

2015

# A History of Preferential Share in Ontario: Intestacy Legislation and Conceptions of the Deserving or Undeserving Widow

Louise M. Mimmagh

McNamara Pizzale

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/olsrps>



Part of the [Estates and Trusts Commons](#)

---

## Recommended Citation

Mimmagh, Louise M. and Pizzale, McNamara, "A History of Preferential Share in Ontario: Intestacy Legislation and Conceptions of the Deserving or Undeserving Widow" (2015). *Osgoode Legal Studies Research Paper Series*. 112.  
<http://digitalcommons.osgoode.yorku.ca/olsrps/112>

This Article is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Legal Studies Research Paper Series by an authorized administrator of Osgoode Digital Commons.

Osgoode Legal Studies Research Paper No. 31  
Vol. 11/ Issue. 07/ (2015)

**A History of Preferential Share in Ontario: Intestacy Legislation and  
Conceptions of the Deserving or Undeserving Widow**

Dalhousie Journal of Legal Studies, Vol. 23 (1), 2014

Louise M. Mimmagh

**Abstract:**

When a will is challenged as being executed under suspicious circumstances, Canadian courts have historically sought clear, compelling, and cogent evidence to demonstrate the will's validity. The associated standard of proof has been described as one residing beyond a balance of probabilities, and is conceptualized as the 'third standard of proof' in addition to the civil and criminal standards. This third standard of proof is also particularly appealing when allocating the risk of error in an estates context in which testators are deceased and no longer available to clarify their intentions or perspectives. However, after the 2008 Supreme Court of Canada decision, *FH v McDougall* ("McDougall"), it was resolutely pronounced that only two standards of proof operate in Canada, with the third standard of proof dismissed for the practical problems of its application. As conceded below, there are compelling and valid reasons to disregard a third standard of proof for typical will challenges investigating circumstances such as the execution of the will or the testamentary capacity of the testator. This paper argues that for challenges that involve allegations of moral guilt, and in cases of fraud or undue influence over the testator, then something more than a balance of probabilities is desirable, and the more demanding third standard of proof should be utilized.

**Keywords:**

Probate Actions, Estate Litigation, Standard of Proof

**Author(s):**

Louise M. Mimmagh

Osgoode Hall Law School

E: [mimmagh.louise@gmail.com](mailto:mimmagh.louise@gmail.com)

## A HISTORY OF PREFERENTIAL SHARE IN ONTARIO: INTESTACY LEGISLATION AND CONCEPTIONS OF THE DESERVING OR UNDESERVING WIDOW

Louise M. Mimmagh\*

### ABSTRACT

Ontario's current method for trying to ensure the fair distribution of an intestate's estate, or the estate of an individual without a valid Last Will and Testament, is outlined in the *Succession Law Reform Act*. Specifically, section 45(1) outlines the foundational concept of a "preferential share," which entitles the surviving spouse to a prescribed financial interest in the estate which is prioritized above all other heirs.

The concept of a preferential share stands in sharp contrast with historical English common law methods of devolving intestate estates in which legal entitlements were heavily influenced by an individual's gender and marital status. In light of the historical influence of gender and marital status on intestacy legislation, this paper investigates the origins and development of the preferential share provision. This paper uses an analytical framework emphasizing the historically gendered experiences of widows and widowers, and how their gender informed the nature of their legal interests under intestacy. In addition, this essay frames its analysis within historical commentary that demonstrates a sharp conceptual dichotomy between the "good wife and deserving widow" or the "bad wife and undeserving widow," and how such categorization impacted perceptions of what a fair and reasonable devolution entailed.

**Citation:** (2014) 23 Dal J Leg Stud 1.

---

\* Louise M. Mimmagh is a third year student at Osgoode Hall Law School in Toronto. The author would like to thank Professor Philip Girard for his guidance and valuable feedback regarding an earlier version of this paper completed during the first year of her legal studies.

## Introduction

The practice of writing a Last Will and Testament has been described as an expression of “self-assertion,” or a means to maintain influence over one’s property after death.<sup>1</sup> However, passing away intestate has been a common historical occurrence, and approximately half of adult Canadians do not have a will.<sup>2</sup> In Ontario, the current method for trying to achieve a fair and reasonable devolution of an intestate’s estate is outlined within Part II of the *Succession Law Reform Act*.<sup>3</sup> Specifically, section 45(1) outlines the foundational concept of a “preferential share,” or the surviving spouse’s entitlement to a base financial interest in the estate, valued up to the preferential share, which is assigned in “preference” to the spouse above all other heirs.<sup>4</sup>

The *Succession Law Reform Act* is a relatively modern piece of legislation, which came into force in 1977 under Bill Davis’ minority Ontario Progressive Conservative government. Historically, the concept of a “preferential share” stands in sharp contrast with English common law methods of devolving intestate estates, including the customs of primogeniture, dower, or curtesy, in which legal entitlements were heavily influenced by an individual’s gender and marital status.

This essay investigates the origins and development of the preferential share provision in Ontario’s *Succession Law Reform Act*. In light of the historical influence of gender and marital status on intestacy provisions, this paper uses an analytical framework emphasizing the historically gendered experiences of widows and widowers, and how their gender informed the nature of their legal interests under intestacy. In addition, this essay frames its analysis within historical commentary that suggests a sharp conceptual dichotomy between the “good wife and deserving widow” or the “bad wife and undeserving widow,” and how such categorization impacted perceptions of what a fair and reasonable devolution entailed.

This essay therefore proceeds through (1) a review of the gender-based analysis this essay employs; (2) a historical review of the differing legal personalities of wives and widows under the common law; (3) an assessment of traditional common law measures for the devolution of an intestate’s estate; (4) an evaluation of the discontent with these traditional measures; (5) an in-depth review of preferential share’s introduction in 1895; (6) a critique of these reforms and how they impacted vulnerable subgroups of wives and widows; and (7) a brief review of the modern exclusion of common-law spouses under this legislation. Finally, this essay closes with general conclusions on preferential share as a fundamental conceptual shift regarding intestate estate distribution, which pioneered other important reforms in the twentieth and twenty-first centuries.

---

<sup>1</sup> Phyllis Palgi & Henry Abramovitch, “Death: A Cross-Cultural Perspective” (1984) 13 Annual Review of Anthropology 358 at 407.

<sup>2</sup> Canadian Press and Leger Marketing, *Canadians and Death* (2002), online: DocStoc <<http://www.docstoc.com/docs/74884846/Canadians-and-Death>> at 2.

<sup>3</sup> *Succession Law Reform Act*, SO 1977, c 40, s 45(1) [*SLRA 1977*].

<sup>4</sup> *Ibid.*

## 1. FRAMEWORK FOR ASSESSMENT

### A Gender-Based Analysis

Although the *Succession Law Reform Act* outlines preferential share in terms of “spouses,” as Ontario has only recently recognized same-sex partnerships, a historical review of intestacy cannot proceed in the same gender-neutral manner.<sup>5</sup> This analysis therefore predominantly occurs in a historical context of exclusively heterosexual unions, and where one’s gender fundamentally altered the experience of both matrimony and widowhood.

In order to appreciate the influence of gender on widowhood and intestacy provisions, this historical examination embraces a “Gender-Based Analysis” framework. Such a framework “recognizes that the realities of women’s and men’s lives are different” due to the phenomenon of culturally specific gender roles.<sup>6</sup> A gender-based framework therefore provides insight into the dynamic and distinct experiences of husbands and wives, or widowers and widows, in an era that the husband held “the purse, the sword, and the plow handle,” and where a widow would suddenly find herself removed from her husband’s traditional authority and *coverture* upon her husband’s death.<sup>7</sup>

## 2. GENDERED EXPERIENCES UNDER THE LAW

### From Wife to Widow: The Death and Resurrection of a Woman’s Legal Personality

Under the common law doctrines of marital unity and *coverture*, a woman’s legal personality would undergo a dramatic transformation upon marriage: as a wife, a woman would be legally classified as a *feme covert*, or one who has her legal existence suspended, merged or “covered” by her husband.<sup>8</sup> Sir William Blackstone, writing in 1765, famously described this transformation:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing.<sup>9</sup>

---

<sup>5</sup> *Succession Law Reform Act*, RSO 1990 c S26, s 1(1) [*SLRA 1990*]. With “spouse” as describing two persons, rather than a “man and wife.” Same-sex marriages were not effectively recognized in Ontario until 2003 via *Halpern v Canada* (2003), 225 DLR (4th) 529, 65 OR (3d) 201 (Ont CA) [*Halpern*].

<sup>6</sup> Minister of Indian Affairs and Northern Development, “Gender-Based Analysis Policy” (Ottawa: 1999, 2006) at 4-5, online: Indian Affairs and Northern Development Canada <[http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/plc\\_1100100028538\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/plc_1100100028538_eng.pdf)>.

<sup>7</sup> Joel T Rosenthal, “Fifteenth-Century Widow and Widowhood: Bereavement, Reintegration and Life Choices” in Sue Sheridan Walker, ed, *Wife and Widow in Medieval England* (Ann Arbor: University of Michigan Press, 1993) ch 2 at 34.

<sup>8</sup> *Ibid* at 3.

<sup>9</sup> William Blackstone, *Commentaries on the Laws of England*, vol 1 (Oxford: Clarendon Press, 1765) at 430.

As a *feme covert*, a wife's real property, land, and income from both labour and gifts would immediately be transferred to her husband's control, and the common law historically only recognized the husband as an agent before the law.<sup>10</sup> Feminist authors have therefore described *coverture* as a "civil death," or the "obliteration of the legal personality of the wife."<sup>11</sup>

If a wife's legal personality experienced a "civil death" at marriage, it was resurrected at the time of her husband's death. As a widow, a woman would return to a legal standing parallel to any other single female. She was legally classified as a *feme sole*, or a "woman who enjoyed a full legal personality," with nearly all the civil rights of a man outside of suffrage, including the ability to own property through purchase or inheritance, and bequeath or devise her property through a will.<sup>12</sup>

### 3. INTESTACY UNDER COMMON LAW AND STATUTE

#### Traditional Measures for the Devolution of Intestate Estates

An intestate's estate was traditionally managed through the common law or legislative provisions. Consequently, intestate legislation has been described as a "second best law," or the "poor man's will," as it attempted to provide a fair and reasonable devolution of the intestate's estate.<sup>13</sup> Yet as outlined above, one's gender, when combined with marital status, was a potent indicator of an individual's legal standing, and also played a critical role in determining one's legal relationship with an intestate spouse's estate.

The basis of intestacy provisions are also linked to the common law's concerns around the doctrine of *bona vacantia*, or "ownerless goods." This doctrine is based upon the common law theory that "all property must vest in someone at all times without interruption," or otherwise be claimed by the Crown.<sup>14</sup> As a result, intestacy provisions existed before the creation of the modern will to prevent property from being classified as *bona vacantia* by ensuring it was immediately vested in the deceased's relatives.<sup>15</sup>

#### The Right of Primogeniture

At common law, primogeniture addressed the issue of *bona vacantia* under intestacy by devolving the estate to the "heir-at-law," with priority being granted to the eldest son. The doctrine is often associated with the aristocracy of England and attempted to prevent fragmentation of substantial family estates. Yet authors in the nineteenth century, such as Eyre Lloyd, argued that this "natural desire of Englishmen to perpetuate land

<sup>10</sup> Lori Chambers, *Married Women and the Law of Property in Victorian Ontario* (Toronto: Toronto University Press, 1997) ch 1 at 18-19; Nancy E Wright, "The Lady Vanishes: Women and Property Rights in Nineteenth-Century New South Wales" in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) ch 9 at 192.

<sup>11</sup> Chambers, *supra* note 10 at 15, 14.

<sup>12</sup> Sue Sheridan Walker, *Wife and Widow in Medieval England* (Ann Arbor: University of Michigan Press, 1993) introduction at 3; Chambers, *supra* note 10 at 14-15.

<sup>13</sup> CH Sherrin & RC Bonchill, *The Law and Practice of Intestate Succession* (London: Thomson Sweet & Maxwell, 2004) at 4.

<sup>14</sup> CED (Ont 4th), vol 18, title 44 "Crown II.4.(c)" at §42 (WL Can).

<sup>15</sup> WD MacDonald, *Fraud on the Widow's Share* (Michigan: University of Michigan Law School, 1960) at 39-40.

in their families” was prevalent throughout all classes in the Christian Commonwealth.<sup>16</sup> Writing in 1877, Lloyd also dismissed any concerns around primogeniture by casually estimating that it only directed the transfer of two percent of land each year, and “could have no appreciable effect upon the descent of the bulk of property.”<sup>17</sup>

Despite Lloyd’s estimations, when combined with the nature of *feme covert*, and provisions that maternal ancestors would not inherit from an intestate until “all paternal ancestors and their descendants had failed,” primogeniture greatly reduced the likelihood of a woman coming to hold property.<sup>18</sup> Likewise, while John A. MacDonald praised the doctrine in 1845 for promoting the enterprise of younger sons, he failed to recognize that this tradition could threaten both the widow and younger children of both sexes with destitution—absent the good will of the eldest son.<sup>19</sup>

### A Widow’s Right to Dower

A widow’s right to her “dower” was therefore an important counterbalance to the male heir-at-law nature of primogeniture, and was a custom born out of the husband’s responsibility for his wife’s maintenance after his passing. Under common law, dower attached to the land at the moment of marriage, and its purpose was twofold: to fulfil a husband’s personal responsibility to secure his wife against his heirs and creditors; and to fulfil a public obligation to prevent a widow of lesser means from “becoming a public liability.”<sup>20</sup> Beyond its common law roots, a widow’s right to dower appeared in chapter 7 of the *Magna Carta* of 1215 and was to be obtained sometime during her “Right of Quarantine,” which referred to her ability to “remain in her husband’s house for forty days after his death.”<sup>21</sup>

The specific nature of a widow’s dower was outlined in the *Dower Act* of 1297, as “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.”<sup>22</sup> Therefore, her dower was a life estate in either one third or one half of her husband’s personal estate, depending on whether children or “issue” had been born by the couple.<sup>23</sup>

However, under statute, this traditional safety net had new conditions attached—conditions that were closely linked to conceptions of the “good wife” and its equivalent of the “deserving widow.” The legislation that added these conditions was the *Statute of Westminster II* of 1285, which stated that a widow would be subject to disqualification from her dower if she were adulterous.<sup>24</sup> Under common law, adultery was not a bar to

<sup>16</sup> Eyre Lloyd, *The Succession Laws of Christian Countries: With Special Reference to the Law of Primogeniture as it Exists in England* (London: Stevens and Haynes, 1877), ch 1 at 1.

<sup>17</sup> *Ibid* at 2.

<sup>18</sup> Sherrin, *supra* note 13 at 33. Citing the *Inheritance Act*, 1833 (UK) 3 & 4 Will IV c 106, s 7.

<sup>19</sup> AR Buck, “This Remnant of Feudalism? Primogeniture and Political Culture in Colonial New South-Wales, with Some Canadian Comparisons” in McLaren, Buck & Wright, *supra* note 10, ch 8 at 180; MacDonald, *supra* note 15 at 59-60.

<sup>20</sup> Wright, *supra* note 10 at 190; Liliás M Toward, *Dower and Curtesy: A Study Paper* (Nova Scotia Law Reform Advisory Commission, 1973) at 2.

<sup>21</sup> *Magna Carta*, 1215 (UK), c 7; Toward, *supra* note 20 at 2.

<sup>22</sup> *Dower Act*, 1297 (UK), 25 Edw I c 7. This form of dower is further discussed at note 39.

<sup>23</sup> Toward, *supra* note 20 at 1-2. Citing the 1670 *An Act for the Better Settling of Intestates Estates*, 1670 (UK), 22 & 23 Charles II c 10, s 5, where a widow was entitled to one third if surviving children, and half if no issue; Sherrin, *supra* note 13 at 42.

<sup>24</sup> *Statute of Westminster II*, 1285 (UK), 13 Edw I c 34.

dower, since it was considered “an offence of ecclesiastical jurisdiction only, and of which the Courts of common law took no cognizance.”<sup>25</sup> Lord Chief Justice Tindal deliberated that the condition was likely added due to concerns about a woman “introducing a supposititious offspring into the family,” although no parallel legislation threatened a husband’s curtesy for identical conduct.<sup>26</sup>

### The Custom of Curtesy

While a widow had a conditional right to her dower, a widower had his own unique relationship with the estate of his intestate wife. This relationship was based upon the common law estate of curtesy, or a husband’s absolute entitlement to his wife’s personal property, and a life estate over “the entirety of land and hereditaments of the wife of which she was seised for an estate of inheritance.”<sup>27</sup>

However, curtesy was conditional upon his wife giving birth to a *living* child that could someday be eligible to inherit the property she was seised of.<sup>28</sup> Therefore, it appears that the purpose of curtesy was to ensure that children would receive their maternal inheritance, through ensuring that the husband would “prevent it from being squandered.”<sup>29</sup> Yet it has also been reported that if the child predeceased the mother, the husband’s life estate of curtesy remained intact, and her property would not revert back to her own family. This is a discrepancy that favoured patrilineage rather than matrilineage, and enhanced property rights or wealth amongst the husband’s lineage, despite the wife’s death clearly terminating *feme covert*.<sup>30</sup>

## 4. DISCONTENT AND DEBATE

### **Discontent with Traditional Intestate Succession Mechanisms**

As the above outline highlights, the common law’s traditional treatment of intestate estates was predominately influenced by an individual’s gender. Beyond growing calls for women’s suffrage into the nineteenth century, the merits of primogeniture, as well as the effectiveness of dower and curtesy, were increasingly the focus of political and societal debate.

### Political Reform after Discontent with Primogeniture and Intestacy Provisions

In Upper Canada, discontent with traditional means of addressing intestacy took root in eighteen different proposals to abolish primogeniture between 1820 and 1851, yet the Legislative Assembly ultimately blocked these requests.<sup>31</sup> Similarly, in December

---

<sup>25</sup> *Hetherington v Graham* (1829), 6 Bing 135. As reported in *The Law Journal*, vol 7 (London: 1829) at 254.

<sup>26</sup> *Ibid.*

<sup>27</sup> Toward, *supra* note 20 at 40-41, 8.

<sup>28</sup> *Ibid* at 40-41.

<sup>29</sup> Chambers, *supra* note 10 at 20.

<sup>30</sup> Toward, *supra* note 20 at 42. In reference to FE Farrer, “Tenant by the Curtesy of England” (1927) 43 Law Q Rev 7 at 92.

<sup>31</sup> Buck, *supra* note 19 at 178.



1821, during the second session of the 8th Parliament of Upper Canada, Mr. Barnabas Bidwell moved to bring an Act forward regarding intestate estates, but the proposed legislation was voted down by a majority to six.<sup>32</sup>

The refusal to support Mr. Bidwell's proposed legislation may have been predominantly political, as Mr. Bidwell was soon expelled from the Legislative Assembly due to outstanding criminal charges in New Hampshire.<sup>33</sup> Furthermore, the debates regarding primogeniture were often accompanied by accusations that abolishment of the doctrine was "anti-British," since the custom had been struck down in the United States and its removal was associated with "republican values."<sup>34</sup> However, when legislation addressing intestacy reforms came to the Legislative Assembly on December 19, 1823, it quickly moved to committee after being introduced by Mr. John Wilson of Wentworth. By 1851, the right of primogeniture was also abolished in Upper Canada.<sup>35</sup>

### Discontent with Dower and Partial Political Reform

A widow's right to dower was also controversial in Upper Canada, and was criticized by those holding title to property influenced by it. As a wife's dower interest was "etched" into the husband's land upon marriage, and her permission was required to convey the property, dower was described as a "blot on the title" that ultimately made the property less amenable to conveyancing or prone to being undervalued.<sup>36</sup>

Similarly, those who sought to enforce dower criticized the doctrine. Such criticisms may be linked to the difficulty widows had accessing their dower, despite its pronouncement in statute; for instance, in 1225 twenty percent of the pleas on the Royal Court's Roll were related to claims for dower.<sup>37</sup> Even once enforced, dower was criticized as failing to support many of the widows it was intended to assist. The Canadian legal community probed this critique, and in 1857 the editors of the Upper Canada Law Journal released a harsh appraisal of the doctrine, stating:

[The Widow] claims dower. What is that? The third part of her husband's lands for life. Of what use is the third part of 100 acres without a house upon it, to a widow without means? Sell it...she cannot. Till it...she cannot. Eat it...she cannot. Truly, the widow asks for bread; but the law gives her a stone. She wants "sustenance" or that which will provide sustenance for her—in other words she wants money... So far the law practically fails to give that which it professes to give—the required relief.<sup>38</sup>

Despite these critiques and concerns, a widow's statutory right to dower was not to be abolished or replaced in Upper Canada, but instead underwent various reforms. For example, in 1859 the Legislative Assembly's *Act Respecting Dower* abolished a non-

<sup>32</sup> Upper Canada, Legislative Assembly, *The Journals of the Legislative Assembly of Upper Canada for the Years 1821, 1822, 1823, 1824*, 8th Parl, 2nd Sess, vol 6, (11 December 1821) (Barnabas Bidwell).

<sup>33</sup> "A Day in Canada's History", *Saskatoon Star-Phoenix* (16 November, 1931) 1.

<sup>34</sup> Buck, *supra* note 19 at 178-179.

<sup>35</sup> Upper Canada, Legislative Assembly, *The Journals of the Legislative Assembly of Upper Canada for the Years 1821, 1822, 1823, 1824*, 8th Parl, 2nd Sess, vol 6, (14, 19 December 1823) (John Wilson).

<sup>36</sup> Philip Girard, "Land law, Liberalism and the Agrarian Ideal: British North America, 1750-1920" in McLaren, Buck & Wright, *supra* note 10 ch 6 at 123-124.

<sup>37</sup> Walker, *supra* note 12 at 3.

<sup>38</sup> Wright, *supra* note 10 at 191, n 6. Citing "The Law of Dower" (1857) 3 UCLJ 209 at 209.

statutory form of dower, *dower ad ostium ecclesie*, or “Dowry at the Church door.”<sup>39</sup> *Dower ad ostium ecclesie* was a husband’s public declaration of dower after the wedding, which could be no more than one third of his property—although it could be less.<sup>40</sup> Therefore, by abolishing this form of dower, the *Act Respecting Dower* standardized a wife’s interest to a firm one-third of the husband’s estate. Similarly, sections 6 and 7 of the *Act Respecting Dower* attempted to protect wives from being coerced into signing away their dower rights when a husband sought to convey his property. These sections required that a wife be examined by a judge to “check for involuntariness or coercion by part of her husband or another party.”<sup>41</sup> In the following decades, other substantial reforms occurred through the 1882 *Married Woman’s Property Act*, in which a wife could bar her husband from curtesy *inter vivos* or through her Will, and through the *Devolution of Estates Act*.<sup>42</sup>

## 5. A FUNDAMENTAL ALTERATION TO INTESTACY

### The Introduction of “Preferential Share” in 1895

#### Political Context

In 1894, Oliver Mowat, the longstanding Premier and leader of the Ontario Liberal Party, opened the 8th Legislative Assembly of Ontario. Despite his deep Presbyterian roots, he promoted the separation of Church and State, and believed that “there must be a constant reformation, if there is to be a constant progress.”<sup>43</sup>

Mowat’s support for reforms regarding women were likely impacted by his “canny sensitivity to public opinion” and the public’s association between the rights that a woman should enjoy and her marital status.<sup>44</sup> For example, despite suffering a loss of seats in the 1884 election, his party was confident in promoting and securing municipal suffrage for widows that owned property. However, in 1889 Mowat still refused to lobby for a married woman’s right to vote—even though he personally thought that many concerns and arguments against women’s suffrage were “trivial.”<sup>45</sup>

At first, the distinction seems clear: while the public would tolerate legislating new rights for the *feme sole*, there was still a reluctance to threaten a husband’s *coverture* and enfranchise the *feme covert*. Despite this distinction regarding a woman’s suffrage, it does not appear that this public concern extended to legislating the property of a *feme covert* or *feme sole*. After all, Mowat, possibly not foreseeing any political firestorm, was keen to personally introduce the first reading of the *Married Woman’s Property Act* in 1882.<sup>46</sup>

---

<sup>39</sup> *An Act Respecting Dower*, 22 Vict, s 3; *An Act Respecting Dower*, Upper Canada Statutes Consolidated 1859, cap 84. This Act also abolished *dower ex assensu partis*.

<sup>40</sup> Richard Thomson, *An Historical Essay on the Magna Charta of King John* (London: 1829) at 148.

<sup>41</sup> *An Act Respecting Dower*, *supra* note 39, ss 6-7.

<sup>42</sup> Sherrin, *supra* note 13 at 34; *Devolution of Estates Act*, 49 Vict c 22.

<sup>43</sup> Margaret Evans, *Sir Oliver Mowat* (Toronto: University of Toronto Press, 1992) at 25, 28.

<sup>44</sup> *Ibid* at 304.

<sup>45</sup> *Ibid* at 306, 304, 15.

<sup>46</sup> *Ibid* at 29. This bill also included “Spinsters,” or women who had never married, as they also classified as *feme sole*.

### Bill 118, “An Act making better Provisions for Widows of Intestates in Certain Cases”

On March 15, 1895, Premier Mowat introduced another piece of legislation that addressed a woman’s property interests: Bill 118, “An Act making better Provisions for Widows of Intestates in Certain Cases,” or *The Intestates’ Estates Act*, based upon the British *Intestate Estates Act* of 1890.<sup>47</sup> It operated as its own distinct entity, instead of amending the *Devolution of Estates Act*, the *Dower Act*, or any other legislation containing intestacy provisions, and was thus a visible and prominent legislative proposal.<sup>48</sup> Even so, the Bill’s importance did not attract significant debate, and by April 16, 1895, Bill 118 effortlessly received Royal Assent, along with 126 other bills, on the final day of the First Session of Ontario’s 8th Parliament.<sup>49</sup>

Despite its uncontroversial passage through the Ontario Legislature, *The Intestates’ Estates Act* substantially altered a widow’s legal relationship with the estate of her intestate husband through three core sections.<sup>50</sup> Section 2 ensured that if an intestate husband did not have children, and his estate had a net value that did not exceed \$1000, his entire estate would go to his widow “absolutely and exclusively.” If the estate had a net value that exceeded \$1000, then section 3 outlined that after the payment “of debts, funeral and testamentary expenses and expenses of the administrator,” the widow would again be able to obtain \$1000 absolutely and exclusively. Finally, section 4 specified that this \$1000 “shall be in addition and without prejudice” to her interest in the residue of the estate.

*The Intestates’ Estates Act* therefore fundamentally changed how a widow’s inheritance is conceptualized. Under the preferential share model, a widow’s inheritance commenced with a fixed interest of \$1000 (if the estate had a net value able to provide this) and then an additional interest in the remainder of the estate. This is in sharp contrast with dower, in which there was no absolute financial interest, and the widow was only entitled to a third of whatever her husband’s estate happened to be worth.

### The Response: The Undeserving Widow

Despite this conceptual shift, the introduction of *The Intestates’ Estates Act* at the Legislative Assembly was initially a quiet affair. On the day after it was introduced, *The Globe’s* headline was focused on the guilty verdict in a murder case, and the parties’ upcoming hanging; however, the updates from the Legislature did mention Bill 118, including a brief description of its purpose:

<sup>47</sup> Ontario, Legislative Assembly, *Journals of the Legislative Assembly of Ontario*, 39th Parl, 1st Sess, vol 28 (15 March 1895) at 52 (Oliver Mowat). The Act was based on the 1890 British *Intestate Estates Act*, 1890 (UK), 53 and 54 Vict c 29, as later clarified by case law such as *Re Charriere, Duret v Charriere*, [1896] 1 Ch 912, as reported by Henry O’Brien, ed, for 32 Can LJ at 548 [*Charriere*].

<sup>48</sup> *MacWilliams v MacWilliams*, [1962] OR 407 at para 15, 32 DLR (2d) 481 (Ont CA) [*MacWilliams*].

<sup>49</sup> Ontario, Legislative Assembly, *Journals of the Legislative Assembly of Ontario*, 39th Parl, 1st Sess, vol 28 (16 April 1895) at 165.

<sup>50</sup> *An Act making better Provisions for Widows of Intestates in Certain Cases*, 58 Vict, c 21, s 3 [*The Intestates’ Estates Act*]. Using the consumer price index to adjust for inflation, a \$1000 estate in 1895 would have a present day value of approximately \$20,300 CAD.

[T]o provide that where a man dies intestate without issue his widow shall be able to claim up to \$1000, and that the divisions among relatives under the law as present shall not take place except [if] the estate exceeds that sum.<sup>51</sup>

The Bill's second reading and amendments recommended by committee also received no coverage. Its seemingly uncontroversial nature is captured by *The Globe's* description of its third reading, remarking that "a number of third readings were discharged when the House met, the bills thus practically becoming law being the Attorney-General's to make better provision for the widows of intestates in certain cases."<sup>52</sup> Regarding its Royal Assent on the last day before the formal prorogation of the Legislature, *The Globe's* coverage only emphasized that the closing ceremonies were the "quietest event of the kind which has happened for some years" with less than half the members' seats being occupied.<sup>53</sup>

It took several months for the new legislation to be fully noticed and debated on record. In November 1895, seven months after *The Intestates' Estates Act* was proclaimed into law, the editors of *The Canada Law Journal* received the following questions:

Wherein is the sense of justice of this latest creature of the Solons of the Local Legislature? If a wife does her duty, or raises children, she gets nothing special; if she provides no issue, she gets \$1,000 clear. Does one farrow cow get all the pasture?<sup>54</sup>

In response, the editors concurred by stating that "[w]hilst it was right to make some provision for the widow who had no children" they also did not understand why a wife with children "should be so much ignored." The editors subsequently dismissed the legislation as part of the "great clamour" for various reforms across the country, and suggested that if it was indeed based on English statute "it does not necessarily follow that it is the essence of wisdom" anyways.<sup>55</sup>

These comments invoke a harsh criticism of a widow without children, and frame her not as a full and legitimate heir, but as a woman of lesser concern than a widow with children. The sentiments correlate to deep societal conceptions of the "good wife" and the corresponding "deserving widow," and their counterparts of the "bad wife" and "undeserving widow." This conceptualization is closely intertwined with a historical perspective that tended to blame women for reproductive issues, from infertility to infant mortality.<sup>56</sup> Similarly, these comments are linked to the notion, pervasive in the nineteenth century, that childbearing was a woman's marital duty. As phrased by Justice Bradley of the United States Supreme Court, "[t]he paramount destiny and mission of women [is] to fulfill the noble and benign offices of wife and mother. This is the law of the creator."<sup>57</sup>

<sup>51</sup> "The Legislature", *The Globe* (16 March 1895) 1, 7.

<sup>52</sup> "The Legislature", *The Globe* (10 April 1895) 4. Oliver Mowat concurrently sat as both Attorney General and Premier during these years.

<sup>53</sup> "The Legislature", *The Globe* (17 April 1895) 5.

<sup>54</sup> "Editorial Times" (1 November 1895) 31:17 Can LJ at 556-557.

<sup>55</sup> *Ibid.*

<sup>56</sup> Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England 1850-1895* (New Jersey: Princeton University Press, 1993) at 87-91, 166-167.

<sup>57</sup> Courtni E Molnar, "Has the Millennium Yet Dawned? History of Attitudes toward Pregnant Workers in America" (2005) 12:1 Mich J Gender & L 163.

### Incorporation into the *Devolution of Estates Act*

In the face of such criticism, the provisions outlining preferential share in *The Intestates' Estates Act* were repealed in 1897, but only so they could be incorporated into the *Devolution of Estates Act* through sections 12(1)–(3).<sup>58</sup> The new concept of preferential share had to have its formal relationship with dower clarified, as these provisions suddenly existed side by side in the same piece of legislation. This clarification was accomplished through section 4(2) in the *Devolution of Estates Act*, which outlined the relationship between preferential share and dower as follows:

Nothing in this Act shall be construed to take away a widow's right to dower; but a widow may by deed or instrument in writing, attested by at least one witness, elect to take her interest under this section in her husband's undisposed of real estate, in lieu of all claims to dower...and unless she so elects she shall not be entitled to share under this section in the undisposed of real estate aforesaid.<sup>59</sup>

This section results in a widow having to *elect* to take her preferential share in lieu of dower, with the default assumption being her inclination for dower, as pronounced under section 4(2). Thus, despite the introduction of a fundamentally new means of dividing an intestate estate, a widow's traditional right to dower still stood.

### Acceptance by the Courts

Despite the criticism of preferential share and dower alike in Ontario, the courts upheld both dower and preferential share in the context of their new relationship outlined in section 4(2) of the *Devolution of Estates Act*. One such instance occurred in 1898, where Justice Role used a strict reading of the preferential share provision in *Sinclair v Brown*, and confirmed that a widow was entitled to \$1000 out of the husband's estate in Ontario, regardless of her potential inheritance from other jurisdictions.<sup>60</sup> The court also strictly limited the availability of preferential share to cases of absolute intestacy. For example, in *re Harrison*, the court did not allow for the exchange of dower for a distributive interest as there was only "intestacy in part," and thus barred the widow from a \$1000 interest.<sup>61</sup>

Contrary to these strict interpretations, Justice C. Boyd did generously interpret the ability of a widow to elect her preferential share in lieu of dower in *Baker v Stuart*.<sup>62</sup> In this case, the widow assumed her dower, but a year later sought to exchange her dower for a preferential share. The court noted that the *Devolution of Estates Act* was silent regarding the time permitted for election, unlike a widower's election for curtesy, which

---

<sup>58</sup> *Schedule A – Acts and parts of Acts Repealed*, RSO 1897, at 3657; *An Act respecting the Devolution of Estates*, RSO 1897 c 127, s 12(1)–(3); *MacWilliams*, *supra* note 48 at 25.

<sup>59</sup> *An Act respecting the Devolution of Estates*, RSO 1897 c 127, s 4(2).

<sup>60</sup> "Notes of Cases, Index-Digest for 1898" in E. Douglas Armour & E. B. Brown, eds, *The Canada Law Times*, vol 18 (Toronto: Carswell Co Limited Publishers, 1899) at 239.

<sup>61</sup> *Re Harrison*, (1901) 21 Occ N 478, 2 OLR 217. As referenced by E. Douglas Armour & E. B. Brown, eds, *The Canadian Law Times* (Toronto: Carswell Co Limited Publishers, 1901) at 196.

<sup>62</sup> E. Douglas Armour & E. B. Brown, eds, *The Canadian Law Times*, vol 18 (Toronto: Carswell Co Limited Publishers, 1899) at 174-175.

only stood for six months.<sup>63</sup> As a result, the court held that since the remainder of the estate had not yet been distributed, the widow was free to alter her decision and elect for a preferential share.<sup>64</sup>

It is difficult to determine the judiciary's exact opinion of this reform and the introduction of a preferential share. As preferential share was based upon the British *Intestate's Estates Act*, adherence to the legislation may have been based upon its strict enforcement in the motherland, such as the judgment in *Duret v Charriere*.<sup>65</sup>

## 6. LIMITATIONS AND PROGRESS

### Review of the Preferential Share Reforms

For a vast majority of widows, the ability to elect between her dower and a preferential share would have been a beneficial reform to intestacy provisions—particularly for those not insulated by a family trust, or those whose husband's estate was worth less than the preferential share threshold of \$1000. However, for some subgroups of widows, the appearance of empowerment through an ability to elect a preferential share could be somewhat misleading. This was the case for widows accused of adultery, those deemed to have an “unsound mind,” or widows with children.

### Influence of Adultery

As noted, the 1285 *Statute of Westminster II* maintained that a widow would be disqualified from obtaining dower should she be adulterous, a condition that remained under the *Dower Act* of 1297 and under the 1970 revised version of this statute in section 8, which states:

Where a wife willingly leaves her husband and goes away and continues with her adulterer, she is barred forever of her action to demand her dower... unless her husband willingly and without coercion is reconciled to her and suffers her to dwell with him, in which case she is restored to her action.<sup>66</sup>

Ontario case law demonstrates that adultery could also bar a widow from her preferential share, even though adultery is not specifically addressed in the *Devolution of Estates Act*. For example, in 1962 Justice Kelly for the Ontario Court of Appeal stressed that the preferential share provisions of the *Devolution of Estates Act* were only accessible if a widow *elected* for a preferential share in lieu of her dower; however, an adulterous widow “is precluded from making an effective choice” since her conduct has disintitiled her from her dower *prima facie*.<sup>67</sup> As a result, the widow in *MacWilliams v MacWilliams* was prevented from claiming her preferential share, since this interest could only be ob-

---

<sup>63</sup> *Ibid* at 175.

<sup>64</sup> *Ibid* at 174-175.

<sup>65</sup> *Charriere*, *supra* note 47.

<sup>66</sup> *Dower Act*, RSO 1970, c135, s 8 [*Dower Act 1970*].

<sup>67</sup> *MacWilliams*, *supra* note 48 at 24-25.

tained in exchange for her dower, which she lost upon her engagement in adultery.<sup>68</sup> Of course, the language of section 8 of the *Dower Act* is problematic, as it only addresses the impact of a wife's adultery on her election of her dower or preferential share—there is no parallel provision barring an adulterous husband from his estate of curtesy.

The basis for such a discrepancy can be found in differing perceptions of male and female adultery during the early twentieth century, including the contention that a husband's infidelity was less offensive to the marital union since he "impose[d] no bastards upon his wife."<sup>69</sup> Submissions to the British *Royal Commission on Divorce and Matrimonial Causes* in 1912 also argued that the husband's adultery was less significant due to it being "more or less accidental" and ultimately the fault of immoral women in his company.<sup>70</sup> In addition, a woman that fled an abusive spouse and sought non-adulterous shelter would surely struggle to secure her dower and ability to elect her preferential share against accusations of infidelity.

### Lunacy or an "Unsound Mind"

Another classification that could impair a wife's ability to claim dower or her preferential share was "lunacy," as noted in various sections of the *Dower Act* of 1914. For example, in section 14(b) a husband seeking to sell land with a wife confined to a "hospital for the insane" could apply for a summary order to dispense with his wife's permission to bar her dower.<sup>71</sup> Similarly, if the wife was not confined to an asylum, a husband could have a doctor certify his medical opinion of lunacy, thus allowing a judge to accept an application to bar her dower under section 15(1).<sup>72</sup>

While a wife permanently confined to an asylum could conceivably not require either her dower or preferential share, these provisions are nonetheless problematic from a gender-based analysis. Once again, the gender-specific language of this legislation only made wives vulnerable to these provisions. The application to bar dower under section 15 had to be completed within a month of the medical certification's completion; as a result, a wife had an incredibly short window of opportunity to contest certification.<sup>73</sup> Under section 10(1) of the *Lunacy Act* of 1914, a wife or widow had to wait a year to challenge certification, unless provided with leave of the court. Section 14 of the *Dower Act* also appears to lack any conception of a wife recovering from her mental affliction, leaving an asylum, or ever requiring her full dower in the future.

Yet a wife accused of lunacy or an unsound mind was offered some protection by section 7(1) of the *Lunacy Act* of 1914, since lunacy had to be established "beyond a reasonable doubt."<sup>74</sup> Of course, reasonable doubt was only as valid as what was classified as "lunacy." Even in the revised 1970 version of the *Dower Act*, section 13(1)(c) considered a wife suffering from epilepsy to be of an "unsound mind."<sup>75</sup> Likewise, in

<sup>68</sup> *Ibid.*

<sup>69</sup> FP Walton, "Divorce in England, the United States and Canada" (1913) 22:7 Yale LJ 531 at 534.

<sup>70</sup> *Ibid.* at 534. However, it is interesting to note from Walton's report that in contrast, adulterous conduct would be deemed "very deliberate" if the conduct occurred with a "pure woman," through an additional emphasis on the reputation of the woman, rather than the man, involved in adultery.

<sup>71</sup> *Dower Act*, RSO 1914, c 70, s 13(1).

<sup>72</sup> *Ibid.*, s 15(1).

<sup>73</sup> *Ibid.*, s 15(2).

<sup>74</sup> *Lunacy Act*, RSO 1914 c 68, s 7(1).

<sup>75</sup> *Dower Act 1970*, *supra* note 66, s 13(1)(c).

the 1820s two women were reportedly confined to the Massachusetts' McLean Asylum For the Insane after they "confessed to despising their husbands."<sup>76</sup> This has led some authors to argue that it was "relatively easy to get troublesome or eccentric individuals admitted to the insane asylums," and that institutional confinement was a "convenient and culturally legitimate alternative to coping with 'intolerable' individuals within the family."<sup>77</sup> Therefore one can conclude that while an uncommon occurrence, wives and widows could be incredibly vulnerable to the burgeoning discipline of psychiatry in the late nineteenth and early twentieth centuries, and could lose access to both their dower and preferential share as a result.

### Women with Children

The longstanding terminology of preferential share provisions, employed from 1895 to 1970, meant that preferential share only applied to a widow with no issue.<sup>78</sup> Therefore, another sub-group of women that could be barred from their access to preferential share were those *with* issue, meaning they had children with their now deceased spouse. As noted above, in *re Harrison*, this reading of the provision was also firmly upheld by the courts. Thus, a widow's options regarding intestacy were dramatically impacted by the presence of children: widows without children could elect a preferential share in lieu of dower, and ensure they gained access to the option which provided them with the greatest benefit. In contrast, widows with children were barred from this choice, and could only rely on their dower.

Such distinctions between widows with or without children were likely based upon societal assumptions about a woman's support system upon widowhood. For example, it was often assumed that a widow without children would have limited assistance, and thus require a preferential share. In contrast, a widow with children would be expected to rely upon her adult children, as any "good wife" who produced her husband heirs would be entitled to an adult child's good faith and financial support.<sup>79</sup> In addition, a widow with dependent children was expected to reside with her matrilineal family.<sup>80</sup> However, Cynthia Curran found that in Victorian England these assumptions often failed to hold true, and that rather than remarrying or living with relatives, 68% of widows were the head of their households.<sup>81</sup>

Widows with or without children also had distinct experiences from their male counterparts. For example, as noted above, a widower would obtain a life interest over his wife's property and real estate if a child was born through an estate of curtesy. Moreover, a widower was not similarly impacted by the pervasive Victorian ideal of "separate spheres" for men and women, whereby men were permitted to work outside the home and women were relegated to the domestic realm. As a result, widows with or

---

<sup>76</sup> E Fuller Torrey & Judy Miller, *The Invisible Plague: the Rise of Mental Illness from 1750 to the Present* (Toronto: Rutgers University Press, 2001) at 322.

<sup>77</sup> *Ibid* at 321.

<sup>78</sup> *The Intestates' Estates Act*, *supra* note 50, s 2.

<sup>79</sup> Cynthia Curran Albion, "Private Women, Public Needs: Middle-Class Widows in Victorian England" (Summer 1993) 25 *A Quarterly Journal Concerned with British Studies* 217 at 227.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid*. Quoting an 1851 census from the British city of Birmingham.



without children typically found it difficult to locate employment outside the home that would lift them beyond “bare subsistence.”<sup>82</sup>

Nonetheless, the distinction between widows with or without issue was reaffirmed, rather than reformed, in 1966 through the *Act to Amend the Devolution of Estates Act*. Through this amendment an apparent “loophole” was closed, and it was clarified that the ability to elect a preferential share “do[es] not apply to the surviving spouse of a person who dies intestate *and is survived by one or more infant children by a former marriage*” [emphasis added].<sup>83</sup>

Progressive commentators in 1895 would have been dismayed to learn that legislative reform regarding the perceived injustice to the “farrow cow” only occurred in 1977 with the advent of the *Succession Law Reform Act*. Under section 45(1) a widow with issue is now able to access the preferential share provision, while section 46(1)–(2) of the *Succession Law Reform Act* explicitly outlines the division of the residue between the widow and children.<sup>84</sup> However, access to preferential share no longer comes in lieu of dower; instead, it comes at the expense of dower due to the repeal of both the *Dower Act* and the *Devolution of Estates Act* by 1978.<sup>85</sup> Despite this reform, the 1895 commentator might have still disliked the *Succession Law Reform Act* because section 44 has actually granted the widow without issue an even *greater interest* than preferential share in her intestate spouse’s estate: she is now “entitled to the property absolutely.”<sup>86</sup> Then again, the commentator might be appeased by the 1960 amendments to the *Devolution of Estates Act*. These reforms gave a widower access to his own preferential share thanks to the gender-neutral nature of the terminology “spouse” in the *Succession Law Reform Act*, despite the 1977 abolition of curtesy.<sup>87</sup>

## 7. MODERN-DAY PREFERENTIAL SHARE: LOVE AND (LESS) MARRIAGE

### Expanding Access to Preferential Share: Widowers, Same-Sex & Polygamous Couples

Since its introduction in 1895, access to a preferential share has consistently been extended to other sub-groups of spouses who would benefit from this provision. As noted above, the 1977 amendments to the *Succession Law Reform Act* expanded this benefit to widows with issue and to widowers, reflecting a more gender-neutral appreciation for the nature of marriage and widowhood. In addition, section 6(2) of the *Family Law Act* now permits a surviving spouse to elect either their preferential share or equalization payment of net family property after the death of their intestate partner—an

---

<sup>82</sup> *Ibid* at 228-229.

<sup>83</sup> *Act to Amend the Devolution of Estates Act*, SO 1966, c 45, s 1.

<sup>84</sup> *SLRA 1977*, *supra* note 3, ss 45(1), 46(1)-(2).

<sup>85</sup> *Devolution of Estates Act*, SO 1977, c 40, s 50; *Dower Act*, SO 1978, c 2, s 70(2).

<sup>86</sup> *SLRA 1990*, *supra* note 5, s 44.

<sup>87</sup> *Devolution of Estates Act*, RSO 1960, c 106, ss 12(1)-(3); *Devolution of Estates Act*, SO 1960-61, c 22, s 2; *SLRA 1977*, *supra* note 3, s 49.

important development that will protect spouses entitled to an equalization payment in excess of \$200,000 before widowhood.<sup>88</sup>

In 1990, the legislation also amended the definition of “spouse” to include those engaged in a polygamous marriage, as long as the union originated in a jurisdiction that legally recognized this marriage structure.<sup>89</sup> After same-sex marriages were legally recognized in 2003 after the Ontario Court of Appeal Decision of *Halpern v Canada*, the definition of “spouse” was also updated from “a man and woman” to “two persons” who are lawfully married. However, this amendment did not occur until March 2005, several months before the passage of the *Civil Marriage Act* in July 2005.<sup>90</sup> Overall, these amendments reflect a progressive and purposive expansion of this benefit to a broader range of individuals impacted by the hardships associated with intestacy and the death of a spouse. These modern amendments have also moved into a gender-neutral framing that distances itself from the provision’s historical emphasis on a conceptual dichotomy between the “good wife and deserving widow” and the “bad wife and undeserving widow.”

### Exclusion of Common-Law Spouses in Ontario

Unfortunately, despite the above amendments which promote an expanded definition of who is considered a spouse under the *Succession Law Reform Act*, and therefore considered entitled to a preferential share, a significant and growing portion of Ontario’s population is still excluded: common-law spouses. Specifically, the *Succession Law Reform Act* does not provide any automatic consideration to a surviving common-law spouse after the death of his or her intestate partner, regardless of how long the relationship existed, or the level of dependency of one spouse upon the other, as section 1(1) of the legislation only extends this benefit to those who are lawfully married or in a void or voidable marriage that was entered into in good faith.<sup>91</sup>

In light of the consistent expansion of access to a preferential share benefit, the continued exclusion of common-law spouses is a sharp contrast to the recent inclusionary trend. This exclusion is also notable due to the increasing prevalence of common-law unions in Canada. For example, in 2011 Statistics Canada recorded that common-law couples accounted for 16.7% of Canadian families, or 1,567,910 households.<sup>92</sup> In addition, between 2006 and 2011 the number of common-law couples increased by 13.9%—a growth rate that was *four times greater* than the increase in married couples.<sup>93</sup> This growth is also mirrored by a decline in married couples overall: in 1961 married

---

<sup>88</sup> *Family Law Act*, RSO 1990, c F3, s 6(2), 5(1). However, it is important to note that the court does have the discretion to increase or decrease the amount of a surviving spouse’s equalization payment if the amount is otherwise unconscionable in regard to the factors set out in section 5(6). In contrast, the court has no discretion to alter the amount of the preferential share, as its value is mandated by O Reg 54/95, s 1.

<sup>89</sup> *SLRA 1977*, *supra* note 3, s 1(2).

<sup>90</sup> *Halpern*, *supra* note 5; *Succession Law Reform Act*, RSO 1990 c S26, s 1(1), as amended 2005, c 5, s 66 on March 9, 2005; *Civil Marriage Act*, SC 2005, c 33.

<sup>91</sup> *SLRA 1990*, *supra* note 5, s 1(1). However, as discussed below, various judicial applications may be available for these common-law spouses in the form of dependant support claims.

<sup>92</sup> Statistics Canada, *Portrait of Families and Living Arrangements in Canada* (9 January 2013), online: StatCan <<http://www.statcan.gc.ca>>.

<sup>93</sup> *Ibid.*

couples comprised 91.6% of families in Canada, and by 2011 Statistics Canada observed a decrease to 67% of all families.<sup>94</sup>

### Exclusion and Potential Stigma associated with Cohabiting Couples

Due to the decrease in marriage rates and an increase in common-law households, a growing percentage of the population in Ontario will not have access to a preferential share of their intestate partner's estate. The decision to exclude common-law spouses or cohabiting couples from obtaining a preferential share is controversial. Proponents for the exclusion prefer the current "opt-in" format, where couples express their autonomy through the deliberate choice of marriage, and explicitly signal their desire to grant the surviving partner an interest in the estate.<sup>95</sup> In contrast, those who promote the inclusion of common-law spouses promote an "opt-out" structure, in which cohabiting couples are granted an automatic interest in the estate by default, while providing a mechanism for those who object to exit the scheme.<sup>96</sup>

The current preference for an opt-in format, and the exclusion of common-law or cohabiting couples unless and until they marry, may exist for reasons beyond advocating for personal choice and autonomy when conferring an interest in one's estate. Rather, it appears that the exclusion of common-law or cohabiting couples may still be associated with conceptions of the deserving or undeserving partner. These exclusions now operate as an expression of stigma and disapproval of those who fail to adhere to societal expectations of entering a traditional marriage.

Empirical investigations demonstrate a clear stigma against those who remain single and fail to marry, despite the growing number of individuals who either marry later in life, or who simply never walk down the aisle.<sup>97</sup> For example, a 2005 study by Bella DePaulo and Wendy Morris argued that those who do not marry encounter a unique form of discrimination, or *singlism*, derived from the "pervasive ideology of marriage and family, manifested in everyday thoughts, interactions, laws, and social policies that favour couples over singles."<sup>98</sup> Specifically, singlism reflects the broad societal myth that everyone *wants* to be married, and that they *will* eventually be married—unless they possess some deep and personal flaw.<sup>99</sup>

Yet singlism and the stigma around failing to marry are not easily transposed onto common-law relationships. In fact, merely being in a long-term romantic relationship and cohabiting in a relationship that is similar in nature to marriage may actually diminish any such stigma. Previous notions that only marriage bestows "dignity and respectability" and that cohabitation is the clear "absence of such desirable qualities"

---

<sup>94</sup> Statistics Canada, *Fifty years of families in Canada: 1961 to 2011* (September 2012), online: StatCan <<http://www.statcan.gc.ca>>.

<sup>95</sup> The Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper. Consultation Paper No 179* (June 2006) at 105-107, online: The Law Commission <[http://lawcommission.justice.gov.uk/docs/cp179\\_Cohabitation\\_Consultation.pdf](http://lawcommission.justice.gov.uk/docs/cp179_Cohabitation_Consultation.pdf)>.

<sup>96</sup> *Ibid* at 107-108.

<sup>97</sup> Elizabeth Sharp & Lawrence Ganong, "I'm a Loser, I'm Not Married, Let's Just All Look at Me: Ever-Single Women's Perceptions of Their Social Environment" (July 2011) 32 *Journal of Family Issues* 956 at 957.

<sup>98</sup> *Ibid* at 957.

<sup>99</sup> *Ibid*.

appear to be fading over time.<sup>100</sup> For example, the “Linda LeClair Affair” of 1968, in which a female college student violated university housing rules by living off-campus with her boyfriend, would hardly make the same national headlines today—and the idea that this student would be banned from the school cafeteria, prohibited from attending certain social events and eventually expelled for cohabitating now seems nothing short of an incredibly ridiculous and excessive punishment.<sup>101</sup>

Nonetheless, Professor Elizabeth Pleck of Illinois University argues that the stigma against cohabitation has not disappeared. In support of her argument she cites a 2010 Pew Trust poll in the United States, which found that 43% of respondents considered cohabitation to be negative, 13% had no opinion, and 44% possessed favourable attitudes.<sup>102</sup> Pleck also notes that there was a strong double standard in the way that women are perceived in cohabitation arrangements; women who were in common-law relationships were more likely to be labeled with negative terms such as “tramp” or “gold digger” than their male counterparts.<sup>103</sup> In addition, Pleck notes that cohabitating women are often regarded in a negative light in family courts and are “punished by losing custody of their children.” By contrast, judges “hold divorced fathers with live-in girlfriends to a ‘lower’ moral standard.”<sup>104</sup>

### Decrease in Stigmatization against Common-Law Couples

Pleck’s findings focus on American-based research, which also found that negative attitudes toward cohabitating couples were most prominent within segments of the population that are older, more religious, and living in the most conservative areas of the United States.<sup>105</sup> Couples that have cohabitated for longer periods of time tend to self-report that the stigma they experience regarding their relationship structure “is much less than it was a decade ago,” as cohabitation becomes more accepted and common place.<sup>106</sup>

There is evidence to suggest that any lingering stigma against common-law couples in the United States does not clearly reflect the social reality in Canada. For example, in the 2013 decision of *Attorney General of Quebec v A*, the Supreme Court of Canada casted doubt on the notion that there is prevalent discrimination against common-law couples in Canadian society. Specifically, the court noted that:

Nothing in the evidence suggests that *de facto* [common-law] spouses are now subject to public opprobrium or that they are otherwise subject to social ostracism.

The expert reports filed by the parties tend to show the contrary. According to them, the *de facto* union has become a respected type of conjugality and is

<sup>100</sup> Elizabeth H Pleck, *Not Just Roommates: Cohabitation after the Sexual Revolution*, (Chicago: University of Chicago Press, 2012) at 14.

<sup>101</sup> Barnard College, *The LeClair Affair: The Incident*, online: Barnard College Archives <<http://barnardarchives.omeka.net/exhibits/show/introduction/leclairaffair>>.

<sup>102</sup> Pleck, *supra* note 100 at 233.

<sup>103</sup> *Ibid* at 15.

<sup>104</sup> *Ibid*.

<sup>105</sup> *Ibid* at 233.

<sup>106</sup> *Ibid* at 14.

not judged unfavourably... [Nor do the expert reports] support a view that society continues to be suspicious or intolerant of *de facto* unions.<sup>107</sup>

In addition, the court highlighted the value of the “opt-in” format and its ability to provide common-law couples with both the choice and opportunity to structure their relationship in a format other than traditional marriage.<sup>108</sup> As a result, it appears that at present the courts and the Ontario legislature are satisfied that the exclusion of common-law couples from the preferential share provision is neither discriminatory, nor the result of social stigma against this population. The general absence of such stigma would suggest that this exclusion is not intentionally being used to turn preferential share into a reward for entering a traditional marriage, adhering to traditional gender roles, or being the “good wife and deserving widow.”

### British Columbia and Inclusion under the *Estates Administration Act*

Due to the present exclusion of common-law couples from accessing an automatic preferential share in Ontario, a surviving partner may pursue various other remedies through the courts. For example, within Part V of the *Succession Law Reform Act*, section 57(1) expressly defines “spouse” in a manner that includes common-law partners, thereby allowing a surviving partner to apply for a dependant support claim against the deceased’s estate.<sup>109</sup> In addition, a common-law spouse could make equitable claims against the estate through claims for unjust enrichment, or a constructive or resulting trust. Unfortunately, these alternatives require not only the time and expense of a judicial application or hearing, but also depend upon the surviving partner’s awareness of their potential entitlements and their overcoming evidential issues.

In contrast, British Columbia has engaged an “opt-out” format that includes a common-law spouse within intestate inheritance, including an automatic entitlement to a preferential share. Section 1 of the *Estates Administration Act* defines “spouse” as including a common-law spouse, or “a person who has lived and cohabited with another person, in a marriage-like relationship...for a period of at least 2 years immediately before the other person’s death.”<sup>110</sup> In addition, common-law partners are included in the preferential share scheme under section 85(1)–(3), which states that the spouse of an intestate will receive the entirety of the estate if its net value is less than \$65,000.<sup>111</sup> These provisions will continue once the new *Wills, Estates and Succession Act* comes into force in March 2014, after the corresponding repeal of the *Estate Administration Act*.<sup>112</sup>

As a result, despite the apparent lack of stigma or discrimination against common-law partners driving their exclusion from the preferential share provision in Ontario, a more protective and purposive reading of the spirit of the legislation would seemingly

<sup>107</sup> *Attorney General of Quebec v A*, 2013 SCC 5 at para 249, 354 DLR (4th) 191. This case is commonly referred to as “*Eric v Lola*” in the Canadian media.

<sup>108</sup> *Ibid* at para 449.

<sup>109</sup> *SLRA 1990*, *supra* note 5, s 57(1)(b). Specifically, a common-law spouse can pursue a dependant support claim if the couple cohabited continuously for a period of not less than three years, or were in a relationship of some permanence and if they are the natural or adoptive parents of a child.

<sup>110</sup> *Estate Administration Act*, RSBC 1996, c 122, s 1.

<sup>111</sup> *Ibid*, s 85(1)–(3).

<sup>112</sup> *Wills, Estates and Succession Act*, SBC 2009, c 13, s (1)–(2): coming into force on March 31, 2014 (see BC Reg 148/2013).

encourage the province to follow in British Columbia's footsteps. Adopting an "opt-out" structure, which avoids a dependant support claim or other judicial application by a vulnerable and grieving partner, would also continue to develop the preferential share provision in a progressive manner. This would emphasize the overall relationship and dependency between two partners, rather than their gender, marital status, and lingering conceptions of the "good wife and deserving widow" or the "bad wife and undeserving widow."

## 8. THE LAST LEGISLATION STANDING

### Reflections on the Preferential Share under the *Succession Law Reform Act*

With the repeal of both the *Dower Act* and the *Devolution of Estates Act* by 1978, the *Succession Law Reform Act* is now one of Ontario's central pieces of legislation addressing intestacy provisions. As noted above, the legislation regarding intestacy in Upper Canada, up until present-day Ontario, has undergone significant reform and reconceptualization. Most notably, this essay has explored the introduction of the preferential share provision in the "Act making better Provisions for Widows of Intestates in Certain Cases."

Like its predecessors, the preferential share model received harsh criticism, particularly in regards to concepts of the "bad wife" or "undeserving widow," since the provision was only accessible for women without issue. Many sub-groups of widows were left vulnerable despite this reform—including but not limited to those accused of adultery, suspected of lunacy, or with children—as preferential share still embraced "the power of the state to reinforce patriarchal control over households."<sup>113</sup>

Overall, the fundamental conceptual shift into a preferential share model preceded other important reforms. First, it recognized the importance of a base level of financial support required for widows, rather than the traditional dower as a percentage of the estate. Accordingly, the threshold of the preferential share has been amended numerous times, including an increase to \$20,000 in 1960, \$75,000 in 1977, and finally \$200,000 in 1995.<sup>114</sup> Second, the original option to elect one's preferential share helped to diffuse the traditional rigidity of dower for many widows and empowered the widow to choose which benefit structure suited her unique situation. Third, preferential share offered a conceptual stepping-stone from intestacy entitlements based exclusively on gender to a gender-neutral entitlement emphasizing core financial needs of the surviving spouse.

Most importantly, as protected under statute, preferential share provided a powerful counterweight to the sharp conceptual dichotomy between the "good wife and deserving widow" and the "bad wife and undeserving widow." Through *The Intestates' Estates Act* of 1895, Premier Mowat's government simply spelled it out: a widow without children is not only deserving of a share of her husband's estate, but deserving of a *preferential share* of his estate. This legislative counterweight to societal notions of the

<sup>113</sup> Chris Clarkson, *Domestic Reforms: Political Visions and Family Regulation in British Columbia, 1862-1940* (Vancouver: UBC Press, 2007) at 6.

<sup>114</sup> *An Act to Amend the Devolution of Estates Act*, SO 1960-61, c 22, s 11(1); *SLRA 1977*, *supra* note 3, s 45(1); *Succession Law Reform Act*, SO 1994 c 27, s 63(1) for the creation of O Reg 54/95, s 1.

“deserving widow” and the “undeserving widow” demonstrates the changing relationships between gender and marital status within intestacy provisions through the nineteenth century, into the gender-neutral provisions of the *Succession Law Reform Act*, and our gradual societal progression towards equality between the sexes.