the surviving spouse or his or her agent or attorney at the time of the execution or delivery of the deed.[162]

158. *Coverture*, BLACK'S LAW DICTIONARY (10th ed. 2014).
159. *Coverture*, BLACK'S LAW DICTIONARY (6th ed. 1990).
160. ARK. CODE ANN. § 28-11-303 (Repl. 2012).
161. *Id.*
162. *Id.* § 28-11-304 (Repl. 2012)

This portion of the Act, which dates back to Act 143 of 1945, does not have any interpretative case law.[163] One analogous issue that has been examined is applicability of dower and curtesy to growing crops.[164]

The Supreme Court of Arkansas addressed this question in the 1872 case of *Street v. Saunders*.[165] In this case, Mr. John Saunders executed a trust deed in favor of Mr. William Street granting Mr. Street security in Mr. Saunders' cotton crop to secure a loan from Mr. Street.[166] Mr. Saunders died before paying the debt, and his widow asserted a dower interest in the cotton.[167] The court concluded that the growing crop of cotton was subject to dower rights if the crop belonged to Mr. Saunders at his death.[168] The court, however, found that the trust deed used in this case to secure the loan actually conveyed fee ownership of the crop to Mr. Street so Mr. Saunders did not have an interest that could be subject to dower.[169]

The Supreme Court of Arkansas re-examined this issue in the 1998 case of *Webber v. Webber*.[170] In this case, Mr. Mark Webber owned farm land in Prairie County, Arkansas.[171] Mr. Webber deeded the property to his five children and reserved a life estate for himself.[172] Mr. Webber was married at the time of this conveyance, but his wife did not join the deed.[173] Mr. Webber filed a deed terminating his life estate a few months before his death.[174] After Mr. Webber's death, his wife asserted a dower interest in the farm land and the crop that was not harvested before he died.[175] The court affirmed the widow's dower interest in the farm land because she did not join in the execution of the deed as required by Arkansas Code Annotated section 28-11-201(a).[176] The court also affirmed the widow's dower rights in the crop that was growing at the time of his death.[177]

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163. *See id.*
164. *See* Street v. Saunders, 27 Ark. 554, 555 (1872).
165. *Street*, 27 Ark. 554.
166. *Id.* at 555.
167. *Id.* at 555–56.
168. *Id.* at 556.
169. *Id.* at 557.
170. Webber v. Webber, 331 Ark. 395, 962 S.W.2d 345 (1998).
171. *Id.* at 397, 962 S.W.2d at 346.
172. *Id.*, 962 S.W.2d at 346.
173. *Id.*, 962 S.W.2d at 346.
174. *Id.*, 962 S.W.2d at 346.
175. *Id.* at 398, 962 S.W.2d at 347.
176. *Webber*, 331 Ark. at 399, 962 S.W.2d at 347.
177. *Id.* at 401, 962 S.W.2d at 349.

10. Arkansas Code Annotated Section 28-11-305. Personal Estate

The next provision of the Act provides:

> If a person dies leaving a surviving spouse and a child or children, the surviving spouse shall be entitled, as part of dower or curtesy in his or her own right, to one-third (⅓) part of the personal estate whereof the deceased spouse died seized or possessed.[178]

Dower rights in personal property did not exist at common law and are entirely a creature of statute.[179] The Arkansas General Assembly extended the common law definition of dower to include personal property very early in the state's history, with case law interpreting the statutory extension of the doctrines of dower and curtesy into personal property arising as early as 1838, just two years after statehood.[180]

The major distinction between real and personal property for purposes of dower is that a spouse may dispose of his or her personal property without the inchoate dower rights remaining attached to the property even if the spouse does not consent to the transfer.[181] In other words:

> The wife, by marriage, has no such inchoate right of dower in the personal estate of her husband as she has in his real estate, and he may sell, mortgage or dispose of the same at his pleasure. Her right of dower in his personal estate does not accrue until his death, and only in such as he then owns.[182]

This also means that all liens secured by the personal property take precedence over the dower interest even if the spouse did not consent to the creation of the lien.[183] In other words, "the right of dower in personal property does not accrue until the decedent's death; the decedent may sell, mortgage or dispose of property at his pleasure."[184] As the Supreme Court of Arkansas said in a case involving the validity of a chattel mortgage as against a widow, "[h]er [the widow's] right to dower in his [the husband's] personal estate does not accrue until he dies, and a chattel mortgage execut-

178. ARK. CODE ANN. § 28-11-305 (Repl. 2012).

179. *In re* Estate of Thompson, 2014 Ark. 237, at 20, 434 S.W.3d 877, 888; Stull v. Graham, 60 Ark. 461, 476, 31 S.W. 46, 50 (1895).

180. *See* Mayo v. Ark. Valley Trust Co., 132 Ark. 64, 74, 200 S.W. 505, 508 (1917) (Smith, J., dissenting); Hill's Adm'rs v. Mitchell, 5 Ark. 608, 612–13, 614–15 (1844), *overruled in part by* Menifee's Adm'rs v. Menifee, 8 Ark. 9 (1847).

181. *See* Hewitt v. Cox, 55 Ark. 225, 236, 15 S.W. 1026, 1029, *modified on reh'g*, 55 Ark. 237, 17 S.W. 873 (1891).

182. McClure v. Owens, 32 Ark. 443, 444 (1877).

183. *Hewitt*, 55 Ark. at 236, 15 S.W. at 1029.

184. Casey v. Casey, No. CA98-900, 1999 WL 138783, at *6 (Ark. Ct. App. Mar. 10, 1999).

ed by him in his lifetime remains a valid lien after his death and takes precedence over the widow's dower."[185]

This seemingly conflicts with the general rule that states, "[t]he surviving spouse is entitled to dower without deduction for any debts, claims, or expense of administration."[186] The key is whether the item of personal property at issue was subjected to a lien prior to the decedent's death as opposed to an unsecured debt that might be satisfied out of the personal property. As the Supreme Court of Arkansas has said, "dower rights are (in the absence of certain special liens) superior to the claims of creditors."[187] Dower "in no way conflicts with the rights of the mortgagee or lienholder whose lien is prior and paramount to the dower interest in the lands."[188] The foreclosure of the lien, however, will not eliminate the dower right if the dower interest is prior to the lien.[189]

For instance, in a case concerning the priority of a vendor's lien on personal property relative to a wife's dower interest, the Supreme Court of Arkansas held:

> [T]he wife has no separate defense against the vendor's lien, for, if the husband is bound, she is bound too. In other words, the wife has no dower right as against a vendor's lien under any circumstances, and any defense to a suit is necessarily a common one between the husband and wife.[190]

Another major distinction between real and personal property for purposes of dower is the concept that personal property is governed by the law of the domicile state of the decedent while real property of the decedent is governed by the state where the real property is located.[191] For example, in *Gibson v. Dowell*, a widow entered an appearance in an ancillary probate occurring in an Arkansas court to petition for a dower interest in $118,209.03 of her husband's personal property.[192] The administrator of the estate objected on the grounds that the decedent was domiciled in Missouri at the time of his death.[193] The Supreme Court of Arkansas rejected the widow's claim, holding:

> But the succession to the personal property of an intestate is regulated by the law of his domicile, without regard to the actual *situs* of the property

185. McKinney v. Caldwell, 220 Ark. 775, 779, 250 S.W.2d 117, 119 (1952).
186. Stevens v. Heritage Bank, 104 Ark. App. 56, 61, 289 S.W.3d 147, 152 (2008).
187. Webb v. Smith, 40 Ark. 17, 25 (1882).
188. Less v. Less, 131 Ark. 232, 236, 199 S.W. 85, 86 (1917).
189. Roetzel v. Beal, 196 Ark. 5, 16, 116 S.W.2d 591, 596 (1938).
190. Bothe v. Gleason, 126 Ark. 313, 316, 190 S.W. 562, 563 (1916).
191. *See* Gibson v. Dowell, 42 Ark. 164, 166 (1883).
192. *Id.* at 165.
193. *Id.* at 165

> at the time of his death. It is considered that movables have no *situs*, but accompany the person of the owner; so that by a legal fiction they are always deemed to be in the place of his domicile. And the rights of the widow, of heirs and distributees, are determined by the intestate laws of the country where the deceased was domiciled.[194]

When allocating dower, the decedent's property is divided into two classes, real and personal, and the dower interest is applied to each independent of the other.[195] A deficiency of assets in one class cannot be made up out of the other class.[196] The Supreme Court of Arkansas has expounded on this to say that "the widow is entitled to one-third out of each kind or class of personal property of which her husband died seised and possessed."[197] For purposes of the phrase "seized or possessed" in this part of the Act, the Supreme Court of Arkansas has interpreted this to "mean simply ownership, which carries with it the actual possession, or a right to the immediate possession."[198]

Notably, this portion of the Act cannot be used to bootstrap a larger cut of the husband's estate for a widow just because the real property of which the husband was seised at the time of his death has been converted into personalty.[199] The case of *Atkinson v. Van Echaute* presented an interesting situation where the decedent's will directed that all real property be sold at his death and converted to cash.[200] The widow was only entitled to a one-third life estate in the real property because the decedent had children.[201] The administrator converted the real property into $4,825.00 cash as directed by the will.[202] The decedent also had $50.00 in personal property.[203] The widow then asserted that she was entitled to her one-third dower interest in all of the cash held by the administrator.[204] The other heirs, however, protested saying that her dower interest in the portion of the cash converted from the real property should be discounted based on the present value of her life estate.[205] The Supreme Court of Arkansas agreed with the heirs holding that the widow was not entitled to a full one-third share of the cash from the real property.[206]

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194. *Id.* at 166.
195. *See* Mayo v. Ark. Valley Trust Co., 132 Ark. 64, 73, 200 S.W. 505, 508 (1917).
196. *Id.*, 200 S.W. at 508.
197. *Ex parte* Grooms, 102 Ark. 322, 325, 143 S.W. 1063, 1064 (1912).
198. Hatcher v. Buford, 60 Ark. 169, 174–75, 29 S.W. 641, 642 (1895).
199. *See* Atkinson v. Van Echaute, 236 Ark. 423, 427, 366 S.W.2d 273, 275 (1963).
200. *Id.* at 424, 366 S.W.2d at 273.
201. *See id.* at 426, 366 S.W.2d at 275.
202. *Id.* at 424, 366 S.W.2d at 273, 274.
203. *Id.*, 366 S.W.2d at 273.
204. *Id.*, 366 S.W.2d at 274.
205. *See Atkinson*, 236 Ark. at 426–27, 366 S.W.2d at 275.
206. *Id.* at 426, 366 S.W.2d at 275.

Personal property is held by the administrator of an estate in trust for the surviving spouse to the extent of the spouse's dower or curtesy interest.[207] The dower interest includes any interest that is collected on the personal property between the time of death and the distribution of the assets to the widow.[208]

11. Arkansas Code Annotated Section 28-11-306. Financial Instruments

The next section of the Act provides:

> If any person shall die leaving a surviving spouse, the surviving spouse shall be allowed to take the same dower or curtesy in the bonds, bills, notes, books, accounts, and evidences of debt as the surviving spouse would be entitled to take out of the personal property or cash on hand of the deceased spouse.[209]

This section of the Act must be read as a corollary to the previous section granting dower in personal property. Dower was limited to real property at common law.[210] The legislature enlarged the common law early in Arkansas's statehood to encompass personal property.[211] This section clarifies that personal property includes bonds, bills, notes, books, accounts and evidences of debt for purposes of applying dower.[212]

This section of the Act would also seem to embrace possible financial claims related to a chose in action.[213] The case law is particularly conflicting in this area.[214] In *Lee v. Potter*, Mr. Charles Potter procured a life insurance policy during the life of his second wife.[215] The policy designated Mr. Potter's then-current wife as the primary beneficiary with his estate as his secondary beneficiary.[216] Mr. Potter remarried after the death of his second

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207. Crowley v. Mellon, 52 Ark. 1, 8, 11 S.W. 876, 877 (1889).
208. *See* Sharp v. Himes, 129 Ark. 327, 331, 196 S.W. 131, 132 (1917).
209. ARK. CODE ANN. § 28-11-306 (Repl. 2012).
210. Arbaugh v. West, 127 Ark. 98, 105, 192 S.W. 171, 173 (1917).
211. *Id.* at 104, 192 S.W. at 173.
212. ARK. CODE ANN. § 28-11-306.
213. Black's Law Dictionary defines a "chose in action" as:

> **1.** A proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort. **2.** The right to bring an action to recover a debt, money, or thing. **3.** Personal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit. — Also termed *thing in action*; *right in action.*

Chose in Action, BLACK'S LAW DICTIONARY (10th ed. 2014).

214. Interestingly, the Supreme Court of Arkansas ruled that the right of dower is itself a chose in action. *See* Carnall v. Wilson, 21 Ark. 62, 65 (1860).
215. Lee v. Potter, 193 Ark. 401, 402, 100 S.W.2d 252, 252 (1937).
216. *Id.*, 100 S.W.2d at 252.

wife.[217] Mr. Potter's widow claimed the entire amount of the policy, but the trial court awarded her one-third as her dower interest.[218] In affirming the trial court, the Supreme Court of Arkansas said, "[t]he proceeds of the policy were clearly a chose in action, and there can be no question that a widow is entitled to her dower interest in all choses in action which belong to her husband at the time of his death."[219]

The Supreme Court of Arkansas examined the *Lee* case almost seventy-five years later and decided the right to sue does not arise until after death and such a suit can only be brought by the personal representative of the deceased.[220] In *Bridges v. Shields*, the court distinguished *Lee* by saying that the life insurance policy at issue in that case could have been changed at any time prior to his death, which constituted a chose in action during the decedent's lifetime.[221] The insurance policy in *Lee* was "due and owing" to the estate at the moment of death, and the decedent "had the right to sue on that policy" during his lifetime.[222]

Even though the court concluded that the trial court reached the right result in the wrong way, the court did not expressly repudiate the trial court's position on the question of whether dower applies to a chose in action.[223] The court said, "[n]evertheless, the circuit court reached the right result in denying Bridges's claim under the dower and curtesy statute. Thus, we affirm the order of the circuit court, but we do so for the reason that Ms. Frazier never possessed a chose in action."[224] This phraseology is less than clear because it could be read as saying that the trial court's entire analysis was incorrect or could be read as merely repudiating the court's conclusion that a wrongful death action constitutes a chose in action.

Unfortunately, the Supreme Court of Arkansas in deciding the *Bridges* case obscured whether dower attaches to a chose in action. The court's decision seems to imply that dower applies to a chose in action because the court distinguished the decision in *Lee* on the basis that wrongful death is not a chose in action rather than overturning on the basis that dower does not apply to a chose in action. The confusion, though, arises in the way that the court addressed the trial court's conclusion that dower does not apply to a chose in action.[225] Earlier in the case, the court recited the trial court's con-

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217. *Id.*, 100 S.W.2d at 252.
218. *Id.* at 403, 100 S.W.2d at 253.
219. *Id.* at 405, 100 S.W.2d at 254.
220. Bridges v. Shields, 2011 Ark. 448, at 6, 8, 385 S.W.3d 176, 180, 181.
221. *Id.* at 8–9, 385 S.W.3d at 181.
222. *Id.*, 385 S.W.3d at 181.
223. *See id.* at 9, 385 S.W.3d at 181–82 (citing Dunn v. Westbrook, 334 Ark. 83, 85, 971 S.W.2d 252, 254 (1998)).
224. *Id.*, 385 S.W.3d at 182.
225. *See id.* at 4, 385 S.W.3d at 179.

clusion that dower does not extend to a chose in action.[226] The trial court cited two cases for this proposition from the mid-1800s: *Hill's Administrators v. Mitchell* and *Mulhollan v. Thompson*.[227]

To help shed some light on this question, it is helpful to look at the two mid-1800s cases relied on by the trial court in reaching the conclusion that dower does not extend to a chose in action. In the 1844 decision in *Hill's Administrators*, the court concluded, "[the widow] has no dower in the *choses in action* of her husband, though she has in his money or cash on hand."[228] The case, however, was apparently annotated with footnotes by the state's first court reporter, Albert Pike, who added a note at the end of the case saying, "[s]he is entitled to dower in the choses in action."[229] In 1853, though, in the other case cited by the trial court in *Bridges*, a different Supreme Court of Arkansas case reaffirmed the *Hill's Administrators* decision with regards to dower's applicability to a chose in action.[230] In *Mulhollan*, the court said a land warrant being claimed by a widow as part of her dower "was clearly a chose in action, to which the right of dower did not attach within the meaning of our statute, as held by this court in the case of *Hill's ad. v. Mitchell et al.*"[231]

12. Arkansas Code Annotated Section 28-11-307. Surviving Spouse with No Children

The next section of the Act provides:

> (a)(1) If a person dies leaving a surviving spouse and no children, the surviving spouse shall be endowed in fee simple of one-half (½) of the real estate of which the deceased person died seized when the estate is a new acquisition and not an ancestral estate and of one-half (½) of the personal estate, absolutely, and in his or her own right, as against collateral heirs.
>
> (2) However, as against creditors, the surviving spouse shall be invested with one-third (⅓) of the real estate in fee simple if a new acquisition, and not ancestral, and of one-third (⅓) of the personal property absolutely.

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226. *Bridges*, 2011 Ark. 448, at 4, 385 S.W.3d at 179 (citing ARK. CODE ANN. § 28-11-305 (Repl. 2004)).

227. *Id.*, 385 S.W.3d at 179.

228. Hill's Adm'rs v. Mitchell, 5 Ark. 608, 608 (1844), *overruled in part by* Menifee's Adm'rs v. Menifee, 8 Ark. 9 (1847).

229. *Id.* at 620 n.3.

230. Mulhollan v. Thompson, 13 Ark. 232, 235 (1853) (citing *Menifee's Adm'rs*, 8 Ark. 9; *Hill's Adm'rs*, 5 Ark. 608).

231. *Id.* (citing *Hill's Adm'rs*, 5 Ark. 608).

> (b) If the real estate of the deceased person is an ancestral estate, the surviving spouse shall be endowed in a life estate of one-half (½) of the estate as against collateral heirs and one-third (⅓) as against creditors.[232]

This section of the Act is the counterpart to sections 28-11-301 and 305, for situations where the deceased spouse left no descendants, though it is a deviation from the common law that was not recognized in Arkansas until 1891.[233] In this scenario, the dower or curtesy allocation increases from a one-third (1/3) life estate in real property to a one-half (1/2) fee simple interest.[234] The allocation of personal property also increases from a one-third (1/3) absolute interest to a one-half (1/2) absolute interest.[235] This increase, though, comes with two twists not found in the scenario where the decedent leaves behind descendants: (1) A reduction in the dower or curtesy interest as against creditors; and (2) The concept of ancestral estates versus new acquisitions.[236]

The reduction in the dower or curtesy interest as against creditors is relatively straightforward. If there is a creditor of the estate and the estate lacks sufficient funds to both satisfy the creditor and the dower interest, then the dower interest in both real and personal property reduces to a one-third (1/3) interest to allow the creditor to take more of the estate.[237]

It is more challenging to understand the difference between "ancestral" and a "new acquisition" as the statute fails to define either, and many cases discussing the concept offer no defining terms.[238] When real property is classified as ancestral and the deceased spouse had no descendants, then the surviving spouse loses all dower or curtesy interest in such property so that it can be inherited by the deceased spouse's blood relations and thereby remain in the family.[239] The Supreme Court of Arkansas observed:

> The purpose of the statute creating ancestral estates was to keep such estates in the line of the blood from whence they came, and blood must be the only consideration by which they are acquired, whether by devise or

232. ARK. CODE ANN. § 28-11-307 (Repl. 2012).
233. Barton v. Wilson, 116 Ark. 400, 405, 172 S.W. 1032, 1033 (1915).
234. Kendall v. Crenshaw, 116 Ark. 427, 429, 173 S.W. 393, 393 (1915).
235. Whitener v. Whitener, 227 Ark. 1038, 1039, 304 S.W.2d 260, 261 (1957).
236. *See* ARK. CODE ANN. §§ 28-11-301, 305, 307 (Repl. 2012).
237. *See* Arbaugh v. West, 127 Ark. 98, 104, 192 S.W. 171, 173 (1917); *see also* Britton v. Oldham, 80 Ark. 252, 253–54, 96 S.W. 1066, 1067 (1906).
238. *See e.g.*, Pfaff v. Heizman, 218 Ark. 201, 204–06, 235 S.W.2d 551, 553–54 (1951) (discussing ancestral estates without offering a definition of the term).
239. Martin v. Martin, 98 Ark. 93, 99, 135 S.W. 348, 351 (1911). *See generally* Browning v. Berg, 196 Ark. 595, 597, 118 S.W.2d 1017, 1018 (1938).

> gift. If the estate is obtained by any means other than descent, gift, or gratuitous devise, then it is a new acquisition.[240]

The significant reduction in the surviving spouse's estate makes defining what is "ancestral" critically important.[241] Black's Law Dictionary defines "ancestral estate" as, "[a]n estate that is acquired by descent or by operation of law with no other consideration than that of blood."[242] Black's Law Dictionary defines "ancestral property" as, "[p]roperty, esp. immovable property, that the present owner has acquired from forebears, esp. when the owner's family has held the property for several generations at least."[243] This second definition would seem to indicate that land would need to have been held by multiple successive generations before being considered ancestral, though Arkansas courts do not apply this requirement. In fact, it is possible for land to be classified as ancestral if the ancestor paid all of the consideration but had the land deeded directly to the deceased spouse.[244]

For instance, in *Barton v. Wilson*, the Supreme Court of Arkansas classified land as an ancestral estate because the deceased spouse inherited from his father and does not discuss whether the land had been inherited from earlier generations.[245] One of the cases that best describes the meaning of an ancestral estate is *Earl v. Earl*.[246] In *Earl*, there was a dispute between the widow and the brothers of the decedent over the classification of real property as an ancestral estate or a new acquisition.[247] Part of the question in this case was whether the designation of an ancestral estate traced to property acquired from the proceeds of an ancestral estate.[248] The court found, "[t]he property of the intestate does not possess an ancestral quality where it was acquired by the intestate with the proceeds of ancestral property, or where the property was acquired by exchanging ancestral property therefor."[249] The court also offered this exposition and definition:

> An "ancestral estate" means the identical estate that so comes to the intestate, and not an estate that may have been substituted for it. Where a child sells the estate which he inherits from his father, or which is given to him by his father, he can no longer be said to have the estate which

240. *Martin*, 98 Ark. at 99, 135 S.W. at 351.

241. *See generally* Hill v. Heard, 104 Ark. 23, 27, 148 S.W. 254, 255 (1912); McElwee v. McElwee, 142 Ark. 560, 563, 219 S.W. 30, 31 (1920).

242. *Ancestral Estate*, BLACK'S LAW DICTIONARY (10th ed. 2014).

243. *Ancestral Property*, BLACK'S LAW DICTIONARY (10th ed. 2014).

244. *See Hill*, 104 Ark. at 29–30, 148 S.W. at 256 (1912). *Cf.* Earl v. Earl, 145 Ark. 559, 564–65, 225 S.W. 289, 290–91 (1920).

245. Barton v. Wilson, 116 Ark. 400, 403–04, 172 S.W. 1032, 1032 (1915).

246. *Earl*, 145 Ark. 559, 225 S.W. 289.

247. *Id.* at 561, 225 S.W. at 289.

248. *Id.* at 563, 225 S.W. at 290.

249. *Id.*, 225 S.W. at 290.

> came to him from his ancestor, and the fact that he exchanged that estate with his brother for another estate which his brother received from their father cannot make any difference.[250]

Additionally, case law has answered the question of what happens when the deceased spouse purchased land from an ancestor or helped pay for the acquisition. The Supreme Court of Arkansas stated:

> [I]n order to constitute a gift from a parent to a child an ancestral estate within the meaning of our statute, the conveyance must be made entirely in consideration of blood and without any consideration deemed valuable in law; and, if such deed is executed partly for a valuable consideration, the estate acquired is a new acquisition.[251]

As an example, in *Beard v. Beard*, a father conveyed land to his son as a gift, but the land was encumbered by a mortgage that the son had to satisfy.[252] The fact that the son had to pay for part of the land converted it from being considered an ancestral estate to a new acquisition.[253] The Supreme Court of Arkansas further stated:

> The fact that the consideration was inadequate or was only in part a consideration for the conveyance does not alter the rule that an estate acquired under such circumstances is a new acquisition. Nor does the fact that the grantee had not in fact paid the consideration affect the application of the rule, for, the obligation being a valid one, it could be enforced against his estate.[254]

13. Arkansas Code Annotated Section 28-11-401. Erecting a Jointure

The next section of the Act provides:

> (a) When an estate in land shall be conveyed to a person and his or her intended spouse, or to the intended spouse alone, or to any person in trust for the person and his or her intended spouse, or in trust for the spouse alone, for the purpose of erecting a jointure for the intended spouse, and with his or her assent, the jointure shall be a bar to any right or claim for dower or curtesy of the spouse in any land of the other spouse.
>
> (b) The assent of the spouse to the jointure shall be evinced, if he or she is of full age, by his or her becoming a party to the conveyance by which

250. *Id.*, 225 S.W. at 290.
251. Martin v. Martin, 98 Ark. 93, 99, 135 S.W. 348, 351 (1911).
252. Beard v. Beard, 148 Ark. 29, 31, 228 S.W. 734, 735 (1921).
253. *Id.* at 32–33, 228 S.W. at 735.
254. *Id.* at 32, 228 S.W. at 735.

> it shall be settled or, if the spouse is an infant, by his or her joining with his or her father or guardian in the conveyance.
>
> (c) Any pecuniary provision that shall be made for the benefit of an intended spouse, and in lieu of dower or curtesy, if assented to by the intended spouse, as provided in this section, shall be a bar to any right or claim of dower or curtesy of the spouse in all lands of his or her spouse.[255]

Understanding this section, and the following sections of the Act, requires an understanding of the term "jointure," which is not in common legal usage today. Black's Law Dictionary defines "jointure" as:

> **jointure** (**joyn**-chər) (15c) **1.** *Archaic*. A woman's freehold life estate in land, made in consideration of marriage in lieu of dower and to be enjoyed by her only after her husband's death; a settlement under which a wife receives such an estate. • The four essential elements are that (1) the jointure must take effect immediately upon the husband's death, (2) it must be for the wife's own life, and not for another's life or for a term of years, (3) it must be held by her in her own right and not in trust for her, and (4) it must be in lieu of her entire dower. See dower. - **equitable jointure** (1803) A premarital arrangement for a woman to enjoy a jointure, accepted by the woman in lieu of dower. — Also termed *equitable dower.*
>
> **2.** A settlement under which a wife receives such an estate. — Also termed *legal jointure.*
>
> **3.** An estate in lands given jointly to a husband and wife before they marry. See JOINTRESS.[256]

The Supreme Court of Arkansas offered this definition of jointure: "[j]ointure is defined to be 'a competent livelihood of freehold for the wife of lands and tenements, to take effect in profit and possession presently after the death of the husband, for the life of the wife at least.'"[257] Put as simply as possible, a jointure is a payment or gift to a spouse that, if accepted, bars the spouse's dower or curtesy rights.[258]

To understand this section, it is also necessary to be mindful of the common law principle that:

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255. ARK. CODE ANN. § 28-11-401 (Repl. 2012).

256. *Jointure*, BLACK'S LAW DICTIONARY (10th ed. 2014).

257. Bryan v. Bryan, 62 Ark. 79, 84, 34 S.W. 260, 261 (1896) (quoting 2 Bl. Comm. 137).

258. *Id.* at 83–84, 34 S.W. at 261.

> Marriage, in the eye of the law, is held to be a valuable consideration, and the wife is regarded as a purchaser for a valuable consideration of all property which accrued to her by virtue of her marital rights . . . . Not only is marriage a valuable consideration, but it is the highest consideration recognized by law.[259]

There must be real consideration given to the spouse for the jointure to be valid.[260] For instance, in *McGaugh v. Mathis*, a man was alleged to have two wives and his first wife asserted a dower interest.[261] The court, however, found that the first wife had entered into a separation agreement and accepted a deed from her husband in lieu of dower, which acted as a jointure barring any potential claim to dower by this purported wife.[262]

In some situations, a court may apply an "equitable jointure."[263] This was the situation in one of the most important jointure cases, *Comstock v. Comstock*.[264] In *Comstock*, Mr. R. Comstock and Ms. Ella Babb, both of whom had children from previous marriages, entered into a prenuptial agreement containing the following clause:

> The said Ella Babb in lieu of dower and widow's right agrees to take that part of the estate which each child shall inherit, counting herself as a child, except as to homestead, only what is known as a child's part as her dowry of R. Comstock's estate should he die first.[265]

The spouses separated after approximately five years of marriage after they decided it was "impossible to live peaceably and quietly together."[266]

Mr. Comstock paid his wife $2,000 upon their separation, though the reason for the payment was hotly disputed during the ensuing case.[267] Mr. Comstock sued his wife after she refused to join a deed to release her dower claiming that the payment he made upon their separation should serve as a jointure.[268] The case involved conflicting testimony over the intent of the $2,000 payment, but the court ultimately believed Mr. Comstock's version, which was that the $2,000 was intended as a jointure.[269] The fact that $2,000 was equal to the portion of Mr. Comstock's estate that Mrs. Comstock was

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259. Bookout v. Bookout, 49 N.E. 824, 825 (Ind. 1898); *see also* Barton v. Wilson, 116 Ark. 400, 408, 172 S.W. 1032, 1034 (1915).
260. *See Bryan*, 62 Ark. at 83, 34 S.W. at 261.
261. McGaugh v. Mathis, 131 Ark. 221, 223, 198 S.W. 1147, 1147 (1917).
262. *Id.* at 226, 198 S.W. at 1148.
263. *See, e.g.*, Comstock v. Comstock, 146 Ark. 266, 271, 225 S.W. 621, 623 (1920).
264. *Id.*, 225 S.W. 621.
265. *Id.* at 268, 225 S.W. at 621.
266. *Id.* at 268, 269, 225 S.W. at 621, 622.
267. *See id.* at 269–70, 225 S.W. at 622.
268. *See id.* at 268, 225 S.W. at 622.
269. *Comstock*, 146 Ark. at 274, 225 S.W. at 623.

entitled to receive upon his death under the prenuptial agreement based on his then-current net worth particularly impressed the court to side with his version.[270] The court found that this arrangement was not technically a jointure, but "was nevertheless intended by the parties as a provision . . . in lieu of dower."[271] Accordingly, the court found that the contract operated as an equitable jointure.[272]

14. Arkansas Code Annotated Section 28-11-402. Election Involving Jointure

The next provision of the Act provides:

> If, before the marriage, but without a spouse's assent, or if, after the marriage, land shall be given or assured for the jointure of a spouse or a pecuniary provision shall be made for the spouse in lieu of dower or curtesy, the spouse shall make an election whether the spouse will take the jointure or pecuniary provision, or whether the spouse will be endowed of the lands of the other spouse. However, the spouse shall not be entitled to both.[273]

This portion of the Act has no case law discussing it. This portion is, however, closely tied to the previous provision. This portion of the Act solidifies the concept that a jointure can be made in lieu of dower, but the spouse has the right to elect dower in lieu of the offered alternative property.[274]

15. Arkansas Code Annotated Section 28-11-403. Election Involving Land, and Arkansas Code Annotated Section 28-11-404. Devise in Lieu of Dower or Curtesy

The next two sections of the Act must be considered together both because of their effect and their treatment in case law, which is usually to consider both sections together. The sections provide as follows:

> If land is devised to a spouse, or a pecuniary or other provision is made for a spouse by will in lieu of dower or curtesy, the spouse shall make an election whether he or she will take the land so devised, or the provision

270. *Id.* at 273–74, 225 S.W. at 623.
271. *Id.* at 271, 225 S.W. at 623.
272. *Id.*, 225 S.W. at 623.
273. ARK. CODE ANN. § 28-11-402 (Repl. 2012).
274. *See id.*

> so made, or whether he or she will be endowed of the lands of the other spouse.[275]
>
> If any spouse shall devise and bequeath to the other spouse any portion of his or her real estate of which he or she died seized, it shall be deemed and taken in lieu of dower or curtesy, as the case may be, out of the estate of the deceased spouse, unless the testator shall, in his or her will, declare otherwise.[276]

These sections allow a spouse to provide a bequest in lieu of dower or curtesy but give the surviving spouse the option to elect against such a devise and take dower or curtesy instead.[277] The Supreme Court of Arkansas has consistently interpreted this section in light of a guiding common law principle, that is:

> Under the common law, the testator will not be presumed to have intended a devise in his will to be a substitute for dower unless the claim of dower would be inconsistent with the will, or so repugnant to its provisions as to disturb and defeat the will. In other words, at common law it is held that, where the testator's intention was not apparent upon the will, the devise would be presumed to be in addition to dower.
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> . . . .
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> . . . [I]f a husband shall devise to his wife any portion of his real estate of which he dies seized, it shall be taken in lieu of dower out of the estate of such deceased husband unless such testator shall, in his will, declare otherwise. It will be noted that there is no such provision in our statutes with regard to personal property. The will under consideration bequeaths personal property and also contains a devise of real estate. It has been held under statutes like that just referred to above that a legacy of personal property will not put the widow to her election as in the case of a devise of real estate unless expressly made in lieu of dower.[278]

This principle can result in the need for a facts and circumstances analysis to determine the devising spouse's intent in the will, or, as the court has said in cases under this section of the Act, "[e]ach case must be determined upon its own circumstances."[279] For instance, in *U.S. Fid. & Guar. Co. v. Edmondson*, the devising spouse left his estate in trust for the benefit of his

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275. *Id.* § 28-11-403 (Repl. 2012).

276. *Id.* § 28-11-404 (Repl. 2012).

277. Costen v. Fricke, 169 Ark. 572, 574, 276 S.W. 579, 580 (1925); *see also* Atkinson v. Van Echaute, 236 Ark. 423, 425, 366 S.W.2d 273, 274 (1963).

278. Gathright v. Gathright, 175 Ark. 1130, 1133–34, 1 S.W.2d 809, 810 (1928); *see also* U.S. Fid. & Guar. Co. v. Edmondson, 187 Ark. 257, 261, 59 S.W.2d 488, 489 (1933); Kollar v. Noble, 184 Ark. 297, 302, 42 S.W.2d 408, 410 (1931).

279. Goodrum v. Goodrum, 56 Ark. 532, 507, 20 S.W. 353, 353 (1892).

wife during her lifetime with the residuary to go to the Catholic Church upon her death.[280] The couple had no children, and the wife was in "delicate health" and had previously been adjudicated insane.[281] In deciding that the bequest was intended to be in lieu of dower, the court considered that the couple had no children, that the real estate was not ancestral, that the will was "a very carefully prepared instrument," and that the husband had made "ample provision for the support of his wife."[282]

If the surviving spouse elects against the will to take dower instead, the will is deemed "destroyed" as to the surviving spouse.[283] The surviving spouse then takes as if the deceased spouse had died intestate.[284] An election, once made, is generally irrevocable absent a fraud upon the electing spouse.[285]

16. Arkansas Code Annotated Section 28-11-405. Conditions for Forfeiture

The final provision of the Act provides:

> Every jointure, devise, and pecuniary provision, in lieu of dower or curtesy, shall be forfeited by the spouse for whose benefit it shall be made, in the same cases in which the spouse would forfeit his or her dower or curtesy, as the case may be. Upon such a forfeiture, any estate so conveyed for jointure and every pecuniary provision so made shall immediately vest in the person, or his or her legal representatives, in whom they would have vested on the determination of the spouse's interest therein by the death of the spouse.[286]

This provision comes into play in situations such as those described in Arkansas Code Annotated section 28-11-204, and discussed in much greater detail in a previous section of this article. In other words, a jointure or devise in lieu of dower is void in the same circumstances where a dower or curtesy is void.

Interestingly, the only case citing this particular section of the Act deals with an alleged wrongful death, though that is not the context where the Supreme Court of Arkansas cited this statute.[287] In *Pickens v. Black*, the children of the deceased husband raised numerous defenses to the husband's

280. *Edmondson*, 187 Ark. at 259, 59 S.W.2d at 488–89.
281. *Id.* at 258, 260, 59 S.W.2d 488, 489.
282. *Id.* at 258, 261, 263, 59 S.W.2d 488, 489, 490.
283. Atkinson v. Van Echaute, 236 Ark. 423, 426, 366 S.W.2d 273, 275 (1963).
284. *Id.*, 366 S.W.2d at 275.
285. McEachin v. People's Nat'l Bank, 191 Ark. 544, 549–550, 87 S.W.2d 12, 14 (1935).
286. ARK. CODE ANN. § 28-11-405 (Repl. 2012).
287. *See* Pickens v. Black, 318 Ark. 474, 478, 885 S.W.2d 872, 874–75 (1994).

third wife taking an interest in his estate.[288] Among these was the argument that the widow was culpable in the husband's death "by neglecting him, depriving him of medical treatment, and allowing him to overdose himself on morphine."[289] The court dismissed this contention noting that, in the final three days of his life, the widow took the husband to the doctor twice, called a doctor for consultation once and brought a doctor to the house twice.[290] The court did not cite this portion of the Act in discussing the culpability claim, but the court cited it in a different scenario.[291] Specifically, the court described how the deceased husband's father had bequeathed land to the deceased's mother as a life estate with the deceased to take in fee simple upon his mother's death.[292] The deceased's mother, however, had elected against the will to take her dower interest, thus causing the deceased's remainder interest to vest immediately upon his mother's election.[293] The court cited this section of the Act to support this interpretation, though the court provided no explanation to further elucidate the application of the statute to this situation.[294]

V. SPECIAL COMMON LAW ISSUES

Dower and curtesy case law and precedent span nearly a millennium, so there is consequently a seemingly endless array of common law legal principles in existence. It would require a book to explore all of the potential issues and precedents, so just a few are explored below to give a feel for the variety of issues that come up in this area of the law.

A. Dower's Characteristics as an Interest in Real Estate

As the Supreme Court of Arkansas has noted, "[t]he inchoate right of dower during the life-time of [the spouse] is not an estate in land."[295] In other words, a dower interest, in both real and personal property, remains inchoate or contingent, until the spouse's death.[296]

A dower interest in real estate includes all lands, tenements and hereditaments.[297] A dower interest can give a party standing in a suit for refor-

288. *Id.* at 476, 885 S.W.2d at 873.
289. *Id.* at 481, 885 S.W.2d at 876.
290. *Id.* at 481–82, 885 S.W.2d at 876.
291. *Id.* at 478–479, 885 S.W.2d at 874–75.
292. *Id.* at 478, 885 S.W.2d at 874.
293. *Pickens*, 318 Ark. at 478, 885 S.W.2d at 874.
294. *See id.*, 885 S.W.2d at 875.
295. Smith v. Howell, 53 Ark. 279, 281, 13 S.W. 929, 929 (1890); *see also* Sanders v. Taylor, 193 Ark. 1095, 1098, 104 S.W.2d 797, 798 (1937).
296. Evans v. Seeco Inc., 2011 Ark. App. 739, at 6, 2011 WL 5974368, at *3.
297. Stull v. Graham, 60 Ark. 461, 474, 31 S.W. 46, 50 (1895).

mation of a deed.[298] Dower is not a transferrable right, though it can be waived or relinquished.[299] A life estate created by dower may be sold and conveyed just like any other estate in land.[300] Possession of property by a widow entitled to dower can lead to adverse possession against the heirs.[301]

The law views the contingent dower or curtesy interest of a spouse as an encumbrance on the title of the spouse seized of an estate.[302] A married person may relinquish his or her dower or curtesy interest by joining the spouse in any deed.[303] A dower interest is subject to the statute of frauds and cannot be released except in writing.[304] When a spouse joins a conveyance to release dower or curtesy, the spouse is effectively only releasing his or her encumbrance on the land.[305] Consequently, the grantee must look only to the grantor for defects in title.[306]

If the wife does not join the deed, then the principle is, "where the wife does not join in the conveyance the grantee of such conveyance or lease takes title burdened with the dower interest of the wife."[307] In the case of *Webb v. Smith*, Mr. Robert Tweedy died on April 6, 1870, leaving a widow.[308] Nearly ten years after his death, the administrator of Mr. Tweedy's estate sold land belonging to Mr. Tweedy to satisfy debts of the estate.[309] The administrator was granted permission by the probate court to sell the land free of the widow's dower interest with her share of the proceeds to be paid to her after the sale.[310] The widow challenged the sale on the basis that her dower interest was not presented to the probate court for adjudication when the administrator applied for permission to conduct the sale.[311] The Supreme Court of Arkansas agreed that the probate court improperly ordered the land sold without preserving the widow's dower interest.[312] Even though a third-party purchased the land at the sale, the court held that the buyer purchased subject to the widow's dower right.[313] The court held that it

298. *See* McFarlin v. Davidson, 2014 Ark. App. 173, at 2, 2014 WL 988958, at *1.
299. Hewitt v. Cox, 55 Ark. 225, 233, 15 S.W. 1026, 1028 (1981), *modified on reh'g*, 55 Ark. 237, 17 S.W. 873 (1891).
300. Horton v. Hilliard, 58 Ark. 298, 302, 24 S.W. 242, 243 (1893).
301. *See* Brinkley v. Taylor, 111 Ark. 305, 308–09, 163 S.W. 521, 522 (1914).
302. Smith v. Howell, 53 Ark. 279, 281, 13 S.W. 929, 929–30 (1890).
303. Stull v. Graham, 60 Ark. 461, 474, 31 S.W. 46, 50 (1895).
304. Carnall v. Wilson, 21 Ark. 62, 68 (1860).
305. *Smith*, 53 Ark. at 281, 13 S.W. at 929.
306. *Id.*, 13 S.W. at 929.
307. George v. George, 267 Ark. 823, 825, 591 S.W.2d 655, 656 (Ark. Ct. App. 1979).
308. Webb v. Smith, 40 Ark. 17, 18, (1882).
309. *Id.* at 19. The case does not explain why there was a nearly ten-year gap between Mr. Tweedy's death and the sale of the land. *See id.*
310. *Id.* at 21.
311. *Id.* at 25.
312. *Id.*
313. *Id.* at 18.

was immaterial that the buyer would have paid less had he known that the dower interest remained, stating:

> It was not the fault of the [widow], who was not personally a party to the order, and in no way to blame, or responsible for the form in which it was made. [The buyer] bid at his peril, and if he mistook the law it was his own fault and misfortune.[314]

B. Divorce and Adultery

To be entitled to dower or curtesy, the parties must be married at the time of death.[315] Dower or curtesy is barred if the parties divorce prior to death.[316]

The Supreme Court of Arkansas disagreed with the common law concept that a wife who divorced her husband because of his acts of adultery might continue to retain the right of dower, holding instead that a divorce, regardless of cause, terminates dower rights.[317] In deciding this question, the Supreme Court of Arkansas examined the New York case of *Wait v. Wait* where the New York court interpreted common law as preserving dower in the case of a husband's adultery.[318] The court found that the existence of alimony laws was sufficient to compensate a wronged wife without giving the ex-wife a continuing inchoate dower right.[319]

At common law, a wife who committed adultery forfeited her dower rights.[320] Her rights were only restored if the husband, without coercion from the church, willingly reconciled with her and allowed her to remain living with him.[321] This meant that the act of adultery could not have been concealed from the husband because it took an act of knowing, willing reconciliation to restore the wife's dower rights after the act of adultery.[322] Consequently, those who might benefit from the defeat of a wife's dower, such as a third-party purchasers of land who might be dispossessed by the dower, would be incentivized to "bring to public investigation scandals which those most interested had preferred to bury, or to pass unnoticed."[323]

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314. *Webb*, 40 Ark. at 25.
315. Wood v. Wood, 59 Ark. 441, 448, 27 S.W. 641, 642 (1894).
316. *Id.*, 27 S.W. at 642; *see also* Kendall v. Crenshaw, 116 Ark. 427, 430, 173 S.W. 393, 393 (1915).
317. *Wood*, 59 Ark. at 451, 27 S.W. at 643.
318. *Id.* at 450–51, 27 S.W. at 643; Wait v. Wait, 4 N.Y. 95, 109 (1850).
319. *See Wood*, 59 Ark. at 447–48, 27 S.W. at 642.
320. Grober v. Clements, 71 Ark. 565, 569–70, 76 S.W. 555, 557 (1903).
321. *Id.* at 570, 76 S.W. at 557.
322. *See id.*, 76 S.W. at 557.
323. Lakin v. Lakin, 84 Mass. (2 Allen) 45, 47 (1861).

The Supreme Court of Arkansas decided in the rather salacious case of *Grober v. Clements* that adultery in the absence of divorce does not terminate dower.[324] In *Grober*, Wilhelmina Clements, aged 35, married John Grober, aged 80.[325] Wilhelmina and John lived together for approximately four years before separating.[326] John twice attempted to divorce Wilhelmina but failed both times, the first for want of equity and the second for failure to obtain service on his inconstant wife.[327] Wilhelmina married another man in St. Louis a few months before John's death at age 95.[328] The court was unable to satisfactorily determine if Wilhelmina intentionally committed adultery and bigamy in her new marriage because she gave unclear testimony whether she believed herself to be divorced from John or believed him to be dead at the time of her new marriage.[329] The court, though, found it to be irrelevant whether Wilhelmina committed adultery, knowingly or otherwise.[330] Despite the protests of John's children by a previous marriage, the court awarded dower rights to Wilhelmina finding that Arkansas did not recognize the common law concept forfeiting dower in cases of adultery.[331] Further, the court found that Wilhelmina was entitled to dower even if she believed herself divorced from John and that only an actual legal divorce would terminate dower.[332]

The decision in *Grober* echoes in the more recent case of *Hamilton v. Hamilton*.[333] In *Hamilton*, Barrett Hamilton, who had two adult daughters from a previous marriage, and Virginia Hamilton filed for divorce in 1990.[334] Mr. Barrett Hamilton died during the pendency of the divorce.[335] Mr. Hamilton's daughters challenged the wife's attempt to elect against the will and claim her elective share, including dower, arguing, among other bases, that Mr. Hamilton was estranged from his wife and in the process of obtaining a divorce.[336] The court concluded that the relationship between the spouses was irrelevant because "the parties were still married under our laws

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324. *Grober*, 71 Ark. at 570–71, 76 S.W. at 557.
325. *Id.* at 565, 76 S.W. at 555.
326. *Id.* at 566, 76 S.W. at 555–56.
327. *Id.*, 76 S.W. at 556.
328. *Id.*, 76 S.W. at 556.
329. *Id.* at 569, 76 S.W. at 557.
330. *See Grober*, 71 Ark. at 569, 76 S.W. at 557.
331. *Id.* at 570, 76 S.W. at 557.
332. *Id.* at 570–71, 76 S.W. at 557; *see also* Kendall v. Crenshaw, 116 Ark. 427, 430, 173 S.W. 393, 393 (1915).
333. *See* Hamilton v. Hamilton, 317 Ark. 572, 879 S.W.2d 416 (1994).
334. *Id.* at 574, 879 S.W.2d at 417.
335. *Id.*, 879 S.W.2d at 417.
336. *Id.* at 577, 879 S.W.2d at 418.

when Hamilton died" and "[h]is widow's election to take against his will was appropriate, the pending divorce action notwithstanding."[337]

C. Attempts to Defeat a Spouse's Interest

One of the most recent and important dower cases in Arkansas is *In re Estate of Thompson* because it held that nonprobate assets are subject to the elective share under certain circumstances.[338] This case has now created significant uncertainty in this area of the law, leaving major unanswered questions about what nonprobate assets may be subject to dower and curtesy.[339] In *Estate of Thompson*, Anne Thompson elected against the will of her husband, Ripley Thompson.[340] In 2009, the decedent amended his *inter vivos* trust and his will to effectively eliminate his wife from his estate.[341] The decedent funded his trust with approximately $5.8 million and left his estate with $230,471 in personal property.[342] Mrs. Thompson sued seeking to invalidate the will or, in the alternative, elect against the will with the additional claim that her elective share, including dower, should include the assets of the trust.[343] After a trial, the circuit court determined that Mr. Thompson's 2009 will and trust deprived his wife of her marital rights to his property.[344] The circuit court determined that Mrs. Thompson was entitled to elect against the will and to include the trust estate within her elective share.[345]

On appeal, the Supreme Court of Arkansas recognized a settled principal:

> [U]pon a settlor's death, title to property held in an *inter vivos* revocable trust becomes irrevocable, such that, regardless of the nature of the rights retained over the assets by the settlor during his lifetime, the property ceases to be owned by the settlor upon his death and is removed from his or her estate.[346]

337. *Id.* at 577, 879 S.W.2d at 418–19.
338. *In re* Estate of Thompson, 2014 Ark. 237, 434 S.W.3d 877.
339. *See id.* For a more in depth discussion about this case, see Lucy Holifield, Note, *PROPERTY LAW—Upending the Familiar Tools of Estate Planning: Equity Renders Revocable Trusts Subject to the Arkansas Spousal Election*, 38 U. ARK. LITTLE ROCK L. REV. 75 (2015).
340. *Estate of Thompson*, 2014 Ark. 237, at 1, 434 S.W.3d at 878.
341. *Id.* at 2–3, 434 S.W.3d at 879.
342. *Id.* at 3, 434 S.W.3d at 879.
343. *Id.* at 2–3, 434 S.W.3d at 879.
344. *Id.* at 5, 434 S.W.3d at 880.
345. *Id.*, 434 S.W.3d at 880.
346. *Estate of Thompson*, 2014 Ark. 237, at 7, 434 S.W.3d at 881.

The court concluded that the principal of a trust becoming irrevocable might be overruled for certain limited purposes when equity dictates.[347] To support this, the court cited the countervailing principal:

> The general rule is that if a man or woman convey away his or her property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from such marriage, equity will avoid such conveyance, or compel the person taking it to hold the property in trust for or subject to the rights of the defrauded husband or wife.[348]

The court also asserted a long-standing principal to zealously protect "a spouse's marital rights in property, even when a spouse's assertion of those rights is contrary to a testator's right to control the distribution of his property upon his death."[349] The court acknowledged that the issue of extending the spouse's elective share to encompass a trust corpus in the case of a fraud was a case of first impression.[350] The court found the decedent's act in this situation constituted a fraud on the wife's marital rights.[351] The finding of fraud justified a limited exception to the general principal to allow the spouse's elective share to include the assets of the trust.[352]

To address the appellant's objections, the court acknowledged the principal announced in the case of *Estate of Dahlmann v. Estate of Dahlmann* that a testator "can devise his property however he chooses and can exclude or disinherit his spouse."[353] The court, though, pointed out that *Estate of Dahlmann* did not prevent the spouse from asserting her elective share including dower.[354] In *Estate of Dahlmann*, the court stated, "[a] spouse has the right to make a will which excludes a surviving spouse."[355] However, "[t]hat a surviving spouse may take against a will prevents any injustice that might result from the spouse's exercise of that right."[356] The court in *Estate of Thompson* interpreted *Estate of Dahlmann* to permit spousal disinheritance, but subject to the spouse's nearly absolute right to elect against the will and claim the elective share.[357]

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347. *Id.* at 9, 434 S.W.3d at 882.

348. *Id.*, 434 S.W.3d at 882 (quoting West v. West, 120 Ark. 500, 504, 179 S.W. 1017, 1018 (1915)).

349. *Id.* at 10, 434 S.W.3d at 883.

350. *Id.*, 434 S.W.3d at 883.

351. *Id.* at 7, 434 S.W.3d at 881.

352. *Estate of Thompson*, 2014 Ark. 237, at 9, 434 S.W.3d at 882.

353. *Id.* at 15–16, 434 S.W.3d at 885–86 (citing *Estate of Dahlmann v. Estate of Dahlmann*, 282 Ark. 296, 298, 668 S.W.2d 520, 521 (1984).

354. *Id.* at 16, 434 S.W.3d at 886.

355. *Estate of Dahlmann*, 282 Ark. at 298, 668 S.W.2d at 521.

356. *Id.*, 668 S.W.2d at 521.

357. *Estate of Thompson*, 2014 Ark. 237, at 16, 434 S.W.3d at 886.

The court's decision in *Estate of Thompson* drew a dissent from Justices Baker and Hart with the dissent authored by Justice Hart.[358] Justice Hart summarized her position by making the following statements:

> The majority holds that the assets of a revocable trust should be included in a decedent's estate for the purpose of calculating the elective spousal share. Because this holding is contrary to established Arkansas probate law and will thwart the use of many traditional estate-planning tools, I respectfully dissent.[359]

Justice Hart pointed out, "[d]ower in personalty is a creature of statute because, at common law, it attached only to real estate."[360] As a creature of statute, Justice Hart felt that the spouse's right to assert her elective share should be subservient to the plain language of the statute that the dower right vests only in the personal property held at death, which would not include the personalty in the trust.[361] Justice Hart felt that the majority's decision was so broad that "*any* transfer of personalty to a person other than the spouse would compel the conclusion that the spouse was defrauded by the transfer and deprived of her marital rights."[362] Justice Hart opined that she interpreted the majority's decision as extending to "any property or accounts held in pay on death, transfer on death, or co-ownership registration with the right of survivorship, as well as in the proceeds of insurance over which the decedent held an exercisable general power of appointment."[363]

D. Allotment of Dower and Curtesy

A widow entitled to dower does not make her an "heir."[364] The heirs at law of a deceased spouse have a duty to allot dower to the widow.[365] A widow does not have a duty to demand her dower as she may presume it will be preserved for her benefit.[366] The failure of the heirs to honor their duty to allot the dower does not start the statute of limitations against a widow to

358. *Id.* at 19, 434 S.W.3d at 888 (Hart, J., dissenting).
359. *Id.* at 19–20, 434 S.W.3d at 888 (Hart, J., dissenting).
360. *Id.* at 20, 434 S.W.3d at 888 (Hart, J., dissenting).
361. *Id.* at 21, 434 S.W.3d at 889 (Hart, J., dissenting).
362. *Id.* at 22, 434 S.W.3d at 889 (Hart, J., dissenting).
363. *Estate of Thompson*, 2014 Ark. 237, at 22, 434 S.W.3d at 889 (Hart, J., dissenting).
364. Sanders v. Taylor, 193 Ark. 1095, 1098, 104 S.W.2d 797, 798 (1937).
365. Maxwell v. Awtrey, 151 Ark. 85, 89, 235 S.W. 384, 385 (1921); *see also* Brinkley v. Taylor, 111 Ark. 305, 308, 163 S.W. 521, 522 (1914).
366. *See* Trimble v. James, 40 Ark. 393, 405 (1883).

assert her dower rights.[367] The widow has "a right to sue for and compel the setting aside to her of her dower interest until it has been assigned."[368]

The devisees of an estate are necessary parties to any proceedings for the allotment of dower.[369] The Supreme Court of Arkansas has held, "[i]n allotting dower it is not proper to deduct the homestead and assign the dower out of the remainder of the estate; the widow is entitled to dower in the whole estate."[370] The court has also held, "[w]hen a probate court finds the land cannot be divided in kind to effectuate dower rights, it may order the property rented and the rental divided, or it may order the property sold and the proceeds divided."[371]

E. Special Lien and Foreclosure Considerations

A foreclosure decree does not terminate a spouse's dower or curtesy rights unless rights are specifically made an issue in the foreclosure case.[372] The widow does not have equity of redemption, but her dower right is paramount to the title of the mortgagee in some instances.[373] In the case of foreclosure sales by the state for non-payment of taxes, dower will be lost after the redemption.[374] A dower interest can supersede federal tax liens in some situations.[375]

As a general rule:

> Title to real estate of an intestate vests in his heirs at law upon his death, subject to the widow's dower and sale for payment of debts, preservation or protection of assets of the estate, the distribution of the estate or any other purpose in the best interest of the estate.[376]

The widow's dower interest is "subject to the payment of a just proportion of the indebtedness."[377] A widow has no right to direct an executor to redeem land subject to a lien.[378] The Supreme Court of Arkansas has held:

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367. Webb v. Smith, 40 Ark. 17, 23–24 (1882); *see also Brinkley*, 111 Ark. at 308, 163 S.W. at 522.

368. Bradham v. United States, 287 F. Supp. 10, 16 (W.D. Ark. 1968).

369. Jameson v. Davis, 124 Ark. 399, 402–03, 187 S.W. 314, 315 (1916).

370. Horton v. Hilliard, 58 Ark. 298, 303, 24 S.W. 242, 244 (1893).

371. Webber v. Webber, 331 Ark. 395, 399, 962 S.W.2d 345, 348 (1998).

372. *See* Fourche River Lumber Co. v. Walker, 96 Ark. 540, 545, 132 S.W. 451, 453 (1910).

373. *See* McWhirter v. Roberts, 40 Ark. 283, 287 (1883).

374. *See id.* at 289.

375. Harrill & Sutter, PLLC v. Kosin, 2011 Ark. 51, 13, 378 S.W.3d 135, 143.

376. Rice v. Seals, 2010 Ark. App. 393, 6–7, 377 S.W.3d 416, 422.

377. Less v. Less, 147 Ark. 432, 437, 227 S.W. 763, 764 (1921).

378. Hewitt v. Cox, 55 Ark. 225, 234, 15 S.W. 1026, 1029 (1981), *modified on reh'g*, 55 Ark. 237, 17 S.W. 873 (1891).

> Under the statutes of this state the real and personal property of the estates of deceased persons are made assets in the hands of the executor or administrator for the payment of debts. The widow has no right to direct how any of the debts shall be paid."[379]

The court has further held, "dower lands may be sold to satisfy the lien for the sum contributed by the heirs to pay the mortgage indebtedness on them."[380]

F. Authority of the Legislature to Change Dower and Curtesy Laws

A significant question is to what extent a legislative change is retroactive. The Supreme Court of Arkansas established well over a century ago that a widow is entitled to dower in accordance with the law at the time of the death of her husband rather than at the time of marriage.[381] The seminal case in Arkansas on this issue is *Skelly Oil Co. v. Murphy*.[382] In *Skelly Oil*, Mr. and Mrs. Oscar Murphy of Union County married in 1888 while both were still minors.[383] Mr. Oscar Murphy owned 80 acres at the time of both his marriage and his minority.[384] Less than two months after their marriage, Oscar's father, acting on Oscar's behalf, conveyed 80 acres to Skelly Oil Company's successor in interest.[385] Neither Oscar nor his wife signed the deed.[386]

Mrs. Murphy remained married to Oscar until his death in 1927.[387] After his death, she asserted her dower interest in the eighty acres, which were producing significant revenue from oil production.[388] The legislature, however, had passed a law in 1923 dissolving a wife's inchoate dower interest fifteen years after an interest is conveyed to a third-party.[389] Because the conveyance of the disputed land occurred more than fifteen years before Mr. Murphy's death, the question before the court was whether the legislature had the ability to retroactively limit Mrs. Murphy's inchoate dower rights she received when she married in 1888.[390]

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379. *Id.* at 232, 15 S.W. at 1028.
380. Less v. Less, 158 Ark. 255, 262, 249 S.W. 583, 584 (1923).
381. *See* Hatcher v. Buford, 60 Ark. 169, 180–81, 29 S.W. 641, 644 (1895).
382. Skelly Oil Co. v. Murphy, 180 Ark. 1023, 24 S.W.2d 314 (1930).
383. *Id.* at 1024, 24 S.W.2d at 314.
384. *Id.*, 24 S.W.2d at 314.
385. *Id.*, 24 S.W.2d at 314.
386. *Id.*, 24 S.W.2d at 314.
387. *Id.*, 24 S.W.2d at 314.
388. *See Skelly Oil*, 180 Ark. at 1024, 24 S.W.2d at 314.
389. *Id.* at 1025, 24 S.W.2d at 315.
390. *Id.* at 1026, 24 S.W.2d at 315.

The court held "that before the death of a husband, and while the right of dower is inchoate, it is subject to legislative control and may be enlarged, diminished, or abolished by the Legislature."[391] The court justified this position by saying, "[t]he reason for the rule is that, since the wife's right of dower is not a vested right in property, it is not protected from legislative impairment or destruction by the constitutional guaranties for the protection of property."[392] The court then observed:

> Dower is not a right based on contract, but one resulting from wedlock as an incident to it, and as a matter of social and domestic policy. Therefore the right to dower results from operation of law, and is not an impairment of the obligation of a contract to change or abolish it before the right becomes vested."[393]

The court justified its decision primarily through citing three cases: *State v. Boney*, *Ferry v. Spokane, P. & S. Ry. Co.* and *Tatum v. Tatum*.[394]

In *State v. Boney*, the court examined the authority of the state legislature to impose an inheritance tax on property taken through dower.[395] In upholding the legislature's power to impose such a tax, the court summarized the law as follows:

> [D]ower is not regarded as springing from contract, although the contract or marriage is a prerequisite to its existence, but is a right, the existence, nature and extent of which is subject to legislative control. The estate of dower appears to be as old as the common law; but so also is the right of an heir to inherit from an ancestor; and the lawmaking power possesses as plenary control over the one as it has over the other. The Legislature has the right to change the law of dower and has done so more than once, usually by enlarging the common-law right of dower. The Legislature as certainly has the right to diminish or to abolish dower, and as the right to take dower is a privilege which the Legislature may give or may withhold as it pleases, it follows that, in granting the right, the Legislature may impose a tax for governmental purposes upon the exercise of the right or privilege against the person to whom it is given.[396]

The case of *Ferry v. Spokane, P. & S. Ry. Co.* was a Supreme Court of the United States case that examined the question of whether dower or curtesy enjoyed any constitutional protections.[397] The Court concluded:

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391. *Id.*, 24 S.W.2d at 315.
392. *Id.*, 24 S.W.2d at 315.
393. *Id.*, 24 S.W.2d at 315.
394. *Skelly Oil*, 180 Ark. at 1026–27, 24 S.W.2d at 315.
395. *See* State v. Boney, 156 Ark. 169, 177, 245 S.W. 315, 315 (1922).
396. *Id.* at 177–78, 245 S.W. at 317.
397. Ferry v. Spokane, P. & S. Ry. Co., 258 U.S. 314, 318 (1922).

> Dower is not a privilege or immunity of citizenship, either state or federal, within the meaning of the provisions relied on. At most it is a right which, while it exists, is attached to the marital contract or relation, and it always has been deemed subject to regulation by each state as respects property within its limits.[398]

The third case, *Tatum v. Tatum*, is a little harder to understand as cited by the court in *Skelly Oil*.[399] The court in *Skelly Oil* described *Tatum* as follows:

> [I]n *Tatum* . . . the court recognized that the wife's inchoate right of dower is not a vested right in the sense that it is not subject to change or even abolishment by the Legislature so long as it is contingent, but held that it could not be divested by any act of the husband, and on that account it was a valuable right which the law would recognize and protect. It necessarily results that, since the right of dower does not exist by virtue of contract but by operation of law, the obligation of a contract is not impaired by the modification of the law which governs it.[400]

The *Tatum* case, however, does not mention the legislature or the general assembly at any point.[401] The *Tatum* case concerned the question of whether a wife with an inchoate dower interest could force a mineral lessee to impound a portion of the oil being produced to avoid overly diminishing the value of her potential future estate.[402] In the case, Mary Jane Tatum's husband, Albert Tatum sold his one-fifth undivided interest in real property to Lizzie Minor without his wife's consent.[403] Lizzie Minor then sold the property to other parties who commenced drilling oil from the property.[404] Mrs. Tatum sued her husband and the current property owners alleging that the drilling activities were diminishing the value of her inchoate interest in the property.[405]

The *Tatum* Court used public policy to guide its decision because it recognized this as a very unique issue with extremely limited case law and no controlling authority.[406] The court stated that it is the "public policy" of the Supreme Court of Arkansas to treat dower as "a favorite of the law."[407] The court said, "[h]er [dower] interest or right—whatever it may be—is

398. *Id.*
399. *See Skelly Oil*, 180 Ark. at 1027–28, 24 S.W.2d at 315 (citing Tatum v. Tatum, 174 Ark. 110, 295 S.W. 720 (1927)).
400. *Id.*, 24 S.W.2d at 315.
401. *See* Tatum v. Tatum, 174 Ark. 110, 295 S.W. 720 (1927).
402. *Id.* at 110, 295 S.W. at 720.
403. *See id.*, 295 S.W. at 720.
404. *Id.*, 295 S.W. at 720.
405. *Id.*, 295 S.W. at 720.
406. See *id.* at 113, 295 S.W. at 720, 721.
407. *Tatum,* 174 Ark. at 113, 295 S.W. at 721.

something of value, and is entitled to protection, if it can be done consistently with the principles of equity."[408] The court held, "[a]fter a careful consideration of the whole matter, the majority of us are of the opinion that the inchoate right of dower is more nearly like the interest of a contingent remainderman who may be protected by impounding the funds in cases like this."[409] The court said:

> Where the husband opens up mines on his own land and works them himself, the law would presume that his wife consented to his action, and was enjoying the benefits which he might obtain. In the case at bar, the wife refused to relinquish her dower in the land, and this of necessity affected the price thereof. Her inchoate right of dower, by whatever name called, necessarily affected the price to be paid, because it would be consummate upon the death of her husband. Thus it will be seen that, if the husband can convey his land without relinquishment of dower on the part of his wife, and his grantees can open up mines, and work them to extinction, a valuable right or interest of the wife is destroyed. It is no answer to say that she will be entitled to dower in the land if she outlives her husband. It is easy to imagine cases where the lands would have no value whatever except for the oil, gas, or other minerals contained in them. The exhaustion of the minerals from the land would leave them of little or no practical value.[410]

Even with the seeming disconnect in the *Skelly Oil* court's interpretation of the *Tatum* case, the court nevertheless cited abundant authority for its ultimate conclusion that dower and curtesy exist at the whim of the legislature.[411] The Supreme Court of Arkansas later summarized the *Skelly Oil* provision as standing for the proposition, "[t]he legislature has the power to give or withhold dower, and it has the power to declare the manner in which the dower right might be barred."[412]

G. Valuing a Life Estate

There are many instances where a spouse may receive a life estate interest through dower or curtesy. This raises the question about how to value the life estate. The two *Dowell v. Dowell* cases provide the key for valuing life estates, though they are not dower or curtesy cases.[413] As discussed be-

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408. *Id.* at 112, 295 S.W. at 721.
409. *Id.* at 113, 295 S.W. at 721.
410. *Id.* at 113–14, 295 S.W. at 721.
411. *See* Skelly Oil Co. v. Murphy, 180 Ark. 1023, 24 S.W.2d 314 (1930).
412. *In re* Estate of Epperson, 284 Ark. 35, 38, 679 S.W.2d 792, 793 (1984).
413. Dowell v. Dowell, 207 Ark. 578, 182 S.W.2d 344 (1944); Dowell v. Dowell, 209 Ark. 175, 189 S.W.2d 797 (1945).

low, the General Assembly has also provided a statute to guide the valuation.

In *Dowell*, the question was how to value a wife's life estate.[414] Mrs. Lillie Dowell sued her husband, Mr. Lewis Dowell, for divorce on the grounds of cruel and harsh treatment and his conviction of a felony.[415] The husband answered admitting the felony conviction for the crime of manslaughter but "alleged that the party killed was his wife's paramour."[416] Mr. Dowell agreed to the divorce but sought to block his wife from receiving any share of his estate.[417] The court ultimately awarded a division of property that included a life estate interest in some property in favor of Mrs. Dowell.[418]

In the second *Dowell* case, the question was how to value Mrs. Dowell's life estate interest when some of the property was sold.[419] The Supreme Court of Arkansas acknowledged that courts throughout the country "have employed a variety of methods in determining the present value of such life estate."[420] The court said that the English common law rule was to consider a life estate as equal in value to one-third of the fee estate.[421] The court, however, found that this method had been rejected in a 1916 divorce case.[422] The court decided that the most appropriate method is to compute the value of the life estate holder's interest "by use of legally recognized life and annuity tables on the basis of appellee's age at the time of the sale, and on the basis of the proceeds realized by the sale after deducting her proportionate part of the costs of the sale."[423]

In Act 350 of 1981, the General Assembly adopted an act "to establish a simple and accurate method for computing the present value of both vested life and remainder interests in property through the use of actuarial tables and to make the actuarial tables used in connection therewith current."[424] For life estates, this act provides:

> In any legal proceeding wherein the court shall decree that a vested right to future income for life from property is to be commuted and an amount

414. *See id.*, 182 S.W.2d at 344.
415. *Id.* at 579, 182 S.W.2d at 345.
416. *Id.*, 182 S.W.2d at 345.
417. *Id.* at 579–80, 182 S.W.2d at 345.
418. *Id.* at 579, 585–86, 182 S.W.2d at 347.
419. Dowell v. Dowell, 209 Ark. 175, 177, 189 S.W.2d 797, 798 (1945).
420. *Id.*, 189 S.W.2d at 799.
421. *Id.*, 189 S.W.2d at 799.
422. *Id.*, 189 S.W.2d at 799 (citing Allen v. Allen, 126 Ark. 164, 171, 189 S.W. 841, 843 (1916)).
423. *Id.* at 178, 189 S.W.2d at 799; *see also* Godard v. Godard, 210 Ark. 769, 775, 197 S.W.2d 554, 557 (1946).
424. ARK. CODE ANN. § 18-2-101 (Repl. 2015).

> payable in gross be substituted for the property right, then the value of the interest shall be computed by use of the table and in the manner described in the example appearing in § 18-2-105 unless parties to the proceeding submit an agreement for a division of the proceeds which the court approves.[425]

The table in Arkansas Code Annotated section 18-2-105(a) is lengthy, giving the life expectancy for every age from 1 through 100 with interest rates at 4%, 6%, 8%, 10% and 12%.[426] The act states that the interest rate to be used for the calculation is "the prevailing interest rates obtainable for investments."[427] Arkansas Code Annotated section 18-2-105(b) provides the following codified example:

> Example: Joe Doe is entitled to receive the income from a principal sum of ten thousand dollars ($10,000) during the life of one Martha Jones, aged fifty-five (55). There is a remainder estate in favor of Timothy Doe. In an appropriate proceeding a court in Arkansas has determined that the life tenant is to be paid a lump sum in commutation of his right to income for the life of Martha Jones; the court has further determined that four percent (4%) is the rate of interest obtainable on an investment of a sum of the size of the principal sum. In the table, follow the left-hand column, which is labeled "age", down vertically until fifty-five (55) is reached; then move horizontally until the column headed "4%" is intersected. At the intersection is found the figure: 15.6110. This figure is to be multiplied by the yearly income, which is found by multiplying the principal sum by the appropriate rate of interest. In this case that would be ten thousand dollars ($10,000) multiplied by .04 equalling [sic] four hundred dollars ($400). Then 15.6110 multiplied by four hundred dollars ($400) equals six thousand two hundred forty-four dollars and forty cents ($6,244.40). This is the sum which the court would direct to be paid to Joe Doe in commutation of his income right. Timothy Doe would be paid three thousand seven hundred fifty-five dollars and sixty cents ($3,755.60). See § 18-2-106: principal sum ten thousand dollars ($10,000) minus commuted life interest six thousand two hundred forty-four dollars and forty cents ($6,244.40) equals commuted remainder three thousand seven hundred fifty-five dollars and sixty cents ($3,755.60).[428]

Notably, the life expectancy table has not been updated since 1981 and was based on a life expectancy of 74.97 years.[429] As of the writing of this article, the United States life expectancy has increased to 78.8 years accord-

425. *Id.* § 18-2-102 (Repl. 2015).
426. *Id.* § 18-2-105 (Repl. 2015).
427. *Id.* § 18-2-104 (Repl. 2015).
428. *Id.* § 18-2-105.
429. *See id.*

ing to the Centers for Disease Control and Prevention.[430] The chart also does not account for differences in life expectancies for women and men, which currently stands at 81.2 years and 76.4 years, respectively.[431] Updating this chart might be an appropriate task for a future meeting of the General Assembly.

VI. THE STUDY

An essential question when considering the impact of dower and curtesy is whether the existence of the law impacts the way that people buy and sell real estate. In other words, does the thousand-year-old concept of dower and curtesy still make a difference today? This is a very difficult question to answer. To help shed some light on this question, I undertook a review of real estate transactions in Pulaski County, Arkansas, to see how often dower or curtesy becomes an issue in transferring real estate.[432]

The question, though, is how to look at a deed and be able to definitively say that a conveyance required a spouse's joinder to waive dower and curtesy. Just because two people sign a deed as grantor does not mean that both had to sign because of dower or curtesy. It could be that both parties had vested legal title to the property. To answer this question, I had to determine how a person took title, then look at how the same person conveyed title in a subsequent transaction. It is possible to say that dower or curtesy definitely played a role in the transaction if a person took title in his or her sole capacity but subsequently conveyed the property with the joinder of a spouse.

To conduct this study, I selected fifteen residential neighborhoods throughout the county representing a geographic and economic cross-section of Pulaski County. I then examined a list of each warranty deed recorded in those neighborhoods from April 2001 through October 2015. This amounted to 2,027 warranty deeds.[433]

I first identified the transactions during the specified time period where the same person took title then subsequently transferred it to someone else in the same time period. Out of the original 2,027 warranty deeds, I found that 1,043 deeds fit this description. In other words, 1,043 of the deeds were part of the cycle where the same person was both a grantee and a grantor of

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430. *Life Expectancy*, CDC.GOV (Feb. 16, 2016), http://www.cdc.gov/nchs/fastats/life-expectancy.htm.

431. *Mortality in the United States, 2012*, CDC.GOV (Feb. 16, 2016), http://www.cdc.gov/nchs/data/databriefs/ db168.htm.

432. Pulaski County is the largest county in Arkansas and contains Arkansas's capital and largest city, Little Rock.

433. See Appendix A for a list of the Instrument Numbers of the deeds included in the study.

the same property within the study timeframe. I refer to those deeds collectively as the "Corresponding Deeds" for ease of reference. I refer to the deed where the person took title (as grantee) as the "Vesting Deed," and the deed where the person conveyed title (as grantor) out of his or her name as the "Conveyancing Deed."

A problem with this approach quickly becomes apparent in that there are some deeds that are both Vesting Deeds and Conveyancing Deeds and, thus, are double-counted. For instance, assume that A took title on July 1, 2001 in Deed #1. Deed #1 would be A's Vesting Deed. A then conveyed title to B on January 1, 2005 in Deed #2. Deed #2 would be B's Vesting Deed but A's Conveyancing Deed. Deed #2 identifies if B took title with his or her spouse, but it also identifies if A required the joinder of his or her spouse to convey title. I refer to these deeds playing double-duty as "Double Deeds" for lack of a better term.

Several weaknesses to the approach that I chose for this task are apparent. First, for the sake of not being overwhelmed with information, I specifically excluded quitclaim deeds from the search. This means that there may be additional sales that I overlooked. Second, the sheer volume of deeds reviewed probably means that some portion of qualifying transactions may have been inadvertently overlooked while sorting through the data. To reduce this risk, I utilized an Excel spreadsheet to identify duplicate values to highlight where the same name appeared as grantor then appeared again as grantee. This method, however, is not foolproof. Third, it is possible that I missed some qualifying transactions because the grantor changed his or her name without identifying that on the face of the deed, such as a woman who changes her name after marriage. Fourth, where two people had the same last name, I assumed that they were married unless there was evidence on the face of the deed making it clearly apparent that they were not married. This means that there could be some transactions included where the parties had the same last name but were not married. Despite these flaws, as discussed further below, the methodology still revealed a significant number of transactions where dower and curtesy played a role in the transaction.

A. The Neighborhoods

It is best to say a few words about the neighborhoods used for the study before digging into the analysis. The neighborhoods are Edgewood in Jacksonville, Belmont in Little Rock, Briarwood in Little Rock, Brodie Creek in Little Rock, Chenal Ridge in Little Rock, Edge Hill in Little Rock, Forest Park in Little Rock, Heatherbrae in Little Rock, Hickory Hills in Little Rock, Leawood Heights in Little Rock, Oak Forest in Little Rock, Pleasant Valley Manor in Little Rock, Yorkwood in Little Rock, Arrowhead Manor in North Little Rock, and Austin Lakes in Sherwood. Little Rock has the

largest representation as the largest city within the study area, though I intentionally selected neighborhoods from different parts of the city, such as Chenal Ridge in West Little Rock, Leawood Heights in Midtown Little Rock, and Yorkwood in Southwest Little Rock. I selected neighborhoods from different parts of the city to determine whether socio-economic differences might play a role. For instance, homes in West Little Rock tend to be more expensive and newer than those in Southwest Little Rock. Also, homes in Midtown Little Rock tend to be older than those in other parts of the city.

Most of these neighborhoods are actually comprised of multiple platted additions. For purposes of this analysis, I examined the plats with similar names, and chose to omit some phases of subdivisions to control the volume of deeds analyzed, which means that I omitted some parts of what might be traditionally considered part of these neighborhoods.[434]

Briarwood had the most activity during the study period with 481 total warranty deeds of which 252 were Corresponding Deeds. Hickory Hills had the least activity during the study period with 29 total warranty deeds of which just four were Corresponding Deeds. In total, the neighborhoods had 135 total warranty deeds on average, of which 70 were Corresponding Deeds on average.

434. See Appendix B for a list of the subdivision additions utilized.

April 2001 – October 2015

Neighborhoods	**Total General Warranty Deeds**	**Total Corresponding Deeds**
Arrowhead Manor	132	67
Austin Lakes	227	139
Belmont	51	18
Briarwood	481	252
Brodie Creek	184	143
Chenal Ridge	99	48
Edge Hill	56	30
Edgewood of Jacksonville	65	22
Forest Park	78	43
Heatherbrae	89	42
Hickory Hills Addition	29	4
Leawood Heights	280	136
Oak Forest	117	56
Pleasant Valley Manor	40	22
Yorkwood	99	21
Total:	2027	1043

I also wanted to see how economic issues might affect the dower and curtesy issue, which meant calculating the sales price of each house based on the reported transfer tax paid.[435] For this calculation, I sorted through the list of deeds and eliminated all transactions that did not show evidence of transfer tax payments. I also eliminated one multi-parcel transaction in the Briarwood Neighborhood that greatly skewed the average and appeared to be a very unusual transaction. In total, transfer tax was paid on 1,510 of the all warranty deeds and 815 of the Corresponding Deeds. The remaining 517 of the all warranty deeds and 228 of the Corresponding Deeds represented gifts, conveyances to trusts, property divisions from divorces, correction deeds, or other conveyances not requiring payment of the transfer tax. After eliminating these deeds, the average sales price for all of the neighborhoods

435. Arkansas requires a transfer tax of $3.30 per thousand on all transactions in excess of $100. *See* ARK. CODE ANN. § 26-60-105 (Supp. 2015). The purchase price can be calculated by dividing the total amount of transfer tax paid as shown on the deed by $3.30 and multiplying the result by $1,000. *Id.*

was $223,200.00 based on all warranty deeds and $216,422.00 based on the Corresponding Deeds. Edge Hill had the highest average sales price at $1,546,875.00 based on all warranty deeds and $1,518,217.39 based on the Corresponding Deeds. Belmont had the lowest average sales price at $28,438.87 based on all warranty deeds and $22,900.00 based on the Corresponding Deeds. Two of the neighborhoods, Edge Hill and Hickory Hills, had average prices in excess of $1,000,000.00 and four of the neighborhoods, Arrowhead Manor, Belmond, Edgewood and Yorkwood, had average prices less than $100,000.00.

April 2001 – October 2015

Neighborhoods	**Average Sales Price of All Deeds (excluding $0 transactions)**	**Average Sales Price of Corresponding Transactions (excluding $0 transactions)**
Arrowhead Manor	$74,427.08	$76,729.17
Austin Lakes	$152,908.11	$154,252.25
Belmont	$28,483.87	$22,900.00
Briarwood	$237,269.89	$137,062.18
Brodie Creek	$237,101.35	$236,652.54
Chenal Ridge	$296,118.42	$314,682.93
Edge Hill	$1,546,875.00	$1,518,217.39
Edgewood of Jacksonville	$79,153.85	$75,357.14
Forest Park	$180,285.71	$193,085.71
Heatherbrae	$215,245.90	$208,064.52
Hickory Hills Addition	$1,045,625.00	$1,150,000.00
Leawood Heights	$187,794.52	$200,000.00
Oak Forest	$117,681.82	$163,422.22
Pleasant Valley Manor	$200,580.65	$201,222.22
Yorkwood	$93,153.85	$98,230.77
Total Average:[436]	$223,200.00	$216,422.00

436. The total average was calculated by multiplying the average sales price of each neighborhood by the number of deeds originating in each neighborhood then averaging the result. This method prevented extremely large sales and extremely small sales from unduly adjusting the average.

B. The Results

I next analyzed the 1,043 Corresponding Deeds to see how many times the same person or entity took title (a Vesting Deed) who then conveyed the property at a later date within the study period (a Conveyancing Deed). As noted above, some deeds played both roles in the study (Double Deeds). I identified 441 of the Corresponding Deeds as Vesting Deeds, 436 as Conveyancing Deeds, and 166 as Double Deeds.

April 2001 – October 2015

Neighborhoods	**Total Corresponding Vesting Deeds**	**Total Corresponding Conveyancing Deeds**	**Total Corresponding Double Deeds**
Arrowhead Manor	32	29	6
Austin Lakes	58	55	26
Belmont	10	7	1
Briarwood	109	108	35
Brodie Creek	54	55	34
Chenal Ridge	20	19	9
Edge Hill	14	14	2
Edgewood of Jacksonville	9	10	3
Forest Park	16	16	11
Heatherbrae	18	19	5
Hickory Hills Addition	2	2	0
Leawood Heights	54	56	26
Oak Forest	25	25	6
Pleasant Valley Manor	10	10	2
Yorkwood	10	11	0
Total:	441	436	166

I then further sorted these deeds to see how often someone took title without a spouse listed (a Vesting Deed), but subsequently included a spouse when he or she conveyed the property at a later date (a Conveyancing Deed). I referred to these deeds as "Dower/Curtesy" deeds because these are the ones where dower or curtesy ended up playing a role in the transaction. I found a total of 107 deeds that fell into the category of Dower/Curtesy Corresponding Vesting Deeds and 112 that fell into the category of Dower/Curtesy Corresponding Conveyancing Deeds, for a total of 219 deeds.

April 2001 – October 2015

Neighborhoods	**Total Dower/Curtesy Corresponding Vesting Deeds**	**Total Dower/Curtesy Corresponding Conveyancing Deeds**
Arrowhead Manor	10	9
Austin Lakes	18	18
Belmont	2	2
Briarwood	29	30
Brodie Creek	12	12
Chenal Ridge	4	4
Edge Hill	2	2
Edgewood of Jacksonville	6	6
Forest Park	1	3
Heatherbrae	2	2
Hickory Hills Addition	0	0
Leawood Heights	12	14
Oak Forest	3	4
Pleasant Valley Manor	2	2
Yorkwood	4	4
Total:	107	112

Taking into account the dual role played by the Double Deeds, 17.63% of all Corresponding Vesting Deeds were also Dower/Curtesy Correspond-

ing Vesting Deeds and 18.60% of all Corresponding Conveyancing Deeds were also Dower/Curtesy Corresponding Vesting Deeds.

April 2001 – October 2015

Neighborhoods	**Percentage of Corresponding Vesting Deeds That Are Also Dower/Curtesy Deeds**	**Percentage of Corresponding Conveyancing Deeds That Are Also Dower/ Curtesy Deeds**
Arrowhead Manor	26.32%	25.71%
Austin Lakes	21.43%	22.22%
Belmont	18.18%	25.00%
Briarwood	20.14%	20.98%
Brodie Creek	13.64%	13.48%
Chenal Ridge	13.79%	14.29%
Edge Hill	12.50%	12.50%
Edgewood of Jacksonville	50.00%	46.15%
Forest Park	3.70%	11.11%
Heatherbrae	8.70%	8.33%
Hickory Hills Addition	0.00%	0.00%
Leawood Heights	15.00%	17.07%
Oak Forest	9.68%	12.90%
Pleasant Valley Manor	16.67%	16.67%
Yorkwood	40.00%	36.36%
Total Average:	17.63%	18.60%

As this chart indicates, there were several outliers. Most notably Edgewood of Jacksonville and Yorkwood were both on the high side. On the other hand, Forest Park, Heatherbrae, Oak Forest, and Hickory Hills were on the low side (less than 10%) of Corresponding Vesting Deeds, and Heatherbrea and Hickory Hills were on the low side (less than 10%) of Corresponding Conveyancing Deeds. Hickory Hills, though, should be discounted considerably because it only had two Corresponding Vesting Deeds and two Corresponding Conveyancing Deeds. Despite the outliers, the total averages

are confirmed by examining the median of the averages. The median of the averages of Corresponding Vesting Deeds was 15.00%, and the median of the averages of Corresponding Conveyancing Deeds was 16.67%, which are both close to the total averages.

A question is whether the economic sophistication of the parties contributed to these outliers. An argument could be made for economic sophistication playing a role by examining the percentage of Dower/Curtesy Deeds relative to the Average Sales Price. As noted in the chart below, all four of the neighborhoods with a higher than average sales price had lower than average rates of Dower/Curtesy Deeds. On the other hand, five of the neighborhoods on the lower end of the economic scale also had lower than average rates of Dower/Curtesy Deeds. Additionally, Edge Hill, which had the highest average sales price, was reasonably close to the average rate of Dower/Curtesy Deeds in both categories. Meanwhile, Belmont, which had the lowest average sales price, was very close to the average number of Dower/Curtesy Vesting Deeds though it was somewhat high on the number of Dower/Curtesy Corresponding Deeds. These disparities seem to belie any notion that economic sophistication is a driving determinate in whether dower or curtesy became an issue in a transaction.

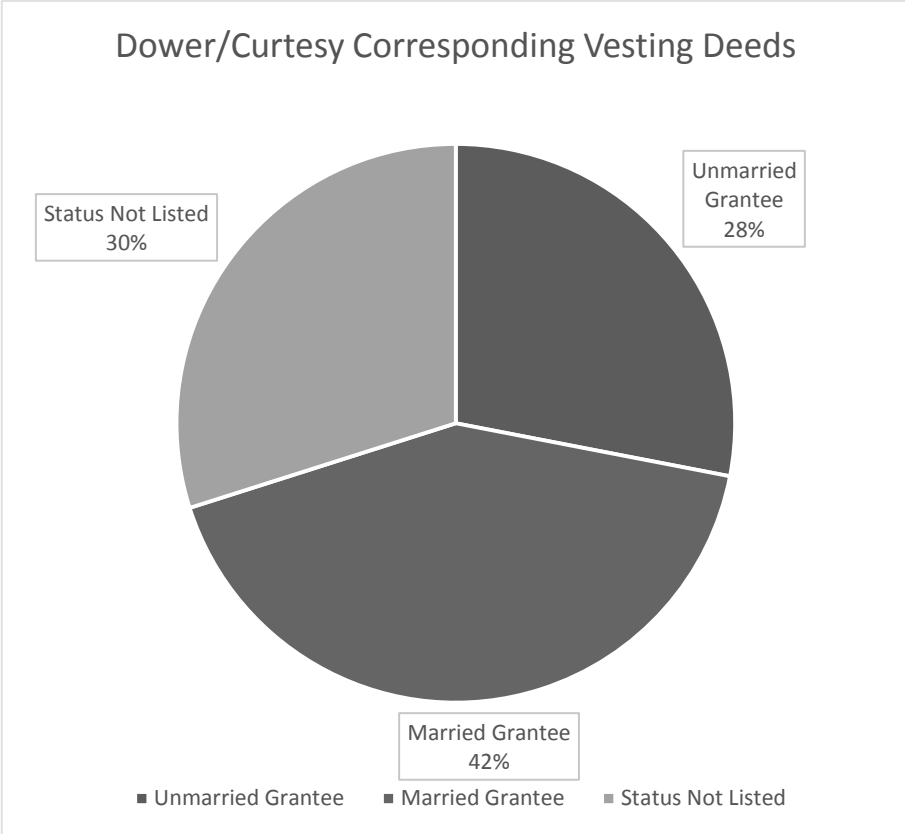
April 2001 – October 2015

Neighborhoods	Average Sales Price of Corresponding Transactions (excluding $0 transactions)	Percentage of Corresponding Vesting Deeds That Are Also Dower/Curtesy Deeds	Percentage of Corresponding Conveyancing Deeds That Are Also Dower/ Curtesy Deeds
Belmont	$22,900.00	18.18%	25.00%
Edgewood of Jacksonville	$75,357.14	50.00%	46.15%
Arrowhead Manor	$76,729.17	26.32%	25.71%
Yorkwood	$98,230.77	40.00%	36.36%
Briarwood	$137,062.18	20.14%	20.98%
Austin Lakes	$154,252.25	21.43%	22.22%
Oak Forest	$163,422.22	9.68%	12.90%
Forest Park	$193,085.71	3.70%	11.11%
Leawood Heights	$200,000.00	15.00%	17.07%
Pleasant Valley Manor	$201,222.22	16.67%	16.67%
Heatherbrae	$208,064.52	8.70%	8.33%
Brodie Creek	$236,652.54	13.64%	13.48%
Chenal Ridge	$314,682.93	13.79%	14.29%
Hickory Hills Addition	$1,150,000.00	0.00%	0.00%
Edge Hill	$1,518,217.39	12.50%	12.50%
Total Average:	$216,422.00	17.63%	18.60%

I next broke down the Dower/Curtesy Corresponding Vesting Deeds to see how the grantee took title. Specifically, I wanted to know how often the deed recited that the grantee was married or unmarried. I found that 42.06% of these deeds listed the grantee as a married person, but did not list his or her spouse. I found that 29.90% of the deeds did not list the grantee's marital status one way or the other, and that 28.04% of the deeds listed the grantee as unmarried.

Dower/Curtesy Corresponding Vesting Deeds

Neighborhoods	**Unmarried Grantee**	**Married Grantee**	**Status Not Listed**
Arrowhead Manor	3	5	2
Austin Lakes	8	10	0
Belmont	2	0	0
Briarwood	8	11	10
Brodie Creek	2	4	6
Chenal Ridge	0	3	1
Edge Hill	0	0	2
Edgewood of Jacksonville	1	3	2
Forest Park	0	0	1
Heatherbrae	0	1	1
Hickory Hills Addition	0	0	0
Leawood Heights	4	5	3
Oak Forest	0	1	2
Pleasant Valley Manor	1	0	1
Yorkwood	1	2	1
Total:	30 28.04%	45 42.06%	32 29.90%



Looking at these deeds as a percentage of all Corresponding Vesting and Double Deeds shows no obvious correlation between the cost of the homes in a neighborhood and the frequency of a grantee taking title as unmarried, married but with an intentionally omitted spouse or with the status not listed. This is demonstrated by the chart below, which is in order of neighborhood with the lowest average sales price to highest sales price.

Dower/Curtesy Corresponding Vesting Deeds as a Percentage of all Dower/Curtesy Corresponding Vesting and Double Deeds

**In Order of Lowest to Highest Average Sales Price*

Neighborhoods	**Unmarried Grantee**	**Married Grantee**	**Status Not Listed**
Belmont	100.00%	N/A	N/A
Edgewood of Jacksonville	16.67%	50.00%	33.33%
Arrowhead Manor	30.00%	50.00%	20.00%
Yorkwood	25.00%	50.00%	25.00%
Briarwood	27.59%	37.93%	34.48%
Austin Lakes	44.44%	55.56%	N/A
Oak Forest	N/A	33.33%	66.67%
Forest Park	N/A	N/A	100.00%
Leawood Heights	33.33%	41.67%	25.00%
Pleasant Valley Manor	50.00%	N/A	50.00%
Heatherbrae	N/A	50.00%	50.00%
Brodie Creek	16.67%	33.33%	50.00%
Chenal Ridge	N/A	75.00%	25.00%
Hickory Hills Addition	N/A	N/A	N/A
Edge Hill	0.00%	0.00%	100.00%

I took a closer look at these results, again looking for a possible economic connection in the pattern. I first calculated the average sales price of houses for each of these three categories amongst these deeds: the Unmarried Grantee, the Married Grantee, and the Status Not Listed Grantee.

Average Sales Price of Dower/Curtesy Corresponding Vesting Deeds
*In Order of Lowest to Highest Average Sales Price

Neighborhoods	**Unmarried Grantee**	**Married Grantee**	**Status Not Listed**
Arrowhead Manor	$90,333.33	$62,333.33	$86,000.00
Austin Lakes	$154,333.33	$149,000.00	N/A
Belmont	$25,000.00	N/A	N/A
Briarwood	$140,571.43	$131,300.00	$121,625.00
Brodie Creek	$137,500.00	$376,000.00	$244,500.00
Chenal Ridge	N/A	$424,500.00	$366,000.00
Edge Hill	N/A	N/A	$1,295,000.00
Edgewood of Jacksonville	$53,000.00	$60,500.00	$75,000.00
Forest Park	N/A	N/A	N/A
Heatherbrae	N/A	$244,000.00	$6,000.00
Hickory Hills Addition	N/A	N/A	N/A
Leawood Heights	$218,750.00	$147,750.00	$182,500.00
Oak Forest	N/A	$89,000.00	$50,000.00
Pleasant Valley Manor	$255,000.00	N/A	$213,000.00
Yorkwood	N/A	$72,500.00	N/A

I then looked at whether the average price in each of these three categories was higher or lower than the same neighborhood's average sales price. The chart below is in order of neighborhood with the lowest average sales price to highest sales price. The average sales price tends to be higher in poorer neighborhoods when the grantee is unmarried than when the grantee is married. This trend is somewhat supported by the lack of a pattern in the Status Not Listed category. In other words, because the Status Not Listed category presumably includes both married and unmarried grantees, one would expect, as is the case, a mix of results if there is truly a pattern of unmarried grantees in poorer neighborhoods paying more than their married counterparts because the Status Not Listed category includes both.

Deviation from Average Sales Price of Dower/Curtesy Corresponding Vesting Deeds Relative to All Corresponding Transactions

*In Order of Lowest to Highest Average Sales Price

Neighborhoods	**Unmarried Grantee**	**Married Grantee**	**Status Not Listed**
Belmont	109.17%	N/A	N/A
Edgewood of Jacksonville	70.33%	80.28%	99.53%
Arrowhead Manor	117.73%	81.24%	112.08%
Yorkwood	N/A	73.81%	N/A
Briarwood	102.56%	95.80%	88.74%
Austin Lakes	100.05%	96.60%	N/A
Oak Forest	N/A	54.46%	30.60%
Forest Park	N/A	N/A	N/A
Leawood Heights	109.38%	73.88%	91.25%
Pleasant Valley Manor	126.73%	N/A	105.85%
Heatherbrae	N/A	117.27%	2.88%
Brodie Creek	58.10%	158.88%	103.32%
Chenal Ridge	N/A	134.90%	116.31%
Hickory Hills Addition	N/A	N/A	N/A
Edge Hill	N/A	N/A	85.30%

Below the results are shown another way:

Deviation from Average Sales Price of Dower/Curtesy Corresponding Vesting Deeds Relative to All Corresponding Transactions

*In Order of Lowest to Highest Average Sales Price

Neighborhoods	Unmarried Grantee	Married Grantee	Status Not Listed
Belmont	-9.17%	N/A	N/A
Edgewood of Jacksonville	29.67%	19.72%	0.47%
Arrowhead Manor	-17.73%	18.76%	-12.08%
Yorkwood	N/A	26.19%	N/A
Briarwood	-2.56%	4.20%	11.26%
Austin Lakes	-0.05%	3.40%	N/A
Oak Forest	N/A	45.54%	69.40%
Forest Park	N/A	N/A	N/A
Leawood Heights	-9.38%	26.13%	8.75%
Pleasant Valley Manor	-26.73%	N/A	-5.85%
Heatherbrae	N/A	-17.27%	97.12%
Brodie Creek	41.90%	-58.88%	-3.32%
Chenal Ridge	N/A	-34.90%	-16.31%
Hickory Hills Addition	N/A	N/A	N/A
Edge Hill	N/A	N/A	14.70%

A title agent, attorney, or other party conducting a closing, will insist on a spouse who does not have record title signing some form of release to abolish the inchoate dower or curtesy interest. Without this release, there is a risk that the titled spouse's death could result in the vesting of the inchoate dower or curtesy interest causing the buyer, even a bona fide purchaser for value, being divested of some portion of the purchased interest. This would in turn trigger a claim against the title insurance. The closing agent, therefore, requires the spouse's release to prevent this from happening.

Another area of inquiry, therefore, is to examine how the spouse released his or her dower or curtesy interest in the Dower/Curtesy Corresponding Conveyancing Deeds. There are two ways for a spouse to release his or her dower or curtesy interest, that is: execute the deed as a co-grantor or sign a separate release of the dower or curtesy interest.[437] The former is

437. The separate release is often incorporated into the deed with language along the lines of: "Jane Doe hereby executes this deed for the sole purpose of releasing her dower interest in and to the property."

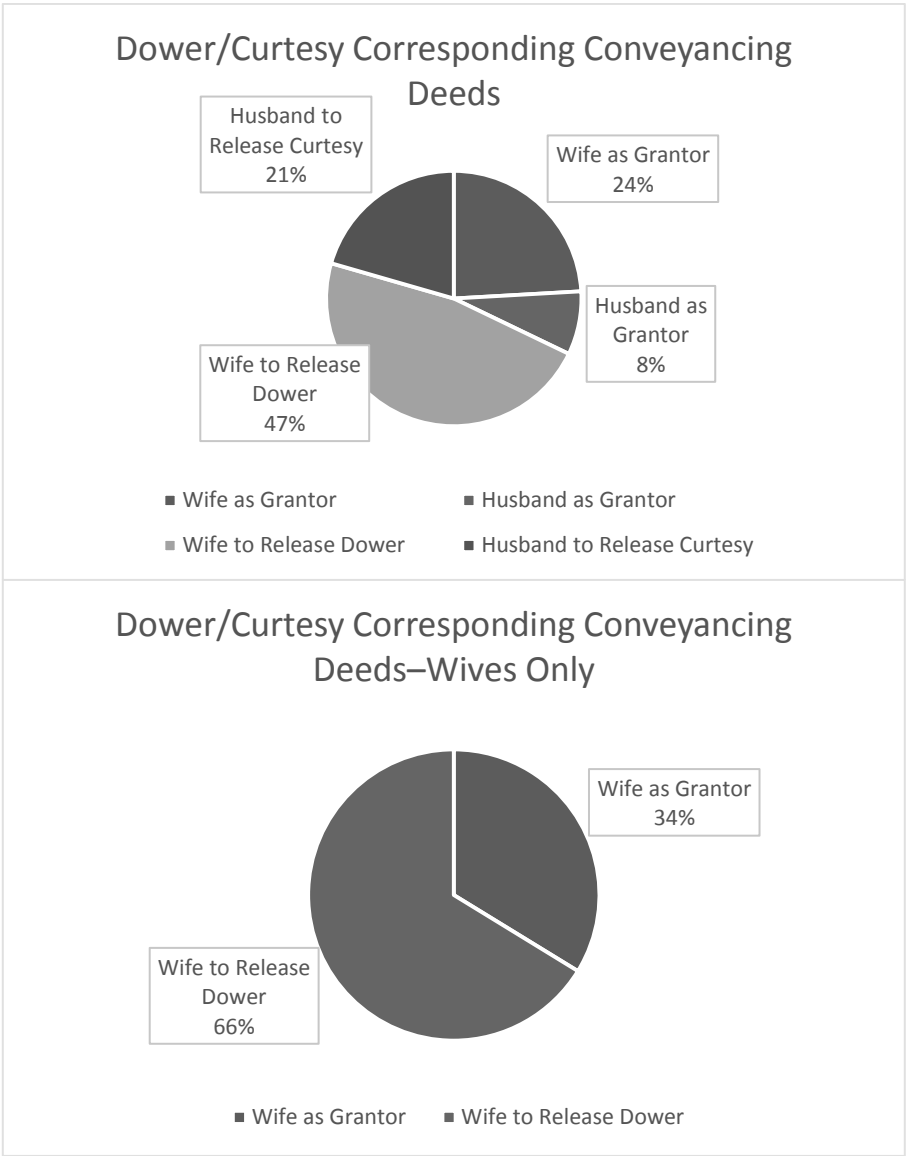
much more dangerous for the non-vested spouse because it exposes him or her to a potential suit for breach of warranties of title in the deed.[438] There is no exposure for breach of the warranties of title in a deed if the spouse merely releases his or her dower or curtesy interest.

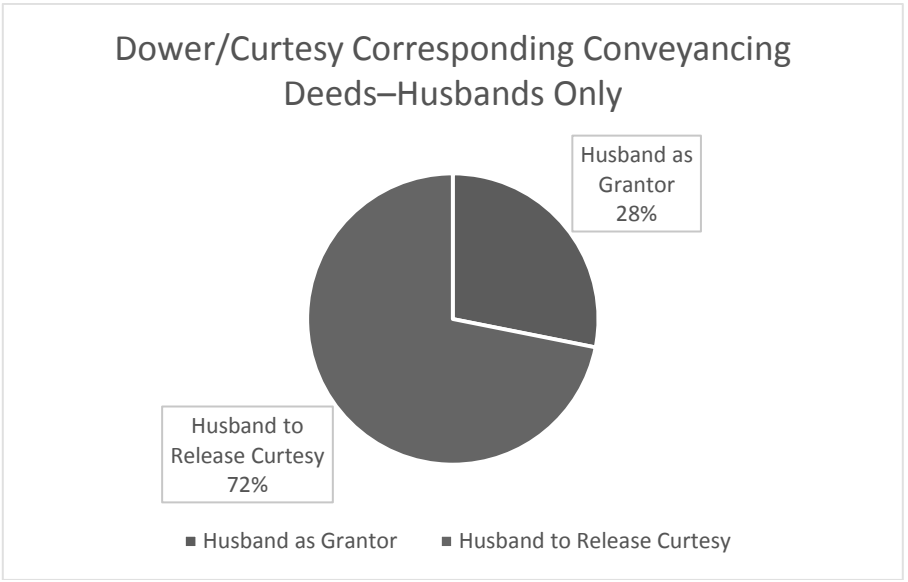
To begin this analysis, I started by identifying the total number of Dower/Curtesy Corresponding Conveyancing Deeds. The analysis shows that of the Dower/Curtesy Corresponding Conveyancing Deeds, 47.32% were wives just releasing dower, 24.10% were wives being listed as co-grantors, 20.54% were husbands just releasing curtesy and 8.04% were husbands being listed as co-grantors.

438. *See generally* Foster & McKinney, *supra* note 122, at 68.

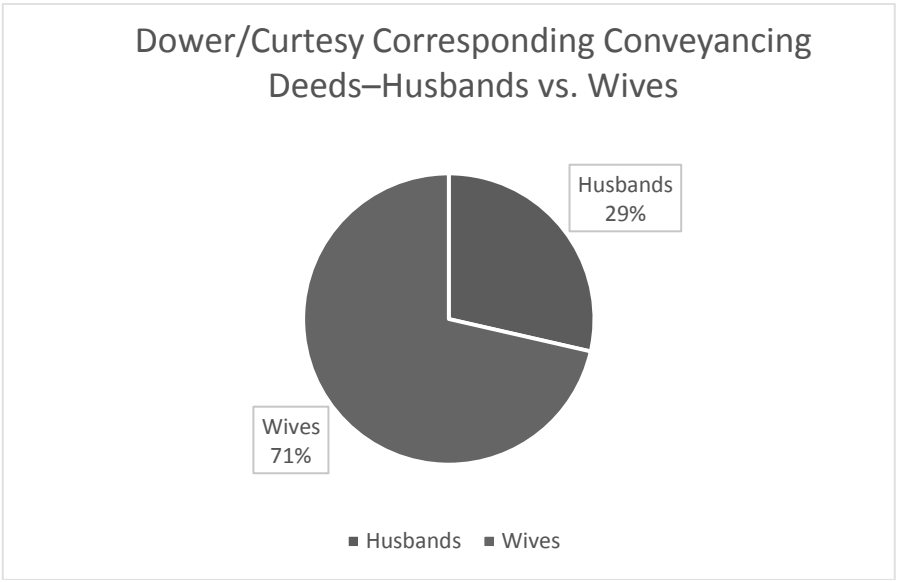
Dower/Curtesy Corresponding Conveyancing Deeds

Neighborhoods	**Wife as Grantor**	**Husband as Grantor**	**Wife to Release Dower**	**Husband to Release Curtesy**
Arrowhead Manor	3	0	5	1
Austin Lakes	3	0	12	3
Belmont	0	0	1	1
Briarwood	11	2	12	5
Brodie Creek	2	3	4	3
Chenal Ridge	1	1	2	0
Edge Hill	1	0	1	0
Edgewood of Jacksonville	0	0	5	1
Forest Park	0	0	3	0
Heatherbrae	1	1	0	0
Hickory Hills Addition	0	0	0	0
Leawood Heights	3	0	5	6
Oak Forest	1	1	1	1
Pleasant Valley Manor	0	1	1	0
Yorkwood	1	0	1	2
Total:	27	9	53	23
	24.10%	8.04%	47.32%	20.54%

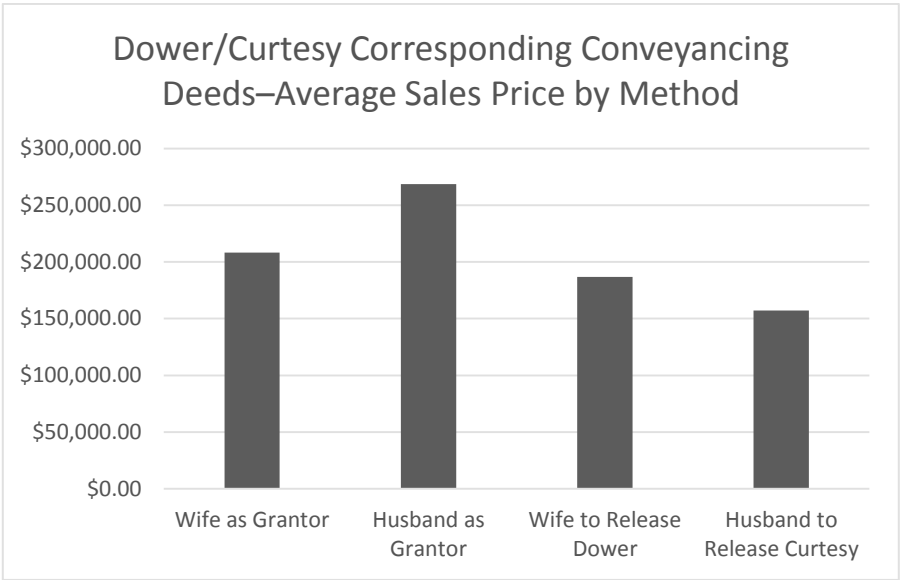

Dower/Curtesy Corresponding Conveyancing Deeds
Husband to Release Curtesy 21%
Wife as Grantor 24%
Husband as Grantor 8%
Wife to Release Dower 47%
Wife as Grantor
Husband as Grantor
Wife to Release Dower
Husband to Release Curtesy
Dower/Curtesy Corresponding Conveyancing Deeds–Wives Only
Wife as Grantor 34%
Wife to Release Dower 66%
Wife as Grantor
Wife to Release Dower



Notably, the analysis showed an exceptional difference between the number of women who did not have legal title to the property owned by their husbands versus the same number of men who did not have legal title to the property of their wives. A woman was two and a half times (2.5x) more likely not to have legal title to her husband's property than a man was to have legal title to his wife's property. In other words, women were the party without title in 71.43% of all Dower/Curtesy Corresponding Conveyancing Deeds, compared to husbands being the party without title just 28.57% of the time. This illustrates that it appears much more common for a man to take title to property without his wife rather than the other way around. Also, wives were somewhat more likely to release dower using the more dangerous method of being a co-grantor (the method used by 34% of wives) than husbands (the method used by 28% of husbands).



Interestingly, for both husbands and wives, the average transaction cost tended to be higher when the husband or wife was a co-grantor rather than mere releaser of dower or curtesy. Excluding transactions that did not have consideration, the average sales price when the spouse was a co-grantor was $208,190.00 for wives and $268,500.00 for husbands. Also excluding transactions that did not have consideration, the average sales price when the wife merely released dower was $186,638.00, and when the husband merely released curtesy was $157,049.00. In other words, the sales price was 10.35% higher when the wife released her dower using the riskier method of being a co-grantor rather than merely releasing dower. For husbands, the sales price was 41.51% higher when the husband released his curtesy using the riskier method of being a co-grantor rather than merely releasing curtesy. There is no obvious explanation for this discrepancy other than to assume that the calculation for husbands is more susceptible to influence through outlying numbers because the sample set is much smaller than that of wives.



C. Summary of Findings

The study examined 2,027 warranty deeds filed from April 2001 through October 2015 in fifteen neighborhoods in Pulaski County, Arkansas, with the purpose of determining the prevalence of dower and curtesy rights. The study found that 18.6% of the applicable conveyances required the joinder of a non-titled spouse to release dower and curtesy. When a person took title without a spouse, 42.06% of the deeds identified the grantee as married, 29.9% did not identify marital status, and 28.04% identified the grantee as unmarried, thus demonstrating that conscious omission of a spouse from title is a common practice. These omitted spouses are far more likely to be women than men with the woman being the omitted spouse in 71.43% of the applicable deeds. The study showed that 34% of women and 28% of men released their dower or curtesy rights using the riskier method of being a co-grantor rather than merely releasing the dower and curtesy rights without becoming liable for the warranties of title in the deed. The study showed no significant differences based on the value of the houses meaning that economic sophistication, or the ability to afford sophisticated advisors, seemed to make no difference in how couples decided to take title. In other words, dower and curtesy benefit both the rich and the poor with no apparent difference.

VII. CONCLUSION

Dower and curtesy are ancient legal doctrines imported from English common law and present from the dawn of Arkansas's statehood. To use a cliché, they are a time-honored tradition. Dower and curtsey laws have evolved significantly over time, morphing from once distinct rights to providing the same benefits to both men and women. Both men and women receive an interest in the real and personal property of their spouses, though the scope of those rights vary depending on whether there are children and whether the land is deemed ancestral.

Arkansas holds firm to the doctrines, though many states have abandoned dower and curtesy. The question becomes whether Arkansas should continue to do so. The future of dower and curtesy is a matter for the Arkansas General Assembly to decide. The Supreme Court of Arkansas invalidated dower and curtesy in 1981, but the General Assembly at the time elected to make the necessary fixes to pass constitutional muster and restore the rights in their current form.[439] During the 2015 meeting of the General Assembly, House Bill 1538 was introduced to repeal dower and curtesy, and though the bill did not pass, questions may continue to arise about the future of the rights.

Policy arguments exist on both sides. On the side of eliminating dower and curtesy, it is true that the national trend tends to be toward elimination, and none of the states adjoining Arkansas retain the rights, at least not in their original form. Further, eliminating the rights simplifies transactions and eliminates the risk of a dowered spouse taking rights away from a *bona fide* third party purchaser.

On the side of retaining dower and curtesy, the rights have existed since the beginning of Arkansas's statehood, and no such time-tested and ancient right should be eliminated casually, without full consideration of the consequences. For instance, how many spouses have relied on dower and curtesy when consenting to the use of assets of the marriage to purchase property without both spouses taking title? In other words, are there wives who have agreed to let their husbands omit them from title but who take comfort in knowing that they have some protected economic interest through dower? There is no easy way to know this, but the study presented in this article shows 18.6% of all residential transactions result in a spouse obtaining dower or curtesy rights. Surely not all of those are ignorant of the rights provided by dower or curtesy, and at least some have relied on it. Further, serious consideration should be given to the possibly disproportionate effect that elimination of the rights may have on women, as the study also

439. *See* Stokes v. Stokes, 271 Ark. 300, 301, 613 S.W.2d 372, 374 (1981); ARK. CODE ANN. § 28-11-101 *et seq*. (Repl. 2012 & Supp. 2015).

revealed that women are more than two and a half times as likely as men to be omitted from title.

In deciding the fate of dower and curtesy rights, consideration should also be given to the Supreme Court of Arkansas's adoption of the following common law principle more than a century ago:

> Marriage, in the eye of the law, is held to be a valuable consideration, and the wife is regarded as a purchaser for a valuable consideration of all property which accrued to her by virtue of her marital rights . . . Not only is marriage a valuable consideration, but it is the highest consideration recognized by law.[440]

The demise of dower and curtesy, particularly if it is made retroactive to existing marriages, would raise the question of whether the court's observation still remains true today. The demise of the rights would also raise questions about the meaningfulness of the old marriage vows, "With all my worldly goods I thee endow . . . ." This, though, is a policy question for the General Assembly and not a question answerable in the law. Perhaps the time for a change has arrived, or perhaps the old traditions should persevere.

440. Bookout v. Bookout, 150 Ind. 63, 49 N.E. 824, 825 (1898); Barton v. Wilson, 116 Ark. 400, 408, 172 S.W. 1032, 1034 (1915).

APPENDIX A

Arrowhead Manor:

2001029843
2001032461
2001037724
2001067495
2001067526
2001078005
2002103995
2002117847
2002117933
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Austin Lakes:

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Belmont:

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Briarwood:

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Yorkwood:

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2002150239
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2006071954
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2015004018

APPENDIX B

Arrowhead Manor:
Arrowhead Manor Addition to North Little Rock

Austin Lakes:
Austin Lakes Addition to the City of Sherwood

Belmont:
Belmont Addition to the City of Little Rock

Briarwood:
Briarwood Addition to the City of Little Rock

Brodie Creek:
Brodie Creek Community Addition to the City of Little Rock

Chenal Ridge:
Chenal Ridge, Phase I, Addition to the City of Little Rock
Chenal Ridge, Phase II, Addition to the City of Little Rock

Edge Hill:
Edge Hill Addition to the City of Little Rock

Edgewood:
Edgewood Addition to the City of Little Rock
Replat of Edgewood Addition to the City of Little Rock

Forest Park:
Forest Park Addition to the City of Little Rock

Heatherbrae:
Heatherbrae Addition to the City of Little Rock
Heatherbrae Addition, Phase II, to the City of Little Rock

Hickory Hills:
Hickory Hills Addition to the City of Little Rock

Leawood Heights:
Leawood Heights First Addition to the City of Little Rock
Leawood Heights Second Addition to the City of Little Rock
Leawood Heights Fourth Addition to the City of Little Rock

Oak Forest:
Oak Forest Addition to the City of Little Rock

Pleasant Valley:
Pleasant Valley Manor Addition to the City of Little Rock

Yorkwood:
Yorkwood Addition to the City of Little Rock
Yorkwood Addition, Phase II, to the City of Little Rock
Yorkwood Addition, Phase III, to the City of Little Rock