

SURVIVING SPOUSE'S RIGHTS UNDER THE PROBATE COURT
2025 Estate Planning and Elder Law Symposium
September 25, 2025

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1. Why Are Spousal Rights Important in Estate Administration?

- a. It is true that we are administering less and smaller probate estates, but we are still dealing with probate estates.
- b. Understanding the rights of a surviving spouse—and how those rights may be contractually modified—is essential to avoiding mistakes in the administration of both testate and intestate estates.

2. Statutory Spousal Rights in Ohio

- a. Election to Take Under or Against the Will – RC 2106.01
- b. Rights of a Surviving Spouse in an Intestate Estate – RC 2105.06
- c. Right to Receive Mansion House – RC 2106.10
- d. Right to Remain in the Mansion House – RC 2106.15
- e. Right to Purchase Property – RC 2106.16
- f. Right to Place Charge on Real Estate – RC 2106.11
- g. Allowance for Support – RC 2106.13
- h. Right to Automobiles – RC 2106.18
- i. Right to Watercraft and Outboard Motor – RC 2106.19
- j. Right to Reimbursement for Funeral and Burial Expenses – RC 2106.20
- k. Right to Challenge Antenuptial, Postnuptial or Separation Agreement – RC 2106.22
- l. Dower Rights - RC 2103.02

3. Election to Take Under or Against the Will [RC 2106.01]

- a. **Election to Take Against the Will.** If the surviving spouse chooses to elect against the Will, they forgo the provisions made for them under the Will and instead receive a statutory share of the decedent's net probate estate:
- i. One-half if the decedent had no more than one child or lineal descendant; and
 - ii. One-third if the decedent had two or more children or lineal descendants.

By electing against the Will, the surviving spouse waives the right to any assets given to the surviving spouse under the Will. Unless the Will provides otherwise, the surviving spouse is treated as having predeceased the decedent. RC 2106.01(D).

Section 2106.01(A) describes the election as "the right to elect to take under the Will or under Section 2105.06 of the Revised Code." However, this does not include the \$20,000 or \$60,000 monetary share that is available under RC 2105.06 to the surviving spouse of a decedent who died without a Will.

An election against the Will results in the balance of the net estate being disposed of as though the surviving spouse had predeceased the testator. RC 2106.01(D).

- b. **Election to Take Under the Will.** If the surviving spouse elects to take under the Will, the surviving spouse will receive those assets given to the surviving spouse under the Will.

c. **Timing Requirements and Presumptions**

- i. After the appointment of an executor or administrator, the probate court shall issue a citation (Probate Form 8.0) to the surviving spouse to elect whether to take under the Will or against the Will (i.e., under RC 2105.06). RC 2106.01(A).
- ii. The citation shall be accompanied by Probate Form 8.3, A Summary of General Rights of the Surviving Spouse. RC 2106.02.
- iii. A surviving spouse must choose to elect against the Will within five months of the initial appointment of an executor or administrator of the estate. 2106.01(E).

- iv. On a motion filed before the expiration of the five-month period, and for good cause shown, the court may allow further time for the making of the election.
- v. If no action is taken by the surviving spouse before the expiration of the five month period, it is conclusively presumed that the surviving spouse elects to take under the Will. RC 2106.01(E).
- vi. When proceedings for advice or to contest the validity of a Will are begun within the time allowed for making the election, the election may be made within three months after the final disposition of the proceedings (if the Will is not set aside). RC 2106.01(E).
- vii. If the surviving spouse dies before the Will is probated or before making an election against a Will that has been probated, there is a conclusive presumption that the surviving spouse elected to take under the Will. RC 2106.04.
 - (1) The right of a surviving spouse to elect against the will is personal to such surviving spouse and does not survive his or her death, and that right may not be exercised in favor of the surviving spouse's estate. *In re Estate of Mathews*, 1994 Ohio App. LEXIS 5701, *4 (11th. Dist., Dec. 16, 1994) (quoting *In re Estate of La Spina*, 60 Ohio St. 2d 101, 102 (Ohio 1979).

d. **Election for Spouse with a Legal Disability**

- i. If the surviving spouse is unable to make the election due to a legal disability, then the probate court shall appoint some suitable person to provide the court with certain information relating to the surviving spouse's assets and anticipated future financial needs. RC 2106.08.
- ii. When the person so appointed returns the report, the probate court may make an election against the Will on the surviving spouse's behalf

"... only if it finds, after taking into consideration the other available resources and the age, probable life expectancy, physical and mental condition, and present and reasonably anticipated future needs of the surviving spouse, [that the election against the will] is necessary to provide adequate support for the surviving spouse during the surviving spouse's life expectancy." RC §2106.08.

- iii. *In re Estate of Cross*, 75 Ohio St. 3d 530 (1996) Husband's Will left everything to his son (wife's stepson). Wife had Alzheimers and was in a nursing home with costs paid by Medicaid. The Probate Court appointed a commissioner who filed a report, and the Probate Court elected against the Will for the surviving spouse. The court of appeals reversed stating that the elective share was not necessary for her care, since her care was being paid by Medicaid. Ohio Supreme Court upheld the Probate Court's decision to elect against the Will. Critical was that the elective share would be considered a resource and failure to make the election would make her ineligible for Medicaid.
- e. **The Election does not Affect other Statutory Rights.** Regardless of the election made (unless the Will explicitly says otherwise), the surviving spouse generally retains rights under Ohio law, including:
 - i. The right to purchase certain estate assets at appraised value;
 - ii. The right to remain in the family residence (mansion house) for up to one year (RC 2106.05);
 - iii. The right to a support allowance (RC 2106.05);
 - iv. The right to receive one or more automobiles (combined value not exceeding \$65,000), one watercraft, and one outboard motor; and
 - v. Any other rights granted to surviving spouses under Ohio law.
- f. **Effect on Non-Probate Property.** The election typically does not affect certain non-probate assets, such as:
 - i. Joint and survivorship property;
 - ii. Payable-on-death (POD) accounts; and
 - iii. Transfer-on-death (TOD) assets; and
 - iv. Inter Vivos Trust.
 - (1) If a testator's will transfers property to an inter vivos trust created by the testator, and under the terms of that trust the surviving spouse is entitled to any interest or is granted any power or nomination concerning the trust, and if the surviving spouse elects to take under section 2105.06 of the Revised Code, then—unless

the trust instrument expressly provides otherwise—the surviving spouse will be treated as having predeceased the testator for purposes of the trust. This applies to all property transferred to the trust under the will, all property held by the trustee at the time of the testator’s death, and all property that comes into the trustee’s possession or control by reason of the testator’s death [summary of RC 2106.01(D)].

- v. Does the exclusion of inter vivos trust assets apply only “if there is a disposition by a will to an inter vivos trust,” the express language in RC 2106.01(D)? No, in light of *Dumas v. Estate of Dumas*, 68 Ohio St. 3d 405 (Ohio 1994).
- (1) In *Dumas*, husband created and funded a trust for the exclusive benefit of himself and his daughters in 1986.
 - (2) He reserved the right to amend or revoke the trust. Wife left husband in 1987.
 - (3) She filed a complaint for divorce in 1988 and sought to reverse the transfer of assets to husband’s trust.
 - (4) Nine days after the complaint was filed, husband died.
 - (5) After husband’s death, wife alleged that the funding of the trust constituted a fraudulent transfer and that husband intended to defraud her by depriving her of her elective share of his probate estate.
 - (6) The Ohio Supreme Court held that wife was not a creditor and therefore did not have a valid fraudulent conveyance claim. The Supreme Court also reaffirmed its prior holdings that “there was nothing intrinsically fraudulent in the creation of a revocable *inter vivos* trust by a husband.” *Id* at 411.
 - (7) However, it went on to state “... that is not to say there can never be fraud in the creation of such a trust.” *Id*.
 - (8) The *Dumas* decision contained a “vigorous” dissenting opinion which noted that “from the spouse’s perspective there is no difference between this trust and a will which provides an insufficient share of the estate for the surviving spouse.” *Id*, at 412-413 (Resnick, J., dissenting).

- (9) While the *Dumas* decision remains good law, given the length of time since the Ohio Supreme Court has examined this question, the previous disagreement among the Justices as to the appropriate rule of law, and the fact-specific nature of the ruling, it is unclear how a court would rule on this question under a different set of facts.
- (10) Therefore, the safest course of action for one who wishes to provide less than the statutory minimum amount for his or her spouse is to enter into a valid prenuptial or postnuptial agreement.
- vi. Assets that are “poured over” to the Trust by Will, are still probate assets and included in the calculation of the net estate if the spouse elects against the Will.

g. What Assets Constitute the “Net Estate”?

- i. The “net estate,” as used in RC 2106.01, is the decedent’s gross estate less certain spousal allowances, decedent debts, funeral or burial expenses, and costs of administration.
 - (1) The “net estate” is that portion of the estate remaining after satisfaction of all the indebtedness of the decedent and the obligations of the estate. It describes the same property to be distributed as under RC 2105.06. *Weeks v. Vandever* (1968), 13 Ohio St. 2d 15, 20, 233 N.E.2d 502.
 - (2) The net estate is determined before the payment of any estate tax that may be due. RC 2106.01(C).
- ii. It does not include any automobile that passes to the spouse in accordance with RC 2106.18. These are not considered estate assets. RC 2106.18(A).
- iii. The “net estate” does not include non-probate assets. Many states follow the Uniform Probate Code’s approach of the “augmented estate,” which allows the election to reach certain non-probate assets. Ohio has not adopted such a statutory rule.

4. Rights of a Surviving Spouse in an Intestate Estate [RC 2105.06]

- a. **Intestacy - Statute of Descent and Distribution.** When the deceased spouse did not have a Last Will and Testament, Ohio’s intestacy statute will dictate how this spouse’s probate assets are distributed.

- b. **Entire Estate.** The surviving spouse receives the entire estate if one or more children of the decedent or their lineal descendants survive, and all of the decedent's children who survive or have lineal descendants surviving are children of the surviving spouse. RC 2105.06(B).
 - c. **Entire Estate.** The surviving spouse receives the entire estate if there are no children or their lineal descendants. RC 2105.06(E).
 - d. **Twenty Thousand Dollars and One-Half of the Estate.** The surviving spouse receives \$20,000 plus one-half of the balance of the intestate estate if there is one child of the decedent or the child's lineal descendants surviving and the surviving spouse is not the natural or adoptive parent of the decedent's child. RC 2105.06(C).
 - e. **Twenty Thousand Dollars and One-Third of the Estate.** The surviving spouse receives \$20,000 plus one-third of the balance of the intestate estate if there is more than one child or their lineal descendants surviving and the spouse is the natural or adoptive parent of none of the children. RC 2105.06(D).
 - f. **Sixty Thousand Dollars and One-Third of the Estate.** The surviving spouse receives \$60,000 plus one-third of the balance of the intestate estate if there is more than one child or their lineal descendants surviving, and the spouse is the natural or adoptive parent of one, but not all, of the children. RC 2105.06(D)
5. **Right to Receive Mansion House** [RC 2106.10] [Probate Form 12.0]
- a. **Mansion House as Part of Intestate Share and Family Allowance.** A surviving spouse may elect to receive the decedent's interest in the mansion house as part of the surviving spouse's intestate share (RC 2105.06) and the allowance for family support (RC 2106.13). RC 2106.10(A).
 - b. **Mansion House as Part of Spouse's Election Against the Will.** If the value of the mansion house equals or exceeds the amount to which the surviving spouse would be entitled if the surviving spouse elects against the Will, then the surviving spouse may elect to receive the mansion house as a part of the surviving spouse's election against the Will. RC 2106.01(B).
 - c. **Timing of Election.** The election shall be made at or before the time the final account is rendered. RC 2106.10(B). If the election is made in an estate relieved from administration or a summary release from administration, the election shall be made at or before the entry relieving the estate from administration or the order granting a summary release from administration. RC 2106.10(D).

d. **Mansion House Includes.** The mansion house includes the decedent's title in the parcel of land on which the house is situated and, at the option of the surviving spouse, the decedent's title in the household goods contained within the house and the lots or farmland adjacent to the house and used in conjunction with it as the home of the decedent. RC §2106.10(F).

i. See, *Chambers v. Bockman*, 2019-Ohio-3538 (12 Dist. Ct. App., 2019), cited below regarding inclusion of adjacent farm under similar definition of "mansion house" in RC 2106.16 (Purchase of Property by Surviving Spouse).

e. **Value of Mansion House.** The interest of the decedent's spouse in the mansion house shall be valued at the appraised value with the deduction of that portion of all liens on the mansion house existing at the time of death and attributable to the decedent's interest in the mansion house. RC 2106.10(A).

i. In *Estate of Hatcher Hamilton v. Hamilton*, No. 29894, 2022 Ohio 1834 (Ohio Ct. App. 9th Dist. June 1, 2022), the Court of Appeals affirmed the Probate Court's decision allowing the surviving husband to receive the residence as part of his \$40,000 spousal allowance. The surviving husband was not a beneficiary under his deceased wife's Will. He elected against the Will and also elected to receive the mansion house per his \$40,000 statutory spousal allowance where the residence was valued at approximately \$315,000 and liens of \$400,000, with a negative equity of \$85,000. The estate inventory showed the value of the residence at \$0.0.

6. **Right to Remain in Mansion House [RC 2106.15]**

a. **One Year.** The surviving spouse has the right to remain in the mansion house (the residence), if it is a probate asset, for a period of one year from the date of death without the payment of rent to the estate.

b. **If Mansion House is Sold.** If the mansion house is sold to pay debts during this period of time, the surviving spouse is entitled to be paid the fair rental value for the unexpired term. This payment has the same priority in the payment of debts as the family allowance.

7. **Right to Purchase Property [RC 2106.16]**

a. **Right to Purchase Estate Assets.** The surviving spouse, even if serving as the executor or administrator, has the right to purchase certain assets of the probate estate at the appraised values, which are not specifically devised or bequeathed.

- b. **Application to Purchase.** The application or petition to purchase the assets must be filed within one month of the approval of the inventory or the right is forfeited.
- c. **Right to Purchase the Mansion House.** The spouse may purchase the decedent's interest in the mansion house. This may include lots or farmland adjacent to the mansion house used in conjunction with it as the home of the decedent. The spouse may also purchase the household goods contained in the mansion house. The purchase price is the appraised value as fixed by the appraisers. RC 2106.16(A).

- i. In *Chambers v. Bockman*, 2019-Ohio-3538 (12 Dist. Ct. App., 2019), decedent and surviving spouse were married in 2009. At the time of the marriage, they lived in different homes. Decedent's property consisted of two lots: a 1.08-acre tract with a house in which decedent lived ("Decedent's Home"), and a separate, adjacent 55-acre tract where decedent raised cattle and kept horses ("Decedent's Farm"). The two lots were separated by a fence to prevent the animals from getting out. Following the marriage, the couple maintained and continued to live in their respective residences. Decedent further purchased a tract of land adjacent to decedent's home, which was used as a rental property ("Rental Property").

Decedent's Will left the Rental Property to the surviving spouse. The residuary estate was left to decedent's friend. The surviving spouse sought to purchase Decedent's Home and Decedent's Farm under RC 2106.16(A) at its appraised value. The executor opposed saying the residence was not the Mansion House because she did not live there, and the Decedent's Farm was a separate lot.

The court of appeals held that the surviving spouse did not need to live in the decedent's home for it to be the mansion house. Further, the Decedent's Farm may be purchased because the statute specifically refers to lots or farm land adjacent to the Mansion House and used in conjunction with the residence.

- d. **Other Real and Personal Property.** The surviving spouse also has the right to purchase other real and personal property of the decedent in an amount not to exceed one-third of the total value of the estate. RC 2106.16(B).
- i. For purposes of calculating this one-third value, the value includes the value of the mansion house, associated land, and household goods elected to be purchased by the surviving spouse.

8. **Right to Place Charge on Real Estate [RC 2106.11][Probate Form 12.0]**

- a. **Monetary Share - Intestate Estate.** If there is no Will and there are insufficient assets to pay the specific monetary share due to the surviving spouse pursuant to RC 2105.06, the court shall place a charge (lien) on any real property included in the probate estate in the amount of the unpaid portion of the specific monetary share.
- b. **Paid out of Tangible and Intangible Assets.** The specific monetary share under division (B), (C), or (D) of RC 2105.06 is to be paid out of the tangible and intangible assets of the intestate estate to the extent that the personal property is available for distribution.
- c. **Appraised Value.** The personal property distributed to the surviving spouse, other than cash, shall be valued at the appraised value.

9. **Allowance for Support [RC 2106.13]**

- a. **Amount of Support Allowance.** Revised Code 2106.13 provides for an allowance for support in the amount of \$40,000, to be paid in money or property. RC 2106.13(A)
- b. **Reduction if Spouse Selects More than One Automobile.** If a surviving spouse selected more than one automobile under RC 2106.18, the allowance for support shall be reduced by the value of the automobile having the lowest value of the automobiles selected. RC 2106.13(A).
 - i. The value of an automobile that a surviving spouse selects is the value that the surviving spouse specifies for the automobile in the affidavit executed pursuant to division (B) of Section 4505.10 of the Revised Code.
- c. **Spouse Entitled to All of Family Allowance.** If there are no minor children, or the surviving spouse is the parent of all of the decedent's surviving minor children, then the surviving spouse is entitled to receive the entire allowance of \$40,000. RC 2106.13(B)(1) and (B)(2).
- d. **Division Between Spouse and Minor Children.** If there are minor children, and the surviving spouse is not the parent of all of the minor children, the court will divide the \$40,000 allowance in equitable shares between the spouse and minor children. RC 2106.13(B)(3).

- e. **Determining the Equitable Shares.** In determining the equitable shares between the surviving spouse and the minor children, the probate court shall:
 - i. Consider the respective needs of the surviving spouse, the minor children who are children of the surviving spouse, and the minor children who are not children of the surviving spouse; RC 2106(B)(3)(a)
 - ii. Allocate to the surviving spouse, the share that is equitable in light of the needs of the surviving spouse and the minor children who are children of the surviving spouse; RC 2106(B)(3)(b)
 - iii. Allocate to the minor children who are not children of the surviving spouse, the share that is equitable in light of the needs of those minor children. RC 2106(B)(3)(c).
- f. **Application to Allocate the Allowance for Support.** If allocation between the spouse and minor children is required, the executor or administrator shall file an Application for Apportionment of Family Allowance (Probate Form 7.2) within five months of the appointment of the executor or administrator. RC 2106.13(D).
- g. **Priority of Allowance for Support.** The allowance for support is 3rd in the order of priority of debts, behind administration expenses and up to \$4,000 for the funeral bill. RC 2117.25.

10. **Right to Automobiles** [RC 2106.18]

- a. **Surviving Spouse May Select One or More Automobiles.** If a decedent owned one or more automobiles, and such automobiles were not transferred pursuant to joint ownership with right of survivorship, or transfer on death designation, or are not otherwise specifically disposed of by decedent's Will, the surviving spouse may select one or more automobiles that do not exceed a total value of \$65,000. RC 2106.18.
- b. **Valuation of the Automobiles.** The value of the automobiles is the value specified in the affidavit that the surviving spouse executes pursuant to division (B) of section 4505.10 of the Revised Code.
- c. **Transfer in Compliance with RC 4505.10 is Outside Probate.** This interest shall immediately pass to the surviving spouse upon transfer of the title or titles in accordance with section 4505.10 of the Revised Code.
- d. **Definition of Automobile.** The "automobile" includes a motorcycle and includes a truck if the truck was used as a method of conveyance by the deceased spouse or

the deceased spouse's family when the deceased spouse was alive. RC 2106.18(D).

- e. **Effect on Allowance for Support.** Note that this transfer will lower the allowance for support if more than one automobile is selected. RC 2106.13.
- f. **Not an Estate Asset.** Each automobile that passes to a surviving spouse under RC 2106.18 shall not be considered an estate asset and shall not be included in the estate inventory.

11. **Right to Watercraft, Watercraft Trailer, and Outboard Motor** [RC 2106.19]

- a. The surviving spouse may elect to receive one watercraft, one watercraft trailer, and one outboard motor, to the extent such items were owned by the decedent and not specifically disposed of by the decedent's Will. RC 2106.19(A).
 - i. A watercraft trailer only refers to one trailer used to transport the watercraft transferred under this section. RC 2106.19(C).
- b. The items selected shall immediately pass to the surviving spouse upon receipt by the clerk of the court of common pleas, or in the case of an untitled but registered watercraft trailer, upon receipt by the bureau of motor vehicles, of both of the following:
 - i. The title executed by the surviving spouse, if titled;
 - ii. An affidavit sworn by the surviving spouse stating the date of the decedent's death, a description of the watercraft, watercraft trailer, or outboard motor, the approximate value, and that the watercraft, watercraft trailer, or outboard motor is not disposed of by testamentary disposition. RC 2106.19 (A).
- c. The watercraft, watercraft trailer, or outboard motor shall not be considered an estate asset and shall not be included in the estate inventory. RC 2106.19(A).

12. **Right to be Reimbursed for Funeral and Burial Expenses** [RC 2106.20]

The surviving spouse has a right to be reimbursed for funeral and burial expenses paid by the spouse to the extent that other creditors of the estate would not be prejudiced by such reimbursement. RC 2106.20.

13. **Right to Challenge Antenuptial, Postnuptial or Separation Agreement** [RC 2106.22]

Any antenuptial, postnuptial, or separation agreement to which a decedent was a party is valid unless an action to set it aside is commenced within four months after the appointment of the executor or administrator of the estate unless, within the four-month period, the validity of the agreement otherwise is attacked.

14. **Time Limit for Exercising Rights** [RC 2106.25]

- a. The surviving spouse shall exercise all rights under Chapter 2106 of the Revised Code within five months of the initial appointment of an executor or administrator of the estate. It is conclusively presumed that a surviving spouse waived any right not exercised within that five-month period, or within any longer period of time allowed by the court.
- b. Upon the filing of a motion to extend the time for exercising a right under Chapter 2106 of the Revised Code and for good cause shown, the court may allow further time for exercising the right that is the subject of the motion.” RC 2106.25.
- c. However, *In re Estate of Cvanciger*, 2015 Ohio 4318 (11th Dist. Ct. App. Oct. 19, 2015) held that the payment of the allowance for support to the surviving spouse is mandatory and not subject to the five-month period under RC 2106.25.
 - i. However, the five-month does apply if the court is required to allocate between the surviving spouse and the minor children because RC 2106.13(D) requires the executor to file an application to allocate within five months of the initial appointment of the executor or administrator.
- d. RC 2106.25 does not apply to the election against the Will under RC 2106.01. The time period for filing a motion to extend time for the election against the Will is more restrictive.
 - i. *On a motion filed before the expiration of the five-month period [emphasis added], and for good cause shown, the court may allow further time for the making of the election. If no action is taken by the surviving spouse before the expiration of the five-month period, it is conclusively presumed that the surviving spouse elects to take under the will. RC 2106.01(E)*
- e. *In re Estate of Wetzel*, 2021 -Ohio-1859 (12th Dist. App.), the court failed to issue a Citation to Surviving Spouse to Exercise Elective Rights. It was an intestate estate and the rights did not include an election to take under the Will. The issuance of a citation by the probate court is mandatory [RC 2106.01(A)].

- i. *Unlike an election to take under the Will, the time limit under R.C. 2106.25 does not require that a motion to extend the period for exercising spousal rights be filed within the initial five-month period. In this case, the court's failure to issue the citation constituted 'good cause' for granting an extension, as permitted under R.C. 2106.25.*

15. **Dower Rights of a Surviving Spouse [RC 2103.02]**

- a. Only three states, Arkansas, Kentucky, and Ohio still have dower rights.
- b. **Surviving Spouse's Dower Interest.** A surviving spouse who has not released or been barred from the surviving spouse's dower rights has a one-third life estate in all real property that was owned by the deceased owner spouse during the marriage. RC 2103.02.
- c. **Termination of Dower Upon Death of Owner-Spouse - Exceptions [RC 2103.02]** A spouse's dower interest terminates upon the death of the owner spouse except:
 - i. To the extent deceased owner spouse conveyed real property during the marriage and the surviving spouse did not release dower, or is otherwise barred from dower; or
 - ii. To the extent that any such real property during the marriage was encumbered by the deceased owner spouse by judgment, lien (except tax lien), or otherwise, or transferred by involuntary sale, and the surviving spouse did not release, or is otherwise barred, from dower therein.
 - (1) If such real property was encumbered or transferred by involuntary sale prior to decease, the dower interest of the surviving spouse shall be computed on the basis of the amount of the encumbrance at the time of the death of such owner spouse or at the time of such transfer, but not upon an amount exceeding the sale price of such property. RC 2103.02(B).
- d. **Surviving Spouse is Barred from Dower.** The surviving spouse is barred from dower in the event of the following:
 - i. The granting of an absolute divorce; RC 2103.02(B)
 - ii. Upon the granting of a judgment for legal separation; RC 3105.10(E)

- iii. A husband or wife who leaves the other and dwells in adultery will be barred from dower in the real property of the other, unless the offense is condoned by the injured spouse. RC 2103.05.
 - e. **Election Against the Will.** In the event that the surviving spouse elects to take against the decedent's Will, the surviving spouse's dower interest is in addition to the surviving spouse's distributive share of the deceased spouse's estate. *See Armstrong v. Armstrong*, 715 N.E.2d 207 (Ohio App. 9th. Dist. 1998).
 - f. **Petition for Dower** [RC 5305.02]. A surviving spouse may file a petition for dower in the court of common pleas against the heir or any other person who holds the next immediate estate of inheritance, or any other estate or interest in the property. The petition must state the surviving spouse's legal right to dower and describe the specific tracts of land where the dower is claimed. After a hearing, the court will issue a judgment that is fair and consistent with the rights of all parties involved.
16. **Dower and Transfer on Death Designation Affidavits.** [RC 5302.22]
- a. If the owner is married, the transfer-on-death affidavit shall include a statement by the owner's spouse stating that the spouse's dower rights are subordinate to the vesting of title to the real property or interest in the real property in the transfer on death beneficiary or beneficiaries designated in the affidavit. RC 5302.22(D).
 - b. What is the result if the owner's spouse does not release dower in the Transfer-on-Death Designation Affidavit (TODDA)?
 - c. In May of this year, the Transfer on Death-Dower Committee reported to the Estate Planning, Trust and Probate Law Section Council on the issue of a TODDA where the spouse does not release dower.
 - d. The Committee reported that Ohio courts have reached different results.
 - i. The following cases found the noncomplying TODDA is not valid.
 - (1) *Vasilchek v. Vasilchek*, Case No. 2017 CI 00002 and *Cole v. Jordan*, Case No. 2019 CI 00030, both in the Mahoning County Probate Court. The Court found that RC 5302.22(D) is very clear and unambiguous and held the noncomplying TOD Affidavit to be invalid.
 - (2) *Pettit v. Schaffner*, 2024-Ohio-5180 (10th Ct. of Appeals, October 29, 2024).

- ii. The following case found the noncomplying TODDA is valid.
 - (1) *In Re Estate of Scarberry*, Case No. 2022ES16040, Clermont County Probate Court. The Court found the language of RC 5302.22(D)(3) to be unclear and ambiguous concerning the effect of the absence of a release of dower and held the noncomplying TOD Affidavit to be valid.
- e. The Committee presented the following options being considered:
 - i. Failure to waive dower results in a valid TODDA, but with the interest of the beneficiaries being subject to the dower interest of the surviving spouse.
 - ii. Leave the TODDA statute as is except to specifically provide that failure to waive dower voids the attempt to create a TODDA.
 - iii. Provide that dower shall not apply to a TODDA, (because there is no present conveyance).
- f. It is interesting to note that a transfer by deed, without a dower release, is valid but subject to the dower rights of the non-owner surviving spouse.

How to Avoid or Alter Spousal Rights

1. **Generally.** The rights of a surviving spouse, other than dower, apply only to probate assets. Those rights can be avoided by transferring assets outside of probate and can be waived or altered by antenuptial or postnuptial agreements.
2. **Avoid Probate - Joint and Survivorship**
 - a. **Real Estate:** A deed showing a spouse and non-spouse as the grantees as joint tenants with right of survivorship will, upon the death of the spouse pass to the non-spouse as the surviving tenant. Such interest is not a probate asset. RC 5302.17 and RC 5302.20.

- i. If one creates the joint tenancy with someone other than his or her spouse, during the marriage, and the non-owner spouse did not release dower and survived the owner spouse, the surviving spouse would have a dower interest in that property.
- b. **Motor Vehicles, etc.:** Title to a motor vehicle, all-purpose vehicle, off-highway motorcycle, watercraft, or outboard motor may be held by two persons as joint tenants with right of survivorship. RC 2131.12.
 - i. Upon the death of one, the interest passes to the surviving tenant. The motor vehicle, all-purpose vehicle, off-highway motorcycle, watercraft, or outboard motor shall not be considered an estate asset and shall not be included and stated in the estate inventory. RC 2131.12(D).
 - ii. The term “motor vehicle” includes manufactured homes, mobile homes, recreational vehicles, and trailers and semitrailers whose weight exceeds four thousand pounds. RC 4505.01(A).
- c. **Bank Accounts.** *Wright v. Bloom* (1994), 69 Ohio St. 3d 596 provided certainty to those establishing a joint bank account with right of survivorship that the account will pass at the death to the surviving joint tenant.
 - i. *We hold that the opening of an account in joint and survivorship form shall, in the absence of fraud, duress, undue influence or lack of mental capacity on the part of the depositor, be conclusive evidence of the depositor's intention to transfer to the survivor the balance remaining in the account at the depositor's death. Id at 607.*
 - ii. *We hold that survivorship rights under a joint and survivorship account of the co-party or co-parties to the sums remaining on deposit at the death of the depositor may not be defeated by extrinsic evidence that the decedent did not intend to create in such surviving party or parties a present interest in the account during the decedent's lifetime. Id at 603.*
 - iii. This case eliminated litigation involving whether the account holder established the account for convenience which, if established, converted the joint and survivor account into a probate asset.
 - iv. It is the author’s experience that some clients do create joint and survivor accounts to allow the joint holder to help pay the bills, without understanding that the account will pass to the surviving owner. The increasing non-acceptance of durable, financial powers of attorney by banks encourages this practice, sometimes with the well-intentioned, but misguided, advice of bank tellers.

d. **Payable on Death (POD) and Transfer on Death (TOD) Designations**

- i. Payable on Death (POD) Accounts: One may designate a beneficiary or beneficiaries of one's bank account through a "payable on death," or P.O.D. designation. RC 2131.10.

(1) The owner, during life, may withdraw funds and may change the beneficiary. The interest of the owner does not vest until the death of the owner.

- ii. Transfer on Death (TOD): The following property is eligible for the designation of one or more beneficiaries under a transfer on death (TOD) designation:

(1) Real Estate: An owner may designate one or more beneficiaries of real estate using a Transfer on Death Designation Affidavit per RC 5302.22.

(2) Motor Vehicles: An owner may designate one or more beneficiaries in a certificate of title of a motor vehicle, all-purpose vehicle, off-highway motorcycle, watercraft, or outboard motor. RC 2131.13.

(3) Securities (Stocks, Bonds, Brokerage Accounts): An owner may register securities in TOD form by naming one or more beneficiaries. RC Chapter 1709.

- e. **Beneficiary Designations**: Certain assets allow the owner to designate one or more beneficiaries. These include:

- i. Life Insurance Policies
- ii. Retirement Accounts
- iii. Annuities
- iv. Health Savings Accounts (HSAs)
- v. 529 College Savings Plans

3. Antenuptial and Postnuptial Agreements

- a. **Antenuptial or Prenuptial Agreements:** An antenuptial agreement is agreement made between a couple before marrying in which they waive, or alter, future rights to each other's property in the event of a divorce or death.
 - i. Antenuptial Agreements are “special contracts to which special rules apply.” *Fletcher v. Fletcher*, 68 Ohio St.3d 464, 467 (1994).
 - (1) The agreement to marry gives rise to a confidential or fiduciary relationship to each other and they must act in good faith; and
 - (2) Antenuptial agreements negate the statutorily defined presumptive rights of a spouse to an equitable distribution of marital assets upon divorce, or statutory rights of a surviving spouse.
 - ii. Antenuptial agreements are valid and enforceable if they are in writing and meet three conditions. *Gross v. Gross*, 11 Ohio St. 3d 99, 105 (1984).
 - (1) If they have been entered into freely without fraud, duress, coercion, or overreaching;
 - (2) There was full disclosure, or full knowledge and understanding of the nature, value and extent of the prospective spouse’s property; and
 - (3) The terms do not promote or encourage divorce or profiteering by divorce.
 - iii. Additional requirements under *Fletcher v. Fletcher*.
 - (a) The party financially disadvantaged by the agreement must have a meaningful opportunity to consult with independent legal counsel. *Id* at 470.
 - (i) The antenuptial agreement was signed the day before the wedding, but because of the small size and informality of the impending wedding it could have been postponed had the the objecting party wished to consult with counsel.
 - (2) Best practices if you represent a party to a antenuptial agreement:

- (a) Full disclosure of assets -- attach to agreement.
- (b) Each party is separately represented by legal counsel, and has sufficient time for review and negotiations.
- (c) The agreement is not signed on the eve of the wedding.
- (d) The agreement terms are fair at the time of signing.

b. Postnuptial Agreements [RC 3103.06]

- i. Effective March 23, 2023, RC 3103.06 allows a husband and wife to do any of the following:
 - (1) Enter into a postnuptial agreement that alters their legal relations with each other;
 - (2) Modify or terminate an antenuptial or postnuptial agreement or any other agreement that alters their legal relations with each other;
 - (3) Agree to an immediate separation and make provisions for the division of property and support of either of them and their children during the separation.
- ii. Any agreement altering legal relations between spouses under RC 3103.06 shall be valid and enforceable, with or without consideration, if all of the following apply:
 - (1) The agreement is in writing and signed by both spouses;
 - (2) The agreement is entered into freely without fraud, duress, coercion, or overreaching;
 - (3) There was full disclosure, or full knowledge, and understanding of the nature, value, and extent of the property of both spouses;
 - (4) The terms do not promote or encourage divorce or profiteering by divorce.

Scenarios Involving Spousal Rights

1. Scenario #1 - Allowance for Support

Facts: Jim and Janet were each previously married and each had 2 adult children from the prior marriages. They had no children together. Jim dies with a Will leaving everything to his two children. Jim is survived by Janet and Jim's children. Jim's assets were as follows: \$3,000 bank account POD to his children. The probate assets were a \$4,000 bank account, household goods valued at \$1,000, and a mobile home appraised at \$30,000. The only expenses were legal fees and court costs of \$1,100.

Question: What is Janet entitled to?

2. Scenario #2 - Joint and Survivor Accounts

Facts: Assume the same facts as in Scenario #1, but Jim owned a \$10,000 bank account as joint tenant with right of survivorship with one of his children, who is also the executor of the estate. You represent Janet, the surviving spouse, and discover that there is evidence that Jim established the account so the beneficiary child could pay Jim's bills because of Jim's poor health. Jim added his child as joint tenant at the suggestion of the bank teller. Jim had told Janet that she would receive that bank account upon his death.

Question: Do you advise Janet that she should consider challenging the joint and survivor status of the joint account?

3. Scenario #3 - Elective Share Dilemma

Facts: John dies testate, leaving most of his \$1.5 million estate to his adult children from a prior marriage. He leaves only \$20,000 to his surviving spouse, Linda, in his will. They were married for 15 years. The estate consists of real property, brokerage accounts, and personal property titled solely in John's name.

Question: What rights does Linda have in this situation, and what steps must she take to assert them?

4. Scenario #4 - Dower Rights & Real Estate

Facts: Alice and Tom are married. Tom dies intestate. Unknown to Alice, Tom owned a parcel of vacant land in another county, purchased in his name alone before marriage. There was no survivorship deed. The land is now under contract to be sold during probate.

Question: What rights, if any, does Alice have in this real estate?

5. **Scenario #5 - Waiver of Spousal Rights**

Facts: Before their marriage, Sarah and James signed a prenuptial agreement waiving “all spousal rights to property of the other.” Sarah was presented the proposed prenuptial agreement two days before the wedding, and was not separately represented. James dies with a will leaving everything to his children from a prior marriage. Sarah files for her elective share anyway.

Question: Is the prenuptial agreement enforceable, and what factors will the court consider?

6. **Scenario #6 - Joint and Survivorship Property**

Facts: Robert and Susan are married. Robert dies, and the bulk of his wealth was held jointly with his adult daughter (not Susan) with rights of survivorship. The probate estate is minimal.

Question: What rights does Susan have regarding these non-probate assets, and is there any recourse?

7. **Scenario #7 - Omitted Spouse**

Facts: Mark dies with a will created in 2015, naming his sister as his sole beneficiary. He married Diane in 2022 but never updated his will. The couple was still married when Mark died in 2024.

Question: What are Diane’s rights as an omitted spouse under Ohio law?

8. **Scenario #8 - Family Allowance**

Facts: Tom dies intestate, survived by his wife, Rachel, and his two minor children from a prior relationship who live with their mother. Rachel applies for the family allowance.

Question: Who is entitled to the family allowance in this case, and how is it determined?

9. **Scenario #9 - Spouse in Nursing Home, Surviving at Home**

Facts: At the time of his death, George was institutionalized with dementia. His wife, Carol, lived at home and was financially independent. George’s will gives his estate to charity.

Question: Can Carol still claim an elective share or support allowance, and how does her financial independence affect the analysis?

10. **Scenario #10 - Spouse Dies During Elective Share Window**

Facts: Emma's husband passed away with a will giving her only a token amount. Emma had 6 months from the filing of the will to elect against it but died 5 months later, before making the election.

Question: Can Emma's estate assert the elective share on her behalf?

11. **Scenario #11 - Election Against Will Issue**

Facts: Henry dies testate, leaving a life estate in the marital residence to his wife, Karen, with the remainder to his children. Karen decides to remain in the house, and makes a timely election against the will.

Question: Has Karen made an equitable election, and can she accept the life estate while electing against the will?

12. **Scenario #12 - Wrongly Assumed Waiver**

Facts: A will states that the surviving spouse, Brian, waived all spousal rights via a "marriage agreement." No such agreement is produced, and Brian denies it exists. The will gives him nothing.

Question: Can Brian still claim an elective share or support allowance, and how does the alleged but missing waiver affect his rights?