

HOW THE FAMILY FARES: A COMPARISON OF THE UNIFORM PROBATE CODE AND THE OHIO PROBATE REFORM ACT

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The Commissioners on Uniform State Laws have responded to nationwide criticism of probate court costs, delay, and disutility by promulgating the Uniform Probate Code [hereinafter referred to as UPC].¹ Each of its provisions incorporate a probate practice that has been in effect in one or more jurisdictions for a period of years. Its most publicized feature is informal administration, a procedure whereby the probate court's only role—unless interested parties ask its assistance in formal proceedings—is to record the probate of the will and appoint a personal representative. The personal representative, although under stringent duties to account to successors, may then administer the entire estate as though he had been appointed trustee of an expertly drafted revocable inter vivos trust. Its intent is that a highly qualified and responsible attorney may handle even intestate estates as inexpensively and swiftly as trust companies now distribute decedents' trust estates. The UPC's most controversial feature, the surviving spouse's elective share, is part of its provisions for protecting the family of a decedent from disinheritance and creditors. The elective share precludes a decedent from disinheriting the surviving spouse by means of transfers of property during the decedent's lifetime. The Ohio General Assembly, after three years

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¹ The author has previously advocated the adoption of the UPC by Mississippi. Robertson, *The Uniform Probate Code: An Opportunity for Mississippi Lawyers to Better Serve the Weak and the Grieving*, 45 Miss. L.J. 1 (1974). Mississippi's probate practice is in some respects similar to that of the UPC. Mississippi has a small cohesive bar, which so far has had no problems with lawyers' plundering estates. The chancery judge has all the supervisory powers of the old chancellor in equity—more equitable jurisdiction than Ohio law confers upon a judge of the probate division of the court of common pleas. The Mississippi jurisdiction is derived from the state constitution, and would not be affected by adoption of the UPC. On the other hand, recent Ohio Supreme Court rules, and publication of disciplinary proceedings against probate practitioners, reflect a basis for concern expressed by some UPC opponents that Ohio lawyers would abuse informal probate administration. The experience in the twelve states that have adopted the UPC should demonstrate whether the Ohio concern is justified.

of study, has also adopted a series of probate reforms.² In so doing, Ohio has definitely rejected the UPC, although some of its provisions and concepts have been adopted into the Ohio probate code.³ This article compares the UPC's family provisions for the surviving spouse and children of the decedent with those under Ohio's amended probate code.

Any detailed comparison is made difficult by the complexity and volume of the Ohio probate law—complexity and volume intended by the proponents of the UPC to be replaced by a simple, comprehensive, and functional codification of probate law. The article will first generally compare the rights of the surviving spouse and children. It will then discuss in detail the provisions relating to intestate succession, homestead allowance, and family allowances. Finally, the UPC's elective share arrangement will be compared with the Ohio surviving spouse's right to elect to take an intestate share of the decedent's estate. The conclusion will then summarize other changes made in Ohio law and suggest factors that could influence the future trend of the law in this area.

I. GENERAL COMPARISON OF THE RIGHTS OF THE SURVIVING SPOUSE AND CHILDREN

A. *Under the Uniform Probate Code*

Under the UPC, the surviving spouse is entitled to an elective share of one-third of both probate and nonprobate assets included in what the UPC defines as the decedent's augmented estate, whether the decedent dies testate or intestate.⁴ In addition, the surviving spouse is entitled to a homestead allowance in an amount to be set by each state,⁵ exempt property not exceeding \$3,500,⁶ and a reasonable allowance for support during the period of administration of the

² Am. Sub. S.B. 145, 111th Ohio General Assembly. The decedent's estate provisions of the act apply only to the estates of persons who die on or after January 1, 1976. By reason of his previous advocacy of the adoption of the UPC in Mississippi, the author did not participate in any way in the drafting of the Ohio act.

³ See, e.g. OHIO REV. CODE ANN. §§ 2101.24(F), 2105.051, 2101.052, 2105.06, 2105.19, 2107.18, 2107.33, 2107.501, 2107.521, 2107.71, 2109.07, 2113.05, 2113.53, and 2113.54 (Page Supp. 1975).

⁴ UNIFORM PROBATE CODE § 2-201 to -207 (1975 version). The augmented estate includes certain nonprobate transfers as well as probate assets. *Id.*, § 2-202.

⁵ *Id.*, § 2-401 (1975 version). The UPC suggests, but does not fix, a figure of \$5,000 to be set by each state as the homestead allowance.

⁶ *Id.*, § 2-402.

estate.⁷ The surviving spouse is not entitled to a dower or curtesy estate.⁸

If there is a surviving spouse, the children of the decedent take no part of the elective share, homestead, or exempt property.⁹ However, the needs of minor or dependent children are considered in the determination of the allowance for support, and the guardian or custodian of a child may be paid that part of the allowance allocated to the child.¹⁰ If neither spouse survives, the children of the decedent share the exempt property equally.¹¹ Minor and dependent children share the homestead allowance.¹² However, children whom the decedent was obligated to support, or did in fact support, as well as minor children, are entitled to the family allowance for support during the period of administration.¹³

B. *The Ohio Law*

Under Ohio law, the surviving spouse is entitled to an elective share of the decedent's "net probate estate" if the decedent dies testate. He may elect to take "under the will" or "under the law."¹⁴ Election under the law entitles the surviving spouse to an intestate share of the net estate, not to exceed one-half.

If the estate is insolvent, the spouse is entitled to a "homestead exemption from execution."¹⁵ However, the Ohio homestead exemption is not comparable to the Uniform Probate Code's homestead allowance. The maximum homestead exemption that may be claimed is \$1,000 if the spouse resides on the land, but only \$500 if the land must be sold to pay prior liens.¹⁶

Formerly Ohio law included provisions for exempt property and an allowance for support comparable to those of the UPC. However, the 1975 amendments repealed the requirement that appraisers set

⁷ *Id.*, §§ 2-403, 2-404. The allowance is limited to one year if the estate is insolvent. The personal representative may fix the allowance at any sum up to \$6,000 per year, although the court has power to increase or decrease the amount.

⁸ *Id.*, § 2-113.

⁹ *Id.*, §§ 2-401 to 2-403.

¹⁰ *Id.*, § 2-403.

¹¹ *Id.*, § 2-402.

¹² *Id.*, § 2-401.

¹³ *Id.*, § 2-403.

¹⁴ OHIO REV. CODE ANN. § 2107.39 (Page Supp. 1975).

¹⁵ OHIO REV. CODE ANN. §§ 2127.26, 2329.75 (Page 1968).

¹⁶ *Id.*, § 2127.26.

aside a certain amount of personal property as exempt from administration,¹⁷ and that they fix an allowance sufficient to support the surviving spouse and minor children for one year.¹⁸

Ohio has replaced these provisions with a lump sum family allowance,¹⁹ and has granted the surviving spouse the right to take one automobile of the decedent.²⁰ The family allowance is in the amount of \$5,000—to be paid to the surviving spouse, if any, and if not, to the minor children of the decedent.²¹

Ohio law has long ago abolished curtesy,²² but gives a form of dower interest to both the husband and wife. The surviving spouse is entitled to an estate for life in one-third of any real property with respect to which the decedent was “seized as an estate of inheritance at any time during the marriage,” but only to the extent that the decedent conveyed or encumbered the property during the marriage.²³ The dower interest may be released by the spouse, but it is no longer barred if the spouse leaves and dwells in adultery.²⁴ This article will not consider the various features of Ohio statutory dower. It should be noted that it is, however, the only portion of Ohio law comparable to the UPC inclusion of nonprobate assets in the spouse’s elective share, since the spouse in Ohio is only entitled to dower in property transferred without the consent of the spouse during the decedent’s lifetime.

In summary, the forced shares of the surviving spouse under the Ohio Revised Code are a dower interest in nonprobate real property transferred by the decedent prior to death, an elective share not in excess of one-half of the net probate estate, a family allowance of \$5,000, and the right to select one automobile of the decedent if he has not disposed of it by will.²⁵

Under the UPC, all children, minor or adult, share the exempt property equally if there is no surviving spouse. Under the Ohio law,

¹⁷ 125 Ohio Laws 903, 978 (repealed 1976). The appraisers were to set off 20% of the value of the estate for this purpose, up to \$2,500.

¹⁸ 133 Ohio Laws 185 (repealed 1976).

¹⁹ OHIO REV. CODE ANN. § 2117.20 (Page Supp. 1975).

²⁰ *Id.*, § 2113.532. This right may be defeated, however, if the spouse has disposed of all his automobiles by will.

²¹ OHIO REV. CODE ANN. § 2117.20 (Page Supp. 1975).

²² OHIO REV. CODE ANN. § 2103.09 (Page 1968).

²³ *Id.*, § 2103.02.

²⁴ OHIO REV. CODE ANN. § 2103.05 (Page 1968) *repealed by* Am. Sub. S.B. 195, 111th Ohio General Assembly.

²⁵ The automobile, which is analogous to exempt property, is not part of the assets of the estate. OHIO REV. CODE ANN. § 2113.532 (Page Supp. 1975).

however, adult children are not entitled to any forced share of the decedent's estate. Thus, if a decedent leaves children over eighteen years old who are dependent, (*e.g.*, handicapped, or college students) they will receive nothing except their testate share, if any, or an intestate share of the estate. Under the UPC, minor and dependent children are entitled to the homestead allowance if there is no surviving spouse.²⁶ Minor and dependent children, and children whom the decedent was in fact supporting, share in the family allowance for support during the period of administration.²⁷ In contrast, under Ohio law, only minor children are entitled to the family allowance of \$5,000,²⁸ even though a minor child of seventeen might be better able to support himself than a disabled dependent child over eighteen.

II. INTESTATE SUCCESSION

In order to compare the UPC elective share of the augmented estate with the Ohio election to take under the law, it is necessary to understand the manner in which each deals with intestate succession. The recent Ohio amendments accept the UPC concept that the surviving spouse should take the entire amount of a small estate. Ohio has, in fact, borrowed UPC language giving the spouse "the first thirty thousand dollars" of the estate.²⁹ UPC § 2-101 provides that any part of a decedent's estate not effectively disposed of by his will passes to his heirs under the UPC, rather than referring as Ohio does to the estate of a person who dies "intestate."³⁰

A. *Surviving Spouse as Sole Heir*

Both the UPC³¹ and Ohio law³² provide that the surviving spouse is entitled to the entire estate if the decedent leaves no surviving child or parent.

²⁶ UNIFORM PROBATE CODE § 2-401 (1975 version).

²⁷ *Id.*, § 2-403.

²⁸ OHIO REV. CODE ANN. § 2117.20 (Page Supp. 1975).

²⁹ *Id.*, § 2105.06(B), (C); UNIFORM PROBATE CODE § 2-102 (1975 version). Some Ohio title lawyers profess discomfort over the meaning of "the first thirty thousand dollars," particularly in estates that contain no "dollars," but only securities, land, and other property. They seem unwilling to believe that the language simply entitles the spouse to the first thirty thousand dollars of value in the estate, even if children or parents of the decedent also survive.

³⁰ OHIO REV. CODE ANN. § 2105.06 (Page Supp. 1975). As late as 1967, an Ohio court had to inform the bar that a person may be said to die intestate as to that part of his property which he does not dispose of by his will. *Central National Bank v. McMunn*, 12 Ohio Misc. 1, 228 N.E.2d 349 (P. Ct. 1967).

³¹ UNIFORM PROBATE CODE § 2-102(1) (1975 version).

³² OHIO REV. CODE ANN. § 2105.06(D) (Page Supp. 1975).

B. *Surviving Spouse and Parents*

Ohio law, in contrast to the UPC, gives no interest to a parent of the decedent if the parent leaves a surviving spouse. The reform act repealed former Ohio Revised Code § 2105.06(D), which gave the decedent's parent or parents a one-fourth interest in the entire estate and the remaining three-fourths to the surviving spouse if no issue of the decedent survived.

Under the UPC, the parents take an interest only if the estate exceeds \$50,000, with the balance in excess of that passing one-half to the surviving spouse and one-half to the parent or parents.³³ The UPC policy is based upon studies that show that most wills of childless persons leave one-half of large estates to their spouses and the other half to their parents.

In Ohio, the interest of the parents was apparently eliminated for want of any compelling reasons or studies indicating that the law should allow parents to share the estate with the spouse.

In any event, the situation seldom arises, and presumably persons with larger estates and dependent parents will generally make wills.

C. *Surviving Spouse and Issue of the Decedent*

1. Issue of the Decedent by the Spouse

The UPC gives the surviving spouse the first \$50,000 of the estate, and one-half of the balance of the estate if the decedent is survived by the spouse and issue of the decedent by the spouse, with the remainder being divided among the issue.³⁴ The amended Ohio law follows the principle of the UPC, but reduces the amount given to the surviving spouse to the first \$30,000 of the estate.³⁵ The division of the balance in excess of \$30,000 depends upon the number of children surviving the decedent.³⁶ If the decedent leaves only one child or the child's issue, the surviving spouse will take one-half of the balance. However, if the decedent leaves two children, or their issue, the surviving spouse will only receive one-third of the balance.

³³ UNIFORM PROBATE CODE § 2-102(2) (1975 version). In practice, the wisdom of granting a share to the parents may be dubious. Often they do not need it for their support. It is a possible source of friction between the parents and the spouse. In some cases the spouse may even be forced to sell the home to pay the parents' share.

³⁴ *Id.*, § 2-102(3).

³⁵ OHIO REV. CODE ANN. § 2105.06(B), (C) (Page Supp. 1975).

³⁶ *Id.*

This not only reflects a policy decision to provide a greater share of the estate to the children, but also implies a belief that most decedents who leave estates in excess of \$30,000 would be more fearful that their spouses would not preserve the estate for their children than that guardianship expense would unnecessarily waste assets that the decedent would have preferred go to his wife and family.³⁷

2. Issue of the Decedent Not by the Spouse

The UPC gives the first \$50,000 of the estate only to a surviving spouse who is the parent of all the decedent's surviving issue.³⁸ The new Ohio law, on the other hand, gives the first \$10,000 of the estate to a surviving spouse who is not the parent of all of the decedent's surviving issue.³⁹ Ohio divides the excess of the estate over \$10,000 in the same manner as if all of the issue were the children of the decedent and the surviving spouse. The surviving spouse takes one-half of the balance if there is one surviving child, or its issue, and one-third if there are two or more children, or their issue.

3. Payment of the Specific Monetary Amount

Ohio law now requires the specific monetary share of the surviving spouse to be paid first out of tangible and intangible personal property, valued at its appraised value.^{39.1} If this property is not sufficient to pay the \$30,000 or \$10,000 to which the spouse is entitled, the balance is charged as a non-interest lien on real estate.^{39.2} Where the estate's assets fluctuate in value, the value of the marital deduction as of the date of death may be at least partly unascertainable as a result of this requirement of distribution in kind at appraised values.^{39.3} The value on the date of distribution may prove to be

³⁷ This section, along with several other sections of the new Ohio law, arguably reflects a distrust of lawyers. Under the unsupervised administration procedures of the UPC, the distribution to the spouse would be accomplished quickly, and there would be no record from which it could be publicly determined that children did not receive their share. Even under the Ohio system, which does provide such a record, some probate judges are now urging that Ohio courts be given affirmative investigatory powers to prevent the victimization of estates and heirs. They believe Ohio lawyers would abuse unsupervised administration. Impartial studies of the experience of jurisdictions where unsupervised administration exists, which might confirm or deny this suspicion, do not yet exist.

³⁸ UNIFORM PROBATE CODE § 2-102(4) (1975 version).

³⁹ OHIO REV. CODE ANN. § 2105.06(B), (C) (Page Supp. 1975).

^{39.1} OHIO REV. CODE ANN. § 2105.063 (Page Supp. 1976).

^{39.2} *Id.*

^{39.3} See Minan, *A Scrivener's "Delight"—The Marital Deduction Formula Clause*, 37 OHIO ST. L.J. 81, 92-95 (1976).

more or less than the specific monetary amount, and result in a corresponding increase or decrease in the value of the shares passing to the decedent's issue. A taxable gain or loss may also result.^{39.4}

The UPC manifests a preference for, but does not mandate, distribution in kind.^{39.5} It requires that property distributed in kind be valued at fair market value at the date of distribution when made to satisfy a homestead or family allowance or a devise payable in money.^{39.6} However, it does not directly address the question of valuation in satisfying the specific monetary share of the spouse. The proponents of the UPC believe that its distribution and administration provisions, taken together, place the personal representative under a duty to pay \$50,000 in value to the spouse, without any possibility of the loss of the marital deduction or of a capital gain or loss to the widow. Distribution in kind of other assets must be proportionate to fluctuations in value of each asset.

It is difficult to even phrase the tax questions that must be answered with respect to a surviving spouse in Ohio who receives a non-interest-bearing charge on real estate and elects not to foreclose the charge. However, the amounts are so small that perhaps certainty of procedure for distribution outweighs tax complications.

D. *Shares of Issue of the Decedent*

The Ohio law with respect to inheritance by children of the deceased is not changed by the new act, apart from the specific monetary share established for the surviving spouse.⁴⁰ If one child and the spouse survive the decedent, they share equally in the estate in excess of the spouse's statutory allotment.⁴¹ Where two or more children survive in addition to the spouse, the children receive two-thirds of the excess estate.⁴² If there is no surviving spouse, the children of the decedent take the entire estate.⁴³ If any of the children is deceased, his issue take per stirpes.⁴⁴ If all of the issue of children are in the

^{39.4} *Id.* at 91 n.48.

^{39.5} UNIFORM PROBATE CODE § 3-906.

^{39.6} UNIFORM PROBATE CODE § 3-906(a)(2).

⁴⁰ *Id.*, § 2105.06(A)-(C).

⁴¹ *Id.*, § 2105.06(B).

⁴² *Id.*, 2105.06(C).

⁴³ *Id.*, § 2105.06(A).

⁴⁴ OHIO REV. CODE ANN. § 2105.11 (Page 1968).

same degree of consanguinity to the decedent, they take in equal parts, per capita.⁴⁵

Except that the Ohio limit of \$30,000 is lower than the \$50,000 suggested by the UPC for the surviving spouse, the substance of both laws is the same.⁴⁶ The issue of the decedent take the portion of the estate not passing to the spouse, or the entire estate if there is no surviving spouse, in equal shares if they are all of the same degree of relationship to the decedent. If they are of unequal degree, those of the more remote degree take by representation, per stirpes.

The other descent and distribution provisions of the Ohio law are beyond the scope of this paper. Although different in arrangement, they accomplish the same distribution of property as the UPC, with one major exception. The UPC cuts off descent and provides for escheat to the state if there are no grandparents or descendants of grandparents. The rationale for this is that it avoids the problem of notifying remote or unknown next of kin when a will is admitted to probate. Although service of process or waivers are not required for the admission of a will to probate under the UPC, the UPC requirements for actual notification to all interested parties are more stringent than those of Ohio.⁴⁷

Ohio law, in contrast, permits inheritance by next of kin other than grandparents or their descendants, but without representation.⁴⁸ Those in the nearest degree of relationship to the decedent, computed according to the civil law, take the entire estate in equal shares. Further, Ohio law allows stepchildren to take before property escheats to the state.⁴⁹

Ohio law, assuming it satisfies the changing requirements of procedural due process, deals with the problem of notifying remote and unknown heirs by requiring proponents of the will to notify only a spouse and heirs known to be residents of the state.⁵⁰ A person is thus treated somewhat like a ship under admiralty law—a “rem” about whom heirs and devisees should be sufficiently concerned during his lifetime so that they will know when he is dead.

⁴⁵ *Id.*, § 2105.12.

⁴⁶ Arguably, however, the UPC is more readable. *See, e.g.*, § 2-106, dealing with representation.

⁴⁷ UNIFORM PROBATE CODE § 3-705 (1975 version). *Cf.* OHIO REV. CODE ANN. § 2107.13 (Page Supp. 1975).

⁴⁸ OHIO REV. CODE ANN. § 2105.06(H) (Page Supp. 1975).

⁴⁹ *Id.*, § 2105.06(I).

⁵⁰ *Id.*, § 2107.13.

E. *Relationship of Elective Share to Intestate Succession*

Under the UPC, a surviving spouse's elective share bears no relationship to the spouse's intestate share. The elective share is one-third of the augmented estate, which includes both probate and non-probate assets.⁵¹ Under the Ohio law, however, the spouse's elective share is based directly upon the intestate share, but is limited to one-half of the net probate estate.⁵²

Under both the Ohio law and UPC the estate planner may easily determine the minimum amount that must be given to the spouse to discourage an election. However, under the UPC the estate planner cannot completely defeat the surviving spouse by arranging for all assets of the decedent to pass at, or before death, by means of inter vivos transfers, whereas he can in Ohio.⁵³

III. PROVISIONS FOR THE FAMILY

A. *Homestead Allowance*

The UPC provides for a homestead allowance to domiciliaries and suggests the sum of \$5,000.⁵⁴ This allowance passes to the surviving spouse, if any, or, if none exists, is divided among the minor and dependent children. It has priority over all claims against the estate. Although the amount is called a "homestead allowance," no realist would assert that the amount suggested is sufficient to keep a roof over the bereaved family unit. The policy behind the homestead allowance is, rather, to fix an amount that may be paid immediately, thus eliminating probate expense and delay. Coupled with the \$3,500 exempt property, and the family allowance during the period of administration, it reflects a clear decision to prefer the spouse and minor or dependent children to creditors, and to expedite the settlement of small estates.

Ohio's homestead exemption normally plays no part in a probate estate. It is an exemption from execution and so is applicable only to insolvent estates.⁵⁵ The exemption applies only to real estate and is incredibly archaic and complex.⁵⁶ Under its terms, if the survivors

⁵¹ UNIFORM PROBATE CODE § 2-202 (1975 version).

⁵² OHIO REV. CODE ANN. § 2107.39 (Page Supp. 1975).

⁵³ *Smyth v. The Cleveland Trust Co.*, 172 Ohio St. 489, 179 N.E.2d 60 (1961).

⁵⁴ UNIFORM PROBATE CODE § 2-401 (1975 version).

⁵⁵ OHIO REV. CODE ANN. §§ 2329.73-.82 (Page 1968).

⁵⁶ Its maximum amount, \$1,000, was fixed in 1869.

entitled to the allowance can live on real estate valued at \$1,000, they may reside on it free of the claims of creditors. Any real estate in excess of that value must be sold, and the survivors then receive the generous sum of \$500.⁵⁷

Although Ohio law does not allow the surviving spouse or children a significant homestead allowance exemption, it does recognize that there is merit in allowing the surviving spouse and children to occupy the family residence for a time, regardless of the decedent's oversight or malice in failing to make such a provision. Further, the state recognizes that it is often desirable that the spouse be able to acquire the family homestead in the spouse's own name rather than share its ownership with the children.

In common with several other states, the Ohio statutes use the quaint expression "mansion house" to describe the family homestead. For many years, an Ohio statute has given the surviving spouse the right to remain in the mansion house rent-free for one year.⁵⁸ If the property is sold for the payment of the decedent's debts, the spouse has the right to be compensated for the rental value of the unexpired term.⁵⁹ The surviving spouse's right to rental comes ahead of all claims except administration and funeral expenses and shares priority with the former law's provision for a year's allowance to the surviving spouse and children.⁶⁰

Allowing the surviving spouse to live in the mansion house for one year allows time to look for a new home and also constitutes a valuable right for those spouses whose decedents owned property. There is, however, no corresponding right to reside in leased premises, nor is there any provision for any amount to be paid to the spouse whose decedent did not own a mansion house.

No significant litigation or particular probate problems have arisen with respect to the right to remain in the mansion house. It has been held that the spouse is not required to reside on the premises and that a personal representative who collects rents from the prem-

⁵⁷ Thus a lucky creditor who can show that the property is worth \$1,000 plus something more than de minimis, can obtain a \$500 windfall. OHIO REV. CODE ANN. §§ 2329.75, 2329.76 (Page 1968).

⁵⁸ OHIO REV. CODE ANN. § 2117.24 (Page 1968).

⁵⁹ *Id.*

⁶⁰ *Id.* Inadvertently, the statute was not amended to reflect the elimination of the one year's allowance to the surviving spouse and children, but presumably the courts will still find an intent that the spouse's right to the reasonable rental value shares priority with the new provision for a \$5,000 family allowance. Am. Sub. S. B. 466, 111th General Assembly, corrects this error.

ises must pay them to the surviving spouse.⁶¹ The right may not be computed for the purpose of determining the marital deduction.^{61.1}

Ohio also allows a surviving spouse who elects to take against the will to remain in the mansion house for a year, unless the will expressly provides otherwise.

Many Ohio lawyers have been vexed by the question of determining whether and how the surviving spouse gets the house. Some of them harbor the suspicion that simply recording a personal representative's deed is too simple—whether the spouse is entitled to the house by will, intestate succession, purchase, exempt property, or allowance.⁶² One routine method of transferring real estate passing by intestate or testate succession, or by reason of an election to take against the will, is by certificate of transfer issued by the probate court and recorded in the recorder's office.⁶³ This method remains unaffected by the new act. The preparation and filing of the forms of application and certificate for transfer are very simple—involving less work than closing an ordinary real estate transaction. If the surviving spouse inherits the entire estate, or the property is willed to him, the certificate of transfer remains the simplest method for transferring the land.

However, in cases where the spouse has neither inherited nor been willed the entire interest in the mansion house it has been necessary for the spouse to exercise a statutory power to purchase the mansion house at its appraised value.⁶⁴ The new § 2105.062 of the Revised Code provides speedier and more certain means of transferring the mansion house into the surviving spouse's name. If the spouse's intestate share of the estate is equal to or greater than the value of the decedent's interest in the mansion house, the spouse can elect to take the property as part of his intestate share. The election can be made at any time at or before the final account is filed. The value used is the appraised value of the house, with all liens against the property attributable to the decedent's interest deducted.⁶⁵ Use of

⁶¹ *Conger v. Atwood*, 28 Ohio St. 134 (1875).

^{61.1} *Miller v. United States*, 71 Ohio Op. 2d 31 (N.D. Ohio 1974).

⁶² UNIFORM PROBATE CODE §§ 2-404, 3-907, 3-908, and 3-910 (1975 version). Under the UPC, an instrument or deed of distribution is sufficient as a means of transfer, proof of title, and protection for bona fide purchasers.

⁶³ OHIO REV. CODE ANN. §§ 2113.61-.62 (Page 1968).

⁶⁴ OHIO REV. CODE ANN. § 2113.38 (Page Supp. 1975).

⁶⁵ It is arguable that the new act, by giving the spouse an option to take at the appraised value, regardless of appreciation or depreciation, makes it impossible to ascertain the value of the marital deduction on the date of death. Rev. Proc. 64-19, 1964-1 CUM. BULL. (Part I) 682.

the appraised value means that the inventory and appraisal will be highly significant. Although the spouse may make the election at a later date, the value fixed in the inventory may become binding on all parties unless timely exceptions are filed to the inventory.

A third method also exists in Ohio for transferring the mansion house into the surviving spouse's name—purchase at its appraised value.⁶⁶ It will be necessary to use this method if the value of the mansion house exceeds the surviving spouse's intestate share. However, it is not available if the house has been specifically devised to someone else.⁶⁷

The surviving spouse is given the right to purchase three classes of property if they have not been specifically devised or bequeathed: (1) the mansion house, which includes the land, any farm land or lots adjacent to it and used in conjunction with the mansion house as the home of the decedent, and the household goods in the mansion house may be purchased at the appraised value;⁶⁸ (2) securities listed on an approved stock exchange may be purchased at their market value on the date of purchase;⁶⁹ (3) any other real or personal property of the decedent may be purchased at its appraised value. However, property purchased under this division may not exceed an amount, including property purchased under (1) and (2), equal to one-third of the gross appraised value of the estate.⁷⁰

The procedure for purchasing personal property under this section is relatively simple. The spouse need file only a simple application setting forth the property he wishes to purchase. If the property consists of household goods in the mansion house or securities, the court may approve the application without further hearing.⁷¹ However, with respect to other personal property, a hearing must be held, and notice given to all interested parties.⁷²

See also Minan, *A Scrivener's "Delight"—The Marital Deduction Formula Clause*, 37 OHIO ST. L.J. 81, 92-95 (1976), which discusses the impact of that Revenue Procedure, and Ohio Revised Code § 1339.41, dealing with testate estates. The Revenue Procedure specifically includes provisions in applicable state law comparable to marital deduction destruction will clauses. Section 1339.41, however, saves only wills and trusts—not intestate succession.

⁶⁶ OHIO REV. CODE ANN. § 2113.38(A) (Page Supp. 1975).

⁶⁷ *Id.*, § 2113.38.

⁶⁸ *Id.*, § 2113.38(A).

⁶⁹ *Id.*, § 2113.38(B).

⁷⁰ *Id.*, § 2113.38(C).

⁷¹ *Id.*, § 2113.38.

⁷² *Id.*

The procedure for purchasing real property is more complex. It requires filing of a formal petition, and specifies the interested parties who must receive notice. The petition may not be filed prior to the time the inventory of the estate is filed or later than one month after the approval of the inventory. The Ohio statute contemplates a hearing upon the inventory within one month after the filing of the inventory.⁷³ This means that the lawyer must be alert, for these time limitations can trap the unwary and cost the spouse the opportunity to purchase the mansion house.

Although the inventory statute⁷⁴ affords interested parties an opportunity to file exceptions and object to the appraisal, they may also raise objections in the formal proceedings for the purchase of real estate.⁷⁵ The court fixes terms of the sale and must order the giving of an additional bond, unless it finds the original bond sufficient.⁷⁶ The surviving spouse must survive until the time a court enters judgment authorizing the sale or his election to purchase is nullified.⁷⁷ If he dies thereafter, his representatives may complete the purchase.

The surviving spouse's right to purchase has been widely used as a means of freeing the title to real estate from the interest of minor children when the decedent dies intestate. Often the decedent had only a one-half interest and arrangements can be made for the surviving spouse to purchase the entire property. The surviving spouse's share in the estate can be applied against the purchase price. The court's power to fix terms can be exercised so that the surviving spouse can make payments that will go to her as guardian of her children, and she can then be authorized as guardian to spend the money for their support. This, however, is an expensive process, requiring not only a land sale proceeding, but also continued account-

⁷³ OHIO REV. CODE ANN. § 2115.16 (Page 1968).

⁷⁴ *Id.*

⁷⁵ The court must approve the sale unless the appraisal was made as a result of collusion or fraud or is so manifestly inadequate that the price would prejudice interested persons. OHIO REV. CODE ANN. § 2113.38 (Page Supp. 1975). The value of the premises at the date of death is the value that is used. A certain amount of latitude is allowed in appraisal and, where the surviving spouse's resources are small, it is obvious that a low appraisal may be helpful. Since the survivor generally remains on the homestead until death, there will usually be no adverse capital gains consequences.

⁷⁶ *Id.* The requirement of an additional bond is one of the many little title traps that can arise in probate proceedings relating to land. A title may be rejected if the additional bond is not handled properly, since in theory the bond takes the real estate's place as available security for the administrator's defalcations. It is, of course, immaterial that the administrator has not defalcated.

⁷⁷ *Id.*

ing for the proceeds and the expense of related guardianship proceedings.

Apart from its expense and delay, this arrangement has proved very helpful in the administration of estates. Not only does it keep the surviving spouse's home, but it also makes possible a later sale without undue expense. Sharing the homestead ownership with compatible adult children is probably wiser than putting the spouse to the probate expense of electing to purchase. But where minor children are concerned, guardianship complexities, whether or not the property is later sold, far outweigh the initial expense of electing to purchase at the appraised value.

The UPC would allow the sale more quickly, and since the surviving spouse would probably be the personal representative, the surviving spouse could buy it personally with the approval of the court.⁷⁸ Her powers as personal representative would allow her to make her own terms.⁷⁹ Hence, in the typical mother-minor children estate, the mother could get the property under the UPC a little more easily and a little less expensively than under Ohio law. But, she would not get the benefit of the low appraisal of a friendly appraiser appointed by the court and she would be likely to be disappointed by other parties who did not wish her to deal generously with herself. If she were not the personal representative, the personal representative might still sell the property to her at a friendly price. However, she would run a greater risk of liability to creditors or to other interested recipients of the estate.⁸⁰

B. *Exempt Property*

UPC § 2-402 provides for a \$3,500 exempt property allowance. The UPC contemplates that the property will, if possible, be selected from household furniture, automobiles, furnishings, appliances, and personal effects.⁸¹ However, any deficiency in the amount may be made up from other assets of the estate. If the spouse survives, she is entitled to the exempt property. If the spouse does not survive, all

⁷⁸ UNIFORM PROBATE CODE § 3-711 (1975 version). Ohio has made a small step in this direction by permitting a surviving spouse who is an executor or administrator to purchase land of the decedent with the consent of all interested parties, if no minor is an interested party. OHIO REV. CODE ANN. § 2127.011 (Page Supp. 1975).

⁷⁹ UNIFORM PROBATE CODE § 3-711 (1975 version).

⁸⁰ *Id.*, § 3-713.

⁸¹ *Id.*, § 2-402.

of the children of the decedent are entitled to share in the same value.⁸²

The reform act repealed former Ohio Revised Code § 2115.13, which required the appraisers to set off to the surviving spouse or minor children an amount not to exceed \$2,500 in value as property exempt from administration. However, Ohio has in one situation created something comparable to exempt property. Ohio Revised Code § 2113.532 permits the surviving spouse to acquire one automobile of the decedent, unless it is disposed of by the will. Ohio Revised Code § 4505.10 permits the surviving spouse to transfer the automobile immediately without the signature of the personal representative. All one need do is execute an assignment on the back of the certificate of title and file an affidavit stating the date of the decedent's death, that the automobile has not been specifically disposed of by will, and a description and approximate valuation of the automobile. The clerk of courts is authorized to transfer the automobile upon receipt of the affidavit and the executed assignment of title.

The automobile is said to be "not an asset of the estate," although it must be listed on the inventory.⁸³ The statute reflects an apparent intention that title questions and probate requirements be completely eliminated with respect to automobile titles. The procedure can probably be done before the probate of a will or application for administration. In fact, there apparently need be no administration at all. If the transfer is wrongful, the legatees of the auto or the living spouse falsely sworn to be a decedent will have to bring an action against the deceitful spouse.

C. *Family Allowance for Support*

UPC § 2-403 provides for the determination and allowance of a reasonable amount to support, during the period of administration, the surviving spouse, minor and dependent children, and any other child the decedent was in fact supporting. The allowance may not continue for more than one year if the estate is insufficient to pay allowable claims. The amount may be paid in a lump sum or in periodic payments.⁸⁴ If a child is not living with the spouse, his por-

⁸² *Id.*

⁸³ OHIO REV. CODE ANN. § 2113.532 (Page Supp. 1975).

⁸⁴ UNIFORM PROBATE CODE § 2-403 (1975 version).

tion may be paid in part to him or his guardian or custodian.⁸⁵ Otherwise, it is payable to the spouse for the benefit of minor and dependent children. The death of any person terminates his right to allowances not yet paid.⁸⁶

The Ohio probate reform act repealed former § 2117.20 of the Ohio Revised Code which contained elaborate provisions for the determination of a year's allowance for the support of the surviving spouse and minor children. It enacts a new § 2117.20 which simply gives the surviving spouse, or the children if there is no surviving spouse, the sum of \$5,000. The sum is considered to be assets of the estate, in contrast to the automobile that the surviving spouse may take. The distinction expresses a legislative recognition that the auto can be transferable immediately without the possibility of title questions arising. On the other hand, there may not be \$5,000 immediately available to pay over and administration (or release from administration) may be legally necessary to convert assets into the money due as the new family allowance.

D. *Priority of Family Allowances*

The homestead allowance, exempt property, and family allowance all have priority over the claims of unsecured creditors under the UPC.⁸⁷ They do not, however, come ahead of costs and expenses of administration, funeral expenses, the expenses of the last illness, and debts and taxes with preference under federal or state law. In terms of priority of the three among themselves, the homestead allowance is paid first, then the family allowance, and finally the exempt property.

Ohio's new \$5,000 family allowance has priority over all claims except costs of administration and funeral bills. The priority of funeral expenses extends only to the first \$800 of the funeral director's bills, and to expenses other than the director's bill in amounts approved by the probate court.⁸⁸

The automobile selected by the surviving spouse is not an asset of the estate⁸⁹ and therefore will probably be treated as were assets

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*, §§ 2-401, 2-402, 2-403.

⁸⁸ OHIO REV. CODE ANN. § 2117.25 (Page Supp. 1975).

⁸⁹ *Id.*, § 2113.532.

exempt from administration under former law, *i.e.* free of claims of unsecured creditors and of the estate.⁹⁰

E. *Testamentary Control over Family Provisions*

Under the UPC, the testator may not bar the right of the surviving spouse and children to the homestead allowance, exempt property, or family allowance.⁹¹ Furthermore, the rights are presumed to be in addition to any benefits passing to the spouse or children under the will. However, the testator may direct that the provision in the will for his family be in lieu of these family rights. Such a provision would operate to cut off the spouse's or children's rights under the will if they accept the statutory family rights.

Under the Ohio law the testator may bar the right of his widow to take any of his automobiles by disposing of the automobile under his will.⁹² There is no provision, however, by which he may bar the right of the spouse or minor children to the \$5,000 family allowance. He might well be able, however, to reduce a devise or bequest to the spouse or children by \$5,000 if the family allowance is paid.

F. *Role of the Court and Personal Representative*

UPC § 2-404 permits the surviving spouse, adult children, and guardians of minor children to select property of the estate to make up the homestead allowance and the exempt property. And, if they fail to do so within a reasonable period of time, the personal representative may make the selection. He may also make the selection if there is no guardian of a minor child.⁹³ The personal representative, regardless of who makes the selection, may execute a deed or instrument of distribution to establish the ownership of the homestead and exempt property.⁹⁴

The personal representative has the power to determine the family allowance and may decide to pay it in a lump sum or periodic installments.⁹⁵ However, he is limited in this determination to a lump

⁹⁰ A dying, debt-ridden husband might be well advised to convert all his assets into the most expensive and resaleable automobile he could purchase. The widow could transfer it into her name and drive off into the sunset.

⁹¹ UNIFORM PROBATE CODE § 2-404 (1975 version).

⁹² OHIO REV. CODE ANN. § 2113.532 (Page Supp. 1975).

⁹³ UNIFORM PROBATE CODE § 2-404 (1975 version).

⁹⁴ *Id.*

⁹⁵ *Id.*

sum of \$6,000 and periodic payments not exceeding \$500 per month for one year, although the court may increase or decrease the size of the allowance.⁹⁶

Under the new Ohio law neither the probate court nor the personal representative has any role to play either in the determination of the right of the surviving spouse to select an automobile from the estate of the decedent⁹⁷ or in the transfer of its title.⁹⁸ Under general principles of law, of course, the surviving spouse could compel the personal representative to surrender possession of the automobile and the certificate of title.

The personal representative must pay the \$5,000 family allowance out of the assets of the estate in the order of priority prescribed by statute.⁹⁹ He could ask the court for permission to distribute assets of the estate in kind through a payment of the allowance instead of first converting them to cash. However, such a distribution would require express permission of the court, in contrast with the UPC which generally permits the personal representative to take all steps necessary without approval of the court, except to the extent that restrictions are noted on his letters in an estate administered in supervised proceedings.¹⁰⁰

IV. ELECTIVE SHARE OF THE SURVIVING SPOUSE

A. *Right to an Elective Share*

The UPC allows a surviving spouse to take an elective share of one-third of the augmented estate subject to certain limitations.¹⁰¹ The UPC has thus adopted a spouse-protecting policy, and by its broad definition of the augmented estate,¹⁰² has made it difficult to defeat the policy by inter vivos transactions effecting transfers at or shortly prior to death.

The new Ohio law continues its policy of giving the spouse an elective share of the decedent's probate estate,¹⁰³ although it has changed the procedures for this election.¹⁰⁴ However, it does nothing

⁹⁶ *Id.*

⁹⁷ OHIO REV. CODE ANN. § 2113.532 (Page Supp. 1975).

⁹⁸ *Id.*, § 4505.10.

⁹⁹ *Id.*, § 2117.25.

¹⁰⁰ UNIFORM PROBATE CODE § 3-704 (1975 version).

¹⁰¹ *Id.*, § 2-201(a).

¹⁰² *Id.*, § 2-202.

¹⁰³ OHIO REV. CODE ANN. § 2107.39 (Page Supp. 1975).

¹⁰⁴ *Id.*, § 2107.391.

to prevent the decedent from defeating the spouse's rights by transfers at death other than by will. It is thus still an open question whether the Ohio Supreme Court would permit the deliberate use of gifts, remainder interests, or trusts executed shortly prior to death for the purpose of leaving a surviving spouse destitute.¹⁰⁵

The basic difference between the UPC elective share and the Ohio surviving spouse's share is that under the UPC the surviving spouse may take an elective share whether the decedent dies testate or intestate. Under the Ohio statute, however, the surviving spouse has an election only if the decedent died testate.

The new law, like the old, permits the surviving spouse to elect to take either under the will or under the Ohio statute of descent and distribution.¹⁰⁶ If the spouse elects to take under the statute, and not under the will, the maximum share the spouse may receive is one-half of the net probate estate.¹⁰⁷ Thus even though the spouse is the sole heir, she would only be entitled to one-half of an estate bequeathed entirely to the decedent's paramour.¹⁰⁸ The spouse may take the maximum one-half interest only if she is the sole survivor or if a child of the decedent survives. If two or more children survive, the maximum share the spouse may take is limited to one-third of the net probate estate.¹⁰⁹ Thus it is possible that a disinherited surviving spouse left with two children to support may be worse off than one with only a single child.

Although the surviving spouse is entitled to the first \$30,000 of an intestate estate if the decedent leaves issue only by her, or to the first \$10,000 if the decedent leaves issue by another person, the spouse who elects to take against the will, will in practical effect be deprived of either amount. Thus if the decedent's net estate is \$30,000, a sole surviving spouse could elect to take only \$15,000. If there are also two or more surviving issue of the decedent he could only elect to take \$10,000. Therefore, for purposes of computation of the surviving spouse's elective share, the Ohio intestate provisions allowing the spouse a monetary priority¹¹⁰ become meaningless.

¹⁰⁵ *Smyth v. The Cleveland Trust Co.*, 172 Ohio St. 489, 179 N.E.2d 60 (1961).

¹⁰⁶ OHIO REV. CODE ANN. § 2105.06 (Page Supp. 1975).

¹⁰⁷ *Id.*, § 2107.39.

¹⁰⁸ Although it has not yet been the subject of a reported case, it would seem clear that, in such a case, the paramour has a third party beneficiary malpractice claim against the lawyer who prepared the will for failing to place the assets in an inter vivos trust naming the paramour as death beneficiary.

¹⁰⁹ OHIO REV. CODE ANN. § 2107.39 (Page Supp. 1975).

¹¹⁰ *Id.*, § 2105.06.

B. *Multistate Estates*

The multistate transaction rule of the UPC is that the law of domicile of the decedent governs the right of the surviving spouse to take a share in the decedent's estate.¹¹¹ The rationale for this rule is that the state of domicile has the paramount interest in the incidents of the marital estate, while the sole interest of the state of probate in the property is to insure title stability. These UPC provisions are consistent with the general philosophy of the Restatement of Conflicts of Laws Second. However, with respect to this specific issue, the Restatement recognizes that established decisions generally follow their own local law.¹¹²

Existing Ohio case law runs contrary to the UPC. *Pfau v. Moseley*¹¹³ held that a nonresident widow was entitled to take an elective share of Ohio real estate, despite the fact that she and her husband were domiciled in New Jersey. Under the law of New Jersey, where the decedent's will had also been admitted to probate, the widow was not permitted to make such an election. The court based its reasoning essentially on its determination of legislative intent as it construed the legislative language. The court also expressed the fear that permitting the law of another state to govern the title to Ohio land would eliminate the certainty, uniformity, predictability, and convenience that there would be if it made that title dependent only upon its own internal law.

The *Pfau* decision confined its ruling to real estate and expressed no opinion with respect to movable property. The decision also leaves open questions of true conflicts that may arise where the surviving spouse's election might be inconsistent with her action in the state of domicile or in other states where the testator's property might be located.

From the point of view of a title examiner, it is difficult to see how local titles could be unsettled by denial of the right to elect, since denial of a surviving spouse's right to elect under the will would have to be recorded in a judicial decision in Ohio. The decision of a local court would be conclusive. It appears more likely that the courts would be unsettled by the prospect of having to rule on the law of forty-nine other states plus foreign countries.

With respect to the time within which the right to elect should

¹¹¹ UNIFORM PROBATE CODE § 2-201(b) (1975 version).

¹¹² RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 241, 242 (1971).

¹¹³ 9 Ohio St. 2d 13, 222 N.E.2d 639 (1966).

be exercised, however, Ohio law should control or title examination would be rendered difficult. A title examiner finding a foreign will probated in his state should not be put to the task of examining proceedings in other states or the law of other states. He ought to be entitled to rely upon the procedures and time limitations established within his state for judicial assertion of rights created in other states.

C. *Estate from which the Elective Share Is Taken*

The UPC provisions insure that the surviving spouse's marital rights are not defeated by will substitutes. The spouse is given a share, not only of the probate estate, but also of assets that the decedent might have transferred in other ways in order to defeat the marital rights of the spouse.¹¹⁴ On the other hand, it also precludes the spouse who has received assets from the decedent during his lifetime, or non-probate assets upon his death, from taking more than the decedent anticipated from the probate estate.¹¹⁵

The draftsmen have taken the position that if the spouse is to be protected the protection should not be spurious. They have not asserted that all states should adopt the elective-share provisions of the code. Obviously, however, uniformity of policy nationwide is desirable. Otherwise, one might find all states permitting deflation of the probate estate in order to prevent prospective decedents from transferring assets to other states in order to bar their spouses, while at the same time their statutes reject such a practice with respect to probate assets within the control of the state.

UPC § 2-202 includes, but is not limited to, what Ohio would call the "net probate estate", *i.e.* the estate reduced by administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims. It adds to this estate certain gratuitous transfers made during the marriage that are roughly comparable to transfers that would be included in the decedent's estate for federal estate tax purposes.¹¹⁶ Thus transfers with retained right of income or possession,¹¹⁷ transfers with retained powers to revoke or dispose of principal,¹¹⁸ transfers into survivorship property,¹¹⁹ or gifts in excess of

¹¹⁴ UNIFORM PROBATE CODE § 2-202 (1975 version).

¹¹⁵ *Id.*, § 2-202.

¹¹⁶ *Id.*, § 2-202(1).

¹¹⁷ *Id.*, § 2-202(1)(i).

¹¹⁸ *Id.*, § 2-202(1)(ii).

¹¹⁹ *Id.*, § 2-202(1)(iii).

\$3,000 to any person in the two years preceding death¹²⁰ are all added to arrive at the total value of the augmented estate. If the wife consents to the transfer in writing, or joins in the transfer, the property is excluded from the augmented estate.¹²¹

The augmented estate does not include life insurance, accident insurance, joint annuities, or pensions payable to persons other than the surviving spouse.¹²² The long term investment of the decedent in such programs, risk factors, and valuation problems all make these transactions generally unsuitable for disinheriting spouses. Including them in the augmented estate would also place a burden upon the insurance and pension industries far out of proportion to the benefit on those occasions when including them might eliminate disinherited spouses from the welfare rolls.

The UPC, to avoid the disruption of the decedent's estate plan by a spouse who has already received substantial amounts of property, deducts from the augmented estate any assets that the surviving spouse derived gratuitously from the decedent during his lifetime.¹²³ The provisions relating to property derived from the decedent were drawn with extreme care, and cannot be easily summarized. Ohio has no corresponding law.

The property deducted is valued at the date of death if it is owned by the spouse.¹²⁴ If it has been transferred by the spouse to another person, and the transfer becomes irrevocable before death, the property is valued at that time rather than at the date of death.¹²⁵

Income that has been earned on property derived from the decedent prior to death is not included as property derived from the decedent.¹²⁶ Inclusion of income would inject considerable mathematical complexity in proof of ownership, particularly since the spouse bears the burden of proving not only the extent of the decedent's nonprobate assets includible in the augmented estate, but also of demonstrating that property owned by the spouse when the decedent dies or that the surviving spouse transferred prior to the death, is not

¹²⁰ *Id.*, § 2-202(1)(iv).

¹²¹ *Id.*, § 2-202(1).

¹²² *Id.*, § 2-202(3)(i).

¹²³ *Id.*, § 2-202(3). It also deducts any assets gratuitously transferred to other persons by the spouse during marriage that would have been included in the surviving spouse's estate had she predeceased the actual decedent.

¹²⁴ *Id.*, § 2-202(2).

¹²⁵ *Id.*

¹²⁶ *Id.*

to be deducted from the augmented estate. An accurate accounting would be impossible.

Under the Ohio law, the surviving spouse takes her elective share from the net probate estate.¹²⁷ Property passing other than by testate or intestate succession at death is not included.¹²⁸ Property of the surviving spouse derived from the decedent and property transferred by the decedent that might have been included in the surviving spouse's taxable estate if she had died before the testator are not charged against the surviving spouse's intestate share.

The net estate in Ohio would include all of the property passing testate, but none of the property passing intestate. Administration expenses, funeral expenses, family allowances, taxes, and all other expenses would be deducted.¹²⁹ Since the automobile is not part of the assets of the estate, however, and no provision is made in the elective share statute with reference to the automobile, it would appear that if the testator has devised the automobile to the surviving spouse she can keep the automobile and still obtain an elective share.

There are really no important Ohio cases with respect to the use of contracts, deeds, and gifts as will substitutes. The few lower court cases follow the general rule that if a transaction meets the technical requirements of a particular transaction, it is not a testamentary disposition of property. For a time, however, Ohio followed the rule that the surviving spouse could elect to take a share of assets passing at the decedent's death under a revocable inter vivos trust.¹³⁰ This rule was laid to rest by *Smyth v. Cleveland Trust Co.*,¹³¹ which held that an inter vivos trust was not testamentary merely because the grantor retained both the beneficial interest in the trust property and the power to revoke it during his lifetime. The court reviewed the checkered history of the revocable trust in Ohio, and reversed all cases inconsistent with its decision. Its reasoning was based primarily on a doctrinal analysis of the differences between a will, an agency, and a trust, and on a literal interpretation of the statutes.

¹²⁷ OHIO REV. CODE ANN. § 2107.39 (Page Supp. 1975).

¹²⁸ *Smyth v. The Cleveland Trust Co.*, 172 Ohio St. 489, 179 N.E.2d 60 (1961).

¹²⁹ The deduction for taxes has caused problems in Ohio where the election has been made in order to take advantage of the marital deduction. The Ohio Supreme Court has forced the electing spouse to bear a share of the tax in the teeth of the testator's direct command that the entire estate pay all taxes, even though her share would be deductible. *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E.2d 695 (1961).

¹³⁰ *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E.2d 381 (1944).

¹³¹ 172 Ohio St. 489, 179 N.E.2d 60 (1961).

The *Smyth* case is generally regarded by Ohio lawyers as expressing a policy permitting disinheritance of spouses. It should be noted, however, that the court in *Smyth* expressly noted that "no fraud is involved here."¹³² The trust had been established by the grantor five years prior to his death, and his widow had accompanied him to the trust company and knew he was establishing a trust. It is at least arguable, therefore, that the Ohio Supreme Court might rule differently with respect to a transfer made secretly a short time prior to death with intent to defeat the elective share of the spouse.

D. *Right of Election is Personal*

UPC § 2-203 provides that the right of election of the surviving spouse may be exercised only during his lifetime and only by him if he is competent. If the spouse is a protected person,¹³³ only the court can make the election for him. The court must do so by order, after finding that the exercise is necessary to provide adequate support for the protected person during his probable life expectancy.¹³⁴ The UPC provides that courts may appoint a conservator or make any other protective order for the person. Provisions for protective orders make it easier to administer the estate of the protected person and avoid the necessity for appointment of a conservator in smaller estates.

In Ohio, the right of election is also personal to the spouse, but it takes more reading time to arrive at the conclusion. Rather than simply providing affirmatively that the spouse must elect in her lifetime, § 2107.41 provides negatively that if she dies before probate, survives probate but fails to make an election, or dies before the expiration of the time within which she might have made an election, she is conclusively presumed to have elected to take under the will. It then recites the obvious, that the heirs, devisees, and legatees are bound by the election, and that persons may deal with the property of the decedent accordingly. Fiduciaries and beneficiaries under the will have no standing to question the determination.¹³⁵

The Ohio law also makes § 2105.21 of the Revised Code (barring the spouse from any rights in the decedent's estate if the spouse dies

¹³² 172 Ohio St. at 503, 179 N.E.2d at 69.

¹³³ A protected person is a minor or someone who for some reason is unable to manage his affairs. UNIFORM PROBATE CODE § 5-101 (1975 version).

¹³⁴ *Id.*, § 2-203.

¹³⁵ *In re Estate of Cook*, 19 Ohio St. 2d 121, 249 N.E.2d 799 (1969).

within thirty days after the decedent) applicable to the election. The UPC has no corresponding provision with respect to the surviving spouse. However, under the UPC all heirs and devisees must survive the decedent by 120 hours in order to be able to share in the estate.¹³⁶

Under the Ohio law¹³⁷ the court must also make the election for the person under legal disability. However, the standard which guides the court is whether the provision made for the spouse in the will or the provision under the law is better for the spouse.¹³⁸ The court is assisted in its decision by the report of a person appointed to investigate the value of each alternative.

The leading case on this matter, *In re the Estate of Strauch*,¹³⁹ held that the court cannot consider the effect of a widow's election upon legatees, heirs, next of kin, or the tax collector. Even though the widow did not need the assets under the will, and would very likely have followed the testator's intention had she been competent, the court of appeals reversed a probate court decision that would have given her own legatees \$44,102.50 rather than \$26,500.00 upon her death. The court recognized that factors other than the mere value of property may be taken into consideration. Both the court of appeals and the supreme court held that the legatees and trustees under the will had no standing to contest the guardian's appeal from the probate court's determination to elect that the incompetent spouse take against the will.¹⁴⁰

The most significant difference, then, is that the UPC allows the carrying out of the decedent's estate plan, except to the extent that the court will not leave a minor or incompetent person unsupported if the elective share will provide such support. The Ohio law, as presently interpreted, may permit the carrying out of some decedent's estate plans, but defeats others. However, the Ohio law may in many instances make possible a better life for the incompetent, and give a minor surviving spouse the same choice that she would have the right to make as an adult.

¹³⁶ UNIFORM PROBATE CODE §§ 2-104, 2-601 (1975 version).

¹³⁷ OHIO REV. CODE ANN. § 2107.45 (PAGE 1968).

¹³⁸ *Id.*

¹³⁹ 11 Ohio App. 2d 173, 229 N.E.2d 95 (1965), *aff'd on other grounds*, 15 Ohio St. 2d 192, 239 N.E.2d 43 (1968).

¹⁴⁰ However, the law is not entirely settled on this point, since an earlier probate court decision in another appellate district held that the court could elect to permit an incompetent husband to take nothing under his wife's will. *In re Estate of Rieley*, 194 N.E.2d 918 (P. Ct. 1963). Both spouses' wills were made pursuant to a plan whereby the wife left all her property to their grandchildren in order to minimize taxes. It is difficult to imagine an election any better for the spouse than to comply with her wishes where the circumstances have not changed.

E. *Waiver of the Right to Elect*

The UPC expresses a strong policy in favor of waiver of marital rights. All rights, including the elective share, homestead allowance, exempt property, and family allowance may be waived, in whole or part.¹⁴¹ The waiver must be in the form of a signed written contract agreement, or waiver, which may be executed before or after marriage. There is no requirement of a fair and adequate consideration, but a fair disclosure must be made to the spouse before she signs the waiver.

To expedite settlements, the UPC provides that a waiver of all rights (or equivalent language) in the property or estate of the spouse waives all rights to the elective share and allowances, and also renounces all benefits of intestate succession or testate succession under a will executed prior to the waiver.¹⁴² A complete property settlement after or in anticipation of separation or divorce is also a complete waiver of such rights.

The Ohio law favors antenuptial and separation contractual agreements, but does not allow post-nuptial agreement or simple waiver. Ohio Revised Code § 2131.03 expresses this policy by a peculiar reverse time limitation period. Whereas most statutes of limitations bar the right to bring an action on a contract, the Ohio law holds that any antenuptial or separation agreement to which the decedent was a party is valid unless its validity is attacked within six months after the appointment of the executor or administrator. Otherwise the decedent's estate must perform the contract.¹⁴³ The surviving spouse may be even further surprised to discover that the dead man's statute bars his testimony as to any oral modification or rescission of the agreement.

An antenuptial agreement must be in writing.¹⁴⁴ However, the writing may be executed after the wedding if the agreement was made before the marriage.¹⁴⁵ The surviving spouse should be aware that the dead man's statute bars his testimony as to any oral modification or rescission of the agreement.¹⁴⁶ Written separation agreements are specifically authorized by statute and may waive all marital and other

¹⁴¹ UNIFORM PROBATE CODE § 2-204 (1975 version).

¹⁴² *Id.*

¹⁴³ *Cantor v. Cantor*, 15 Ohio Op. 2d. 148, 174 N.E.2d 304 (P. Ct. 1959).

¹⁴⁴ OHIO REV. CODE ANN. § 1335.05 (Page 1962); *Finch v. Finch*, 10 Ohio St. 501 (1860).

¹⁴⁵ *In re Estate of Weber*, 170 Ohio St. 567, 167 N.E.2d 98 (1960).

¹⁴⁶ OHIO REV. CODE ANN. § 2317.03 (Page Supp. 1974); *Mosier v. Mosier*, 133 N.E.2d 202 (P. Ct. 1954).

rights in the decedent's estate.¹⁴⁷ The statute also provides, however, that the husband and wife cannot by any contract "except for an immediate separation agreement" alter their legal relations with each other.¹⁴⁸ Thus to accomplish such an agreement in Ohio it would be necessary to establish a trust.¹⁴⁹

The Ohio cases relating to antenuptial and separation agreements require, in addition to full disclosure, that the share of the surviving spouse not be disproportionate to the share she would be entitled to by law.¹⁵⁰ The Ohio statute thus inhibits estate planning by a contract between agreeable spouses, out of a perhaps outdated fear that the surviving spouse would otherwise be defenseless.

F. *Proceedings in Election to Take*

(1) Initiation of the Proceedings

Under UPC § 2-205, the surviving spouse must take the initiative to claim an elective share in the augmented estate.¹⁵¹ To do so she must file a petition in the court within nine months after the date of death, or within six months after the date of probate of the will, whichever is later.¹⁵² If the spouse files a petition after the expiration of nine months from the date of death, only probate assets will be included in the augmented estate.¹⁵³ A timely filing of the petition is therefore essential. Excluding nonprobate transfers serves to clear the title of those assets transferred from the lien of the elective share. In contrast probate assets may be controlled by a will offered for probate as late as three years after death.¹⁵⁴ There is thus no reason for an earlier barring of the lien on probate assets.

The time for filing the petition may be extended by the court before the time for election has expired.¹⁵⁵ The spouse will therefore

¹⁴⁷ OHIO REV. CODE ANN. § 3103.06 (Page 1972).

¹⁴⁸ The Ohio Supreme Court has held that this section renders a post-nuptial contract providing for the release of all interests invalid, including dower and distributive shares in the estate of the decedent. *Dubois v. Koen*, 100 Ohio St. 17, 125 N. E. 121 (1919).

¹⁴⁹ Another possible method would be to join in a dissolution of marriage ceremony in the domestic relations court, as permitted by Ohio Rev. Code §§ 3105.61-.65, execute an antenuptial agreement at counsel's desk, and then return to the judge's chambers for the remarriage ceremony.

¹⁵⁰ *Mintier v. Mintier*, 28 Ohio St. 307 (1876); *In re Shafer*, 77 Ohio App. 105, 65 N.E.2d 902 (1944).

¹⁵¹ UNIFORM PROBATE CODE § 2-205(a) (1975 version).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ UNIFORM PROBATE CODE § 3-108 (1975 version).

¹⁵⁵ *Id.*, § 2-205(a).

have an adequate opportunity to investigate and determine the most advantageous course to take. The additional time afforded will not delay the administration and distribution of the estate, since the personal representative is not required to hold assets after the time for filing a petition has expired. The personal representative is authorized to make distribution without order of the court,¹⁵⁶ and distributees would be required to contribute to any after-determined elective share.¹⁵⁷ If the personal representative desires protection in making the distribution, he may notify persons entitled to object to the distribution. This right to object is terminated if the person does not object within thirty days after mailing or delivery of the proposal.¹⁵⁸ The personal representative may also invoke the jurisdiction of the court with respect to any question concerning the estate or its administration.¹⁵⁹

After the petition is filed, the case would proceed as a formal judicial proceeding with notice and an opportunity for hearing afforded to all parties. There is no provision in the UPC whereby the spouse can be compelled to exercise the right of election because under the UPC there is no reason for delay in the administration of the estate or for a bona fide purchaser to reject the title of the personal representative¹⁶⁰ or a distributee¹⁶¹ on the ground that the surviving spouse's election may affect the bona fide purchaser. In each case, the bona fide purchaser is protected.¹⁶² Further, assets purchased by a bona fide purchaser from the decedent are not included in the augmented estate,¹⁶³ and only original transferees of nonprobate assets included in the augmented estate or their donees are required to contribute from assets included in the augmented estate in order to make up the elective share.¹⁶⁴

In contrast to the UPC, Ohio law is very concerned with the time limits within which the spouse is required to make an election.¹⁶⁵

¹⁵⁶ *Id.*, § 3-703.

¹⁵⁷ *Id.*, § 3-909.

¹⁵⁸ *Id.*, § 3-908.

¹⁵⁹ *Id.*, § 3-704.

¹⁶⁰ *Id.*, § 3-714.

¹⁶¹ *Id.*, § 3-910.

¹⁶² *Id.*, §§ 3-714, 3-910.

¹⁶³ *Id.*, § 2-202.

¹⁶⁴ *Id.*, § 2-207.

¹⁶⁵ OHIO REV. CODE ANN. § 2107.39 (Page Supp. 1975). The former law making it optional for the personal representative or the court to send the citation has been repealed.

However, the recent reforms have retained the provisions of former law permitting the

In order to eliminate delay in settling estates the new act now requires the probate court rather than the surviving spouse to take the initiative. The court must issue a citation by certified mail to the surviving spouse to elect whether she shall take under the will or under § 2105.06 of the Ohio statute of descent and distribution. The probate court must issue the citation immediately after the personal representative files the inventory and schedule of debts. Only after the inventory and schedule of debts have been filed will there be a record from which the court can inform the surviving spouse of his rights under the will and under the law. Ohio law requires the personal representative, unless the court extends the time, to file the inventory and appraisal within one month after his appointment,¹⁶⁶ and to file the schedule of debts, in accordance with rules to be adopted by each probate court, within three months and no later than five months, after his appointment.¹⁶⁷ Thus unless the court has extended the filing time, the earliest moment at which the probate court could issue the citation would be after three months from the appointment. However, it has not been unusual in the past for inventories and schedules of debts to be filed late. Adoption of the probate reform act, with its goal of completed administration within four or five months of the personal representative's appointment, may signal an intent by probate judges to insist upon prompt filing, since the judge and his deputies will know that they must cause a citation to be issued. They may be expected to be greatly concerned if they cannot perform their appointed duty at the appointed time.

surviving spouse to make an election within three months after the disposition of any proceedings for advice or to contest the validity of the will. Under Ohio law, therefore, it appears that the spouse may extend the time for his election by taking action within the one-month period, requesting an extension of time within which to make the election. During that time, he may also file proceedings for construing the will. OHIO REV. CODE ANN. § 2107.40 (Page Supp. 1975).

The recent amendments reduce the time period within which a will contest action must be brought from six months to four months. OHIO REV. CODE ANN. § 2107.23 (Page Supp. 1975). If a will contest is brought before the expiration of the time within which the spouse must elect, the time for election would be automatically extended. It is not clear what the effect would be of a will contest brought after the time to elect expired.

¹⁶⁶ OHIO REV. CODE ANN. § 2115.05 (Page Supp. 1975).

¹⁶⁷ OHIO REV. CODE ANN. § 2117.15 (Page Supp. 1975). Claims of creditors must be filed within three months after the appointment, since the appointment requires publication that includes a notice to creditors to present claims to the personal representative. OHIO REV. CODE ANN. §§ 2117.06, 2113.08 (Page Supp. 1975). Hence, the executor or administrator should not file the schedule of debts until the three-month period has expired.

(2) Notice to Other Parties

Under UPC § 2-205(b), the surviving spouse must not only serve a copy of notice of petition upon the personal representative, but also notify all persons interested in the estate and all persons whose interests in the augmented estate might be adversely affected. This would include transferees entitled to nonprobate assets that are included in the augmented estate.

The probate court is required to notify the personal representative that it has issued a citation notifying the surviving spouse to make an election.¹⁶⁸ No one else need be notified. The reason for this is twofold. First, the Ohio theory is that the amount that the surviving spouse will take, either under the law or under the will, is absolutely fixed by the values shown on the inventory and the schedule of debts. The surviving spouse can compare the will and the law and easily determine which share is greater and what its total tax and estate planning consequences will be.¹⁶⁹ Second, the executor has standing to make an objection as to whether a particular surviving spouse is entitled to exercise an election.¹⁷⁰ Logically, the executor could also object to the timeliness and manner of exercising the election. The remedy of other interested parties would be to bring an action if the executor refused to do so,¹⁷¹ or to object to his accounting.

(3) Right to Withdraw Election

Under the UPC, the surviving spouse may withdraw the demand for an elective share at any time before entry of a final determination by the court.¹⁷² There is no reason for requiring a binding election prior to such time, although finality of judicial determinations requires that the surviving spouse not be permitted to withdraw thereafter. Taxes, creditors, and titles might also be adversely affected by a later withdrawal.

An early Ohio case held that a widow could not revoke a properly made election, even where the attempted revocation was made before the expiration of the time allowed for an election.¹⁷³ The court

¹⁶⁸ OHIO REV. CODE ANN. § 2107.391 (Page Supp. 1975).

¹⁶⁹ If heirs and devisees wish to object, the proper procedure is to object to the inventory appraisements and schedule of debts.

¹⁷⁰ *In re Estate of Gould*, 1 Ohio Op. 2d 366, 140 N.E.2d 793 (P. Ct. 1956), *aff'd* 1 Ohio Op. 2d 372, 140 N.E.2d 801 (Ct. App. 1956).

¹⁷¹ OHIO REV. CODE § 2107.46 (1975).

¹⁷² UNIFORM PROBATE CODE § 2-205(c) (1975 version).

¹⁷³ *Davis v. Davis*, 11 Ohio St. 386 (1860).

held that permitting the widow to do so would make a mockery of the election, although it recognized that an election could be set aside in case of fraud, imposition, misrepresentation, and mistake. The Ohio cases since have adhered to this viewpoint.¹⁷⁴

It is open to question whether these older cases have any practical effect when the spouse elects, under the present form of the statute, to take under the will. Under § 2107.41 of the Ohio Revised Code a surviving spouse who fails to make an election to take either against or under the will within the time provided by law is conclusively presumed to take under the will. The conclusive presumption has been held constitutional where the surviving spouse was insane.¹⁷⁵ Thus it appears that a surviving spouse can elect to take against the will only by making a valid election within the short period of time allowed. Such an election to take against the will might be set aside for cause, but it does not appear possible to set aside an election to take under the will after the very brief period for election expires. Setting aside an election to take under the will could not affect the conclusive presumption that the spouse had elected to take under the will by reason of failure to make a timely election to take against the will.¹⁷⁶

Although a surviving spouse cannot revoke an election to take under the will, she can renounce the share she has elected to take under the will.¹⁷⁷ Presumably, the reason for electing to take under the will and then renouncing its benefits would be to expedite administration and assure that objects of the testator's bounty (unless renunciation caused property to descend intestate) would receive benefits without further administration expenses or taxes. The Ohio statute¹⁷⁸ with respect to renouncing will benefits has no time limitation, but

¹⁷⁴ *Bell v. Henry*, 121 Ohio St. 241, 167 N.E. 880 (1929); *Mellinger v. Mellinger*, 73 Ohio St. 221, 76 N.E. 615 (1906).

¹⁷⁵ *In re Wolfel*, 3 Ohio App. 2d 11, 209 N.E.2d 594 (1965).

¹⁷⁶ The Ohio Supreme Court decided, under a former version of the statute, that a widow who had elected to take under a will was not, however, estopped from later contesting the will. *Carder v. Commissioners*, 16 Ohio St. 353 (1865). The court reasoned that her election did not prejudice other claimants, but that they would obtain an unfair advantage over her unless she could contest the will. If she declined to take under the will, believing it to be invalid, but a later contest established its validity, she would have lost her right to elect to take under the will.

The question should not arise under the present law, since the statute extends the time for making an election to include any period during which an action to construe or contest the will is pending.

¹⁷⁷ *In re Estate of Hartman*, 29 Ohio Op. 256 (P. Ct. 1944).

¹⁷⁸ OHIO REV. CODE ANN. § 2113.60 (Page 1968).

presumably the common-law rule requiring renunciation within a reasonable time after probate would be applicable.

It is very doubtful that a case would ever arise in which an Ohio surviving spouse would attempt to elect to take against the will, and then renounce the share she would take under the law. *Miller v. Miller*¹⁷⁹ holds that the share of the surviving spouse is not an intestate share but is a share given by the statute establishing the right to elect to take against the will and under the law. Further, the Ohio statute permitting renunciation of an intestate share requires the renunciation to be made within sixty days after notice of hearing on the inventory.¹⁸⁰ This time limitation is inconsistent with the time limitation established for the surviving spouse's election.

UPC § 2-801 permits renunciation, within a general limitation period of six months after the decedent's death, of both testate and intestate succession as well as of interests passing pursuant to the exercise of powers. It thus permits post-mortem estate planning to an extent not possible under Ohio law.

(4) Determination of the Elective Share

The determination of an elective share under the UPC may be made only by the court after notice and hearing.¹⁸¹ The burden is on the surviving spouse to prove the share to which she is entitled. The court must also fix the liability of any person, other than the personal representative, who has an interest in or possession of property included in the augmented estate. The liability of the person cannot exceed the amount he would have to contribute if all parties subject to contribution were made parties.¹⁸² However, the spouse is not required to make parties to the action all persons who might, by reason of having received transfers from the decedent, be subject to contribution to the spouse's elective share.

In contrast to the UPC requirement that the surviving spouse prove the share of the augmented estate which she is entitled to take, the entire thrust of the Ohio law is that the court must assist and protect her in determining the share she is entitled to under the will and under the law.¹⁸³ Only when the spouse succeeds to the entire

¹⁷⁹ 129 Ohio St. 230, 194 N.E. 450 (1935).

¹⁸⁰ OHIO REV. CODE ANN. § 2105.061 (Page 1968).

¹⁸¹ UNIFORM PROBATE CODE § 2-205(d) (1975 version).

¹⁸² *Id.*

¹⁸³ If the spouse is under a legal disability, the court must make the election for her after

estate of the decedent under the will is a burden placed upon the spouse to take affirmative action to elect to take against the will.¹⁸⁴

The recent amendment requires the initial citation issued by the court to describe the effect of the election and the general rights of the spouse.¹⁸⁵ It must state that the surviving spouse has a right to bring an action to construe the will. It must also advise her of the presumption that arises if she does not make an election within the one-month period.¹⁸⁶

The Ohio policy in favor of a spouse's electing to take under a will is evident from the language of the recent amendments. No particular formal procedure is required. The statute merely provides "[t]he surviving spouse electing to take under the will may manifest the election in writing."¹⁸⁷ However, an election to take against the will must be made before the probate judge,¹⁸⁸ a deputy clerk referee,¹⁸⁹ or a commissioner appointed by the court.¹⁹⁰ The judge, referee or commissioner must explain the will, the spouse's rights under it, and the spouse's rights under the law if she refuses to take under the will.

Care must be exercised, particularly by counsel, in advising the spouse of her rights. The case law in this area is meager but a lower court opinion indicates that the election may be set aside if either the court or counsel misleads the spouse.¹⁹¹

(5) Enforcement of the Election

Under the UPC, the personal representative distributes the probate estate in accordance with the order determining the elective share. However, as to persons who have received nonprobate assets,

appointing a suitable person to investigate which provision is better for the spouse. OHIO REV. CODE ANN. § 2107.45 (Page 1968).

¹⁸⁴ OHIO REV. CODE ANN. § 2107.39 (Page Supp. 1975).

¹⁸⁵ OHIO REV. CODE ANN. § 2107.391 (Page Supp. 1975). The new act contains the following ambiguous language: "The description of the effect of the election and of the rights of the spouse need not relate to the nature of any particular estate." Presumably it uses the term "particular estate" to mean the content of the particular decedent's estate.

¹⁸⁶ OHIO REV. CODE ANN. § 2107.391(B) (Page Supp. 1975).

¹⁸⁷ OHIO REV. CODE ANN. § 2107.391(C) (Page Supp. 1975). Presumably a court would construe this as requiring the written election to be signed and filed before it is binding. Otherwise, a fickle or uninformed spouse would be bound by an instrument not of record, although she might desire to change her mind.

¹⁸⁸ OHIO REV. CODE ANN. § 2107.43 (Page Supp. 1975).

¹⁸⁹ *Id.*

¹⁹⁰ OHIO REV. CODE ANN. § 2107.44 (Page 1968).

¹⁹¹ *Smith v. First National Bank*, 124 N.E.2d 851 (C.P. Tuscarawas Cty. 1954).

the court order would have to be enforced in a separate action for contribution or payment.¹⁹²

Since the Ohio law applies only to the probate estate, in contrast to the UPC, the personal representative would distribute the probate estate in accordance with the election. The spouse might be able to bring a direct action, under the law relating to fraudulent conveyances, against persons who had fraudulently received assets from a decedent. However, the normal procedure would be for the spouse to demand that the personal representative bring the action, and, if the representative refused, bring an appropriate action in which the personal representative would be a party.

(6) Effect of the Election upon Provisions in the Will

Under the UPC § 2-206, the spouse who takes an elective share does not lose any benefits under testate or intestate succession, unless the spouse specifically renounces such benefits. This is so because these benefits are applied first to satisfy the surviving spouse's elective share before recipients of the balance of the augmented estate are required to contribute to the elective share.

The spouse is permitted to renounce either testate or intestate succession because by so doing she does not gain at the expense of such recipients. Probate property which the spouse might have kept will pass to others, presumably the objects of his bounty, as though she had predeceased the testator. Thus, the spouse may defeat taxes and expenses of administration upon later decease, without losing the right to obtain contribution from the deceased spouse's transferees. The persons taking the interests renounced by the spouse are not liable for contributing to the elective share of the augmented estate that the spouse does take, since the interest renounced is charged to the elective share.¹⁹³

Under the recent Ohio amendments it is clear that by electing to take under the law the surviving spouse is treated as "thereby refusing to take under the will."¹⁹⁴ Accordingly, the spouse will receive no benefit under the will—apparently even if the will expressly provides that a spouse who elects to take against the will may take benefits under it. The Ohio law, like the UPC, provides that the surviving spouse's share shall be disposed of as if she predeceased the

¹⁹² UNIFORM PROBATE CODE § 2-205(e) (1975 version).

¹⁹³ *Id.*, § 2-207.

¹⁹⁴ OHIO REV. CODE ANN. § 2107.43 (Page Supp. 1975).

testator.¹⁹⁵ However, remainders are not accelerated unless the will provides otherwise.¹⁹⁶ The UPC leaves questions of acceleration to the common law.

The surviving spouse who elects to take under the will is of course entitled to the benefit of all of the will's provisions for her. The spouse is also entitled to an intestate share of "that portion of the estate as to which the decedent dies testate."¹⁹⁷ However, the section also retains apparently inconsistent language stating that the spouse "shall be barred of all right to an *intestate* share of the property *passing under the will* . . . unless it plainly appears from the will that the provision for the spouse was intended to be in addition to an intestate share."¹⁹⁸ The statute was amended to add the language that the surviving spouse is entitled to an intestate share of that portion of the estate as to which the decedent dies testate, after *Jones v. Webster*¹⁹⁹ held that the language quoted above barred a widow from taking an intestate share of property that the testator had tried, but failed to dispose of in his will. The court ruled that the testator's attempt to create a trust in the property was void, and hence, the property passed intestate to all the heirs except the widow.

(7) Effect of Election on Family Provisions

UPC § 2-206 states that the surviving spouse is entitled to the homestead allowance, exempt property, or family allowance, whether or not she elects to take an elective share. Thus in order to discourage a disruptive election, the estate plan must at least give to the surviving spouse a minimum value equivalent to the value of the family provisions, plus the elective share. The UPC policy, simple in application, is that this minimum value is the fair share to which a surviving spouse is entitled, whether the decedent's estate passes by inter vivos transfer, intestate succession, or testate succession. Thus an election to take an elective share has no effect on the family rights.

It is clear that in Ohio a surviving spouse who elects to take against the will is entitled to receive the family allowance and to live in the mansion house for one year in addition to the intestate share. Even a spouse who elects to take under the will is entitled to these

¹⁹⁵ *Id.*, § 2107.39.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*, § 2107.42.

¹⁹⁸ *Id.* (emphasis added).

¹⁹⁹ 133 Ohio St. 492, 14 N.E.2d 928 (1938).

rights, in addition to the benefits passing under the will, unless the will expressly otherwise directs.²⁰⁰ Hence, to discourage a disruptive election, the estate plan must give the surviving spouse a minimum value equivalent to the value of the intestate share plus the value of the family allowance and of the right to live in the mansion house. The decedent may, however, be able to successfully prevent the surviving spouse from taking either an automobile or the "mansion house." These rights may not be exercised if the automobile has been "otherwise disposed of by the will"²⁰¹ or the mansion house has been "specifically . . . devised."²⁰²

It is possible that the surviving spouse will be able to successfully take the mansion house in any event, under new § 2105.062 of the Ohio Revised Code. That section contains no exception covering a mansion house that has been specifically devised. Section 2107.39 of the Ohio Revised Code gives the spouse the right to elect to take either "under the will or under § 2105.06 of the Revised Code." Section 2105.062 of the Ohio Revised Code states that the "surviving spouse may elect to receive, as part of his share of the intestate estate under § 2105.06 of the Revised Code, the entire interest of the decedent spouse in the mansion house." An argument can be made that the right to take "under section 2105.06 of the Revised Code" includes the right to take the mansion house if the electing spouse's share equals or exceeds the value of the mansion house. A counter argument can be made, however, that § 2105.062 of the Ohio Revised Code refers only to a mansion house in "the intestate estate." Further, it could be asserted that § 2107.39 of the Ohio Revised Code would have referred to § 2105.062 if it had been intended to include it. It seems unlikely that the General Assembly would give a right so disruptive of a testator's wishes or so unequally applicable to different estates without clearly expressing such an intent. Finally, it could be

²⁰⁰ OHIO REV. CODE ANN. § 2107.42 (Page Supp. 1975).

²⁰¹ *Id.*, § 2113.532. An interesting problem could arise if the estate consists of nothing but specifically devised automobiles. Section 2113.532 of the Ohio Revised Code states that the spouse is entitled to take an automobile only if it is "not otherwise disposed of by testamentary disposition." Is an automobile "disposed of by testamentary disposition" if the surviving spouse's election to take against the will makes it certain that at least one or more automobiles will not pass according to the will? Since the automobile the spouse is entitled to select will not be a part of the decedent's estate, the most logical conclusion is that a clause in the will disposing of an automobile ought to defeat the surviving spouse's election, even though her election to take against the will may ultimately prevent the legatee from receiving the automobile.

²⁰² OHIO REV. CODE ANN. § 2113.38 (Page Supp. 1975).

argued that the sole purpose of the section is to expedite settlement of intestate estates.

(8) Effect of Surviving Spouse's Separate Estate

The UPC does not consider the extent of the surviving spouse's separate estate in determining his elective share unless the property in the estate has been derived from the decedent and is includible in the augmented estate. The augmented estate includes the value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time which would have been included in the spouse's augmented estate if the surviving spouse had predeceased the decedent, to the extent that the property is gratuitously derived from the decedent by any means other than testate or intestate succession.²⁰³ It is, of course, impossible to determine exactly what the decedent would have had in the estate, if he had given nothing away during the marriage, and then to allow the spouse one-third of that amount—less what the spouse had been given by the decedent during his lifetime. The UPC approach is similar to this, but deliberately limited, carefully specifying the nature of transfers that are to be considered as part of the augmented estate. UPC § 2-207 provides that values included in the augmented estate which pass or have passed to the surviving spouse, or would have passed to the spouse but were renounced, are applied first to the elective share. This necessarily reduces the amount that other recipients must disgorge by way of contribution in order to make up the full elective share.

Ohio law does not charge the separate property of the spouse against the share that a surviving spouse may elect to take under the law. The result is that a surviving spouse may freely upset the estate plan by electing to take against the will, even though she has been amply provided for by inter vivos transfers. Neither the legislature nor the courts have expressed any sentiment in favor of a disinherited spouse or in opposition to a greedy spouse.

(9) Effect of Election upon the Disappointed

The UPC requires recipients of assets constituting the augmented estate to contribute equitably to make up the balance of the elective share, unless the recipients take by reason of the renunciation

²⁰³ UNIFORM PROBATE CODE § 2-202 (1975 version).

of the surviving spouse.²⁰⁴ UPC § 2-207(b) requires the other recipients to contribute equitably in proportion to the value of their interests to the total value of the augmented estate not charged to the surviving spouse. The use of the term “equitably apportioned” might mean that factors of estoppel, waiver, or other equities may be considered in addition to mathematical proportions.

The UPC also protects, to a limited extent, persons who have received nonprobate assets included in the augmented estate. Unlike heirs or beneficiaries under a will, they would normally have no reason to anticipate the spouse’s election. Hence, they may choose either to give up the property, or pay its value as of the time the transfer became irrevocable, or at the decedent’s death, whichever occurred first. Only transferees from or appointees of the decedent are liable, unless they have given the property away. If the property has been given away, the donee of the decedent’s transferee or appointee is liable for contribution if he still has the property or the proceeds.²⁰⁵

Apparently, however, if the donees no longer have the property or proceeds of the property, the original transferees or their appointees would have to make the contribution. This should not be too harsh in application because the transferees should know, by reason of the definition of augmented estate, that the transfer may be affected by the death of the transferor.

The UPC specifically excludes the spouse’s elective share from the provisions of the will.²⁰⁶ This is consistent with the UPC concept that the surviving spouse’s share is of an augmented and not a probate estate, and would be implicit even if not expressed.

If the spouse elects to take against the will in Ohio, the balance of the estate is distributed as though the spouse had predeceased the testator.²⁰⁷ Remainders are not accelerated, however, unless the will makes a specific provision for acceleration. If provision has been made for the spouse in the will, the court sequesters the gift to the spouse and applies it to compensate disappointed beneficiaries.²⁰⁸ If,

²⁰⁴ Recipients of renounced property are not required to contribute because the value of the renounced property is charged against the elective share. Only property that is not charged to the elective share is subject to be applied to making up any deficiency in the elective share. *Id.*, § 2-207(a).

²⁰⁵ *Id.*, § 2-207(c).

²⁰⁶ *Id.*, § 3-902(a).

²⁰⁷ OHIO REV. CODE ANN. § 2107.39 (Page Supp. 1975).

²⁰⁸ *Jennings v. Jennings*, 21 Ohio St. 56 (1871); *Wilson v. Hall*, 6 Ohio C.C.R. 570 (1895), *aff’d*, 53 Ohio St. 679, 44 N.E. 1139 (1895).

however, the spouse's share is sufficient to compensate the legatees and the will has no residuary clause, his share under the will would descend as intestate property.

If, as is normally the case, distributing the sequestered assets does not compensate all the beneficiaries, Ohio appears to have adopted a rule of equitable but not necessarily equal apportionment.²⁰⁹ However, it has also been held that specific legatees and devisees are entitled to exoneration from the residuary estate,²¹⁰ unless a contrary intention appears from the will.²¹¹ The right of specific beneficiaries to exoneration from the residuary estate creates an equitable lien on real estate, which may be enforced against purchasers from the residuary distributees.²¹²

It therefore appears that, although there is authority for the application of equitable apportionment of the beneficiaries' disappointment, Ohio would generally apply traditional rules of abatement in the absence of a showing of the intent of the testator with respect to an election to take against the will. The result is that the residuary beneficiaries usually bear the full loss if the surviving spouse elects to take against the will.

As previously discussed, an argument can be made that a spouse who elects to take against the will may thereby become entitled to take the entire interest of the decedent in the mansion house if the value of the spouse's intestate share equals or exceeds the interest. If so, the disappointed specific devisee of the mansion house would have a very strong argument for exoneration. Not only would the surviving spouse obviously be the preferred object of the testator's bounty, but also her loss would be the result of a peculiar operation of the statute under circumstances not within the contemplation of the legislature.

V. CONCLUSION

Although Ohio has now adopted some UPC concepts, it has

²⁰⁹ In *Blackford v. Vermillion*, 107 Ohio App. 26, 156 N.E.2d 339 (1958), for example, the testator had made a specific bequest of the proceeds of sale of a farm to six grandchildren in equal shares. His residuary clause directed that the proceeds from the sale of the remainder of his property be divided equally among his three children. The court held that the surviving spouse took a one-third interest in both the farm and the remainder of the property. Accordingly, the court directed that the grandchildren should bear the loss of one-third of the proceeds of the farm. The residuary beneficiaries, in turn, lost one-third of their interest.

²¹⁰ *Dunlap v. McCloud*, 84 Ohio St. 272, 95 N.E. 774 (1911).

²¹¹ *Kenyon College v. Cleveland Trust Co.*, 130 Ohio St. 107, 196 N.E. 784 (1935).

²¹² *Wyer v. King*, 67 Ohio App. 321, 36 N.E.2d 897 (1940).

rejected its proposals of flexible forms of probate procedure, expanded powers of a personal representative, broad protection to bona fide purchasers, elimination of bond and appraisal requirements, state uniformity, and other such concepts. Above all, it has rejected the concept that a decedent should not be permitted to dispose of property by means that disinherit the surviving spouse. Ohio has, however, adopted UPC provisions relating to advancements,²¹³ debts of a deceased heir,²¹⁴ the prior right of the surviving spouse to a fixed monetary amount,²¹⁵ the barring of a convicted murderer from benefiting by the murder,²¹⁶ the effect of a separation agreement on a testator's will,²¹⁷ the effect of a guardian's sale, condemnation, and other events upon a disabled testator's will,²¹⁸ and the effect of a general residuary clause upon a power of an appointment.²¹⁹ It has leaned toward the UPC in shortening the period of estate administration,²²⁰ in not requiring a surviving spouse who is the sole heir to give an administrator's bond,²²¹ in allowing a nonresident spouse or next of kin to serve as executor,²²² in authorizing personal representatives to make immediate distributions,²²³ and in expediting the sale of real estate if all interested parties are adult and consent to the sale.²²⁴ Whether these Ohio changes will produce a sufficient reduction in the costs and time necessary for administration to stem the tide of dissatisfaction with probate, only time will tell.

Interestingly enough, although the Ohio act does not appear to

²¹³ OHIO REV. CODE ANN. § 2105.051 (Page Supp. 1975).

²¹⁴ *Id.*, § 2105.052.

²¹⁵ *Id.*, § 2105.06.

²¹⁶ *Id.*, § 2105.19.

²¹⁷ *Id.*, § 2107.33.

²¹⁸ *Id.*, § 2107.501.

²¹⁹ *Id.*, § 2107.521.

²²⁰ Limitation periods are shortened throughout the act in accordance with two major time changes. The first shortens the time for bringing a will contest from six months to four months after admission of the will to probate. *Id.*, § 2107.23. The second permits distributees to bring an action to compel the executor or administrator to distribute assets within five, rather than seven months, after his appointment. *Id.*, § 2113.54

²²¹ *Id.*, § 2109.07.

²²² *Id.*, § 2113.05.

²²³ *Id.*, § 2113.53. But note that neither she, the distributees, nor bona fide purchasers from them are protected if the spouse does so.

²²⁴ *Id.*, § 2127.011. These slight tilts toward the UPC are offset somewhat by the repeal of Ohio's self-proved will statute. 135 Laws of Ohio 120 (May 15, 1974, repealed 1976). It apparently was repealed because of lack of knowledge of any reason for retaining it after elimination, by the act, of the need for proof of wills by witnesses unless a party demands such proof. *Id.* § 2107.14.

be a prelude to full scale adoption of the UPC, one section of the act may be used by some proponents of probate reform as a springboard for free or do-it-yourself probate. That section²²⁵ mandates that every probate court in the state shall use the blank form set forth in the statute in procedures used to relieve an estate of less than \$15,000 from administration. Some consumer advocates argue that anyone can fill out the required form, without legal expertise, and that the amount can easily be increased from \$15,000 to \$150,000, or any other figure. They would amend the statute to make the journal entry relieving the estate to operate as a conveyance upon which a bona fide purchaser could rely not only for protection from the claims of creditors, as provided in present law, but also from all other persons interested in the decedent's estate. The purchaser could use a certified copy of the entry and an instrument of conveyance from the person shown by the entry to be entitled to the decedent's property as proof of the purchaser's title. The certified copy of the entry and the instrument of conveyance could be recorded if necessary to give constructive notice of his ownership.²²⁶

It has also been argued that a single administrative agency could quickly do the work for the heirs—and that the procedures could be data processed before the decedent died. Perhaps the day may come when the decedent's computer program will be triggered by the processing of his death certificate, and heirs, devisees, and taxing authorities will become the swift recipients of the decedent's bounty.

However, in their present form, the Ohio probate statutes express a clear policy that beneficiaries and creditors of a decedent require the full protection of the probate court, unless the decedent has made formal use of a will substitute. In the absence of objective studies as to the necessity of such protection, and of a complete and objective analysis of the effect of the UPC, or other proposed reforms, upon Ohio law, it is unlikely that the policy will be changed.

²²⁵ *Id.*, § 2113.03(B). The section now requires the court to appoint a commissioner when necessary for the execution of an instrument of conveyance. The UPC's provisions for small estates less than \$5,000 would permit transfer or delivery of certain personal property to successors upon receipt of a successor's affidavit delivered after thirty days from the date of death.

²²⁶ Protection of a bona fide purchaser from claims is the key to UPC simplification of administration. A personal representative may, after his appointment, settle an estate without further court action unless a party requests supervised administration or a formal proceeding. Bona fide purchasers from the personal representative, or his distributees, take free from the claims of creditors or other interested parties. The UPC proponents contend that, unless requested by the parties, probate court protection is illusory, costs too much, and takes too long. UNIFORM PROBATE CODE §§ 3-714 and 3-910 (1975 version).