

IN THE COURT OF COMMON PLEAS, PROBATE DIVISION, GEAUGA COUNTY, OHIO
Judge Timothy J. Grendell

Information Sheet
Rights of Surviving Spouse (and Minors)

WARNING

This Information Sheet is intended to provide you with an overview of the subject matter, effective as of the date noted in the upper left-hand corner. This Information Sheet is not intended to provide you with all legal information that may be necessary for you to decide upon a course of action, and the information provided may not be error-free, complete, or accurate. Moreover, this Information Sheet may not accurately describe the cited sections of the Ohio Revised Code or cited case law. Finally, this Information Sheet is not intended as a substitute for legal advice from a competent licensed attorney, who is familiar with all of the relevant facts of your case, and therefore the Help Center recommends that you seek legal advice from a competent licensed attorney that you select before taking any action. While the Help Center can provide you with a limited amount of general legal information, neither the Help Center staff nor any other Court employee can give you any legal advice.

Background

If a Decedent is survived by a spouse or certain minor children, then the surviving spouse and those minor children have rights that are superior to the claims of many creditors and superior to those of other beneficiaries under the Decedent's Will, or next-of-kin if the Decedent dies without a valid Will. The Estate Representative¹ must account for the rights of a surviving spouse and certain minor children before paying creditors (who have properly presented their claims), and before making distributions in accordance with the Decedent's Will or the Statute of Descent and Distribution.² Please read the form titled Summary of General Rights of Surviving Spouse (Form 8.3) on the Court's website. The following provides additional information.

Transfer of Automobiles³

If the Decedent owned one or more automobiles⁴ that are probate property, and which are not specifically disposed of by the Will, then the surviving spouse may select and take title to those automobiles to the extent that the aggregate value of those automobiles do not exceed \$65,000.⁵ If the surviving spouse selects one or more of those automobiles, then those selected automobiles are not considered probate property and the Estate Representative need not list those

¹ "Estate Representative" means a person appointed as the Executor, Administrator, or an applicant for a Release from Administration or Summary Release from Administration.

² R.C. 2105.06

³ R.C. 2106.18

⁴ See R.C. 2106.18(D) – note that "automobile" includes a motorcycle and includes a truck if the truck was used as a method of conveyance by the deceased spouse or the deceased spouse's family when the deceased spouse was alive.

⁵ R.C. 2106.18(A) and 4505.10. "automobile" includes a motorcycle and a truck if the truck was used as a method of conveyance by the deceased spouse or the deceased spouse's family when the deceased spouse was alive.

automobiles as probate property in the Inventory and Appraisal, or an Application to Relieve Estate from Administration or an Application for Summary Release from Administration.⁶ Furthermore, that right to select automobiles is superior to any claims of creditors. However, there are other key points to consider:

- If the surviving spouse selected more than one automobile under R.C. 2106.18, then the allowance for support described below is reduced by the value of the automobile having the lowest value of the automobiles so selected. The value of the automobile is determined by the affidavit that the surviving spouse executes for the BMV pursuant to R.C. 4505.10(B).
- Any automobile owned by the Decedent, which passes to the surviving spouse by reason of a right of survivorship as provided for in the car title, is in addition to the right to select one or more automobiles under R.C. 2106.18.⁷
- An automobile that is so selected remains subject to any liens against the automobile, and the rights of the secured creditor, even if that creditor did not properly present its claim.⁸
- The surviving spouse can cause the transfer of a motor vehicle title by presenting to the Auto Title Bureau (i) the death certificate, (ii) an affidavit of value (i.e., form BMV 3773 – Surviving Spouse Affidavit,⁹ and (iii) the certificate of title.

Transfer of Watercraft or Outboard Motor¹⁰

The surviving spouse is entitled to select one watercraft, one watercraft trailer, and one outboard motor, in which case that property is not considered an estate asset. The surviving spouse should carefully follow the provisions in R.C. 2106.19.

Allowance for Support¹¹

If a Decedent is survived by (i) a spouse, (ii) a spouse and one or more minor children, or (iii) no spouse but one or more minor children, then the spouse or the minor children, as the case may be, are entitled to receive from the probate estate, and before any payment to most creditors, probate property in the aggregate value of \$40,000 (known as the Allowance for Support), provided, however, that if the surviving spouse selected more than one automobile under R.C. 2106.18, then the Allowance for Support shall be reduced by the value of the automobile having the lowest value of the automobiles so selected.

Assuming no written waiver of the rights to the Allowance for Support (discussed below) has been filed with the Court, if there is (i) a surviving spouse and either (a) no minor children, or (b) one or more of Decedent's minor children and all the those minor children are children of the spouse, then the Court shall order a distribution of 100% of the Allowance for Support to the surviving spouse.¹² However, to obtain the court order, the Executor or Administration MUST prepare and file with the Court the form titled "Application for Family Allowance" (Form 7.1).

⁶ See generally probate information sheet "Full Administration."

⁷ R.C. 2131.12 and 2131.13

⁸ See generally probate information sheet "Creditor Rights."

⁹ See R.C. 4505.10(B) – and Bureau of Motor Vehicles form "BMV 3773 – Surviving Spouse Affidavit"

¹⁰ R.C. 2106.19

¹¹ R.C. 2106.13

¹² R.C. 2106.13(B)(1) and 2106.13(B)(2)

Again, assuming no written waiver of the rights to the Allowance for Support has been filed with the Court, if there is (i) a surviving spouse and minor children of the Decedent, and at least one of those minor children is not a child of the surviving spouse, or (ii) no surviving spouse, but there are minor children of the Decedent who survive, then the Court shall order a distribution of the Allowance for Support to be apportioned among (a) the surviving spouse and Decedent's surviving minor child(ren) for which the spouse is not the parent, or (b) all the Decedent's minor children.¹³ However, to obtain the court order to apportion the Allowance for Support, within five months after appointment the Executor or Administration MUST prepare and file with the Court the form titled "Application for Apportionment of the Family Allowance" (Form 7.2), and the Court will determine how to apportion the Allowance for Support among the surviving spouse (if there is one) and those minor children.

Waiver of Right to Allowance for Support.¹⁴ A surviving spouse or minor children (by a guardian for a minor child) may waive payment of the Allowance for Support. Of course, if the payment of the Allowance for Support is waived, then the Estate Representative need not prepare and file the forms titled "Application for Family Allowance" (Form 7.1) or "Application for Apportionment of Family Allowance" (Form 7.2), as applicable.

The waiver must be signed by the surviving spouse, if legally competent, otherwise by a guardian (with the consent of the court having jurisdiction over the guardianship) on behalf of a legally incompetent spouse or minor children. If the surviving spouse is competent, then the surviving spouse may sign on behalf of minor children for which the surviving spouse is a parent.

Note: The Estate Representative should use and file with the Court the form titled Waiver of Allowance for Support Rights (GC PF 7.3).

There are other key points to consider:

- Selection of Automobile.
 - If the surviving spouse selected more than one automobile under R.C. 2016.18, then the Allowance for Support (that is - \$40,000) is reduced by the value of the automobile so selected with the lowest value.¹⁵
 - If the surviving spouse received a motor vehicle by right of survivorship under R.C. 2131.12 or 2131.13, then the value of that motor vehicle does not reduce the amount of the Allowance for Support because those automobile(s) are not probate property and not part of the probate estate.¹⁶

¹³ R.C. 2106.13(B)(3) and 2106.13(B)(4)

¹⁴ R.C. 2106.13(E).

¹⁵ R.C. 2106.13(A)

¹⁶ "Motor vehicle" includes manufactured homes, mobile homes, recreational vehicles, and trailers and semitrailers whose weight exceeds four thousand pounds. The value of the vehicle is the value that the spouse uses on the affidavit required by the Auto Title Bureau under R.C. 4505.10(B).

Right to Remain in Mansion House¹⁷

The surviving spouse may elect to remain in the mansion house (the family residence), free of charge, for one year if the mansion house is probate property. However, the Estate Representative may sell the mansion house to pay creditor claims, in which case the surviving spouse shall be paid from the sale proceeds a sum equal to the fair rental value of the remaining term.¹⁸

Election to Receive the Mansion House¹⁹

If (i) the aggregate value of a surviving spouse's right to receive the Allowance of Support²⁰ (\$40,000 reduced by the value of decedent's vehicle selected by the spouse²¹) and (ii) the amount that the spouse has the right to receive by intestacy,²² is greater than the value of Decedent's interest in the mansion house, then a surviving spouse may elect to receive the Decedent's entire interest in the mansion house (including household goods) as part of the spouse's rights for Allowance for Support and the spouse's right to receive property under the intestacy laws. The Decedent's interest shall be valued at the appraised value, as adjusted for any liens. The spouse must exercise the election before the final account is filed if the probate estate is handled as a Full Administration. If the probate estate is handled as a Release from Administration or a Summary Release from Administration, then the spouse must make the election at or before the court order granting the Release or Summary Release. If the spouse desires to make the election, then the spouse must inform the Estate Representative, and then the Estate Representative shall complete the transfer of title as specified in R.C. 2016.10(C).²³

Right to Purchase Probate Property²⁴

If the mansion house is not specifically given to a beneficiary under the Will, then, regardless of any provision in the Decedent's Will to the contrary, the spouse has the right to purchase the Decedent's interest in the mansion house at the appraised value. Likewise, to the extent that other probate property is not specifically given to a beneficiary under the Will, then the spouse has the right to purchase such probate property, both real and personal property, for the appraised value. The spouse shall exercise the right to purchase by filing an application or Complaint with the Court no sooner than the filing of the Inventory and Appraisal, nor later than one month after the approval of the Inventory and Appraisal. The spouse must follow the rules set forth in R.C. 2106.16.

Right to Place Charge on Real Estate²⁵

If no Will is admitted to probate and there are insufficient assets to pay the specific monetary share due to the surviving spouse pursuant to R.C. 2106.05 (the "Allowance for Support"), then

¹⁷ R.C. 2106.15

¹⁸ R.C. 2106.15. See generally R.C. 2106.10(F) for a definition of the "mansion house," which states "the mansion house includes the decedent's title in the parcel of land on which the house is situated and, at the option of the surviving spouse, the decedent's title in the household goods contained within the house and the lots or farmland adjacent to the house and used in conjunction with it as the home of the decedent."

¹⁹ R.C. 2106.10

²⁰ R.C. 2106.13

²¹ R.C. 2106.18

²² R.C. 2105.06

²³ See generally the form titled "Application for Certificate of Transfer" (Form 12.0)

²⁴ R.C. 2106.16

²⁵ R.C. 2106.11

the surviving spouse may place a charge (lien) on any real property included in the probate property in the amount of the unpaid portion of the specific monetary share.

Election to Take Against Will²⁶

A primary purpose of a Will is to allow the Decedent to decide who will receive his or her probate property after the payment of expenses, costs, fees, and valid creditor claims, and rights of the surviving spouse (or minor children), which the Estate Representative has a duty to pay or satisfy.²⁷ If the Decedent dies without a valid Will (or to the extent the Will does not fully dispose of all probate property), then the State of Ohio decides who will receive that probate property, as set forth in R.C. 2105.06, known as the “Statute of Descent and Distribution”. Under that Section, a surviving spouse has significant rights, as a next-of-kin, to receive a share of the probate property, as more fully explained in the Information Sheet “Probate Process Overview.” Any person has the right to execute a Will that makes no provision for the spouse, children, or any other relative. For example, a person may decide to execute a Will that gives all probate property to a charity.

However, the primary purpose of R.C. 2106.01 is to provide some protection for a spouse who is disinherited in the Decedent’s Will. Thus, the surviving spouse is given an election to take that portion of the probate property as provided for in “Statute of Descent and Distribution,” rather than under the provisions, if any, given to the surviving spouse in the Decedent’s Will. A surviving spouse must consider both R.C. 2105.06 and 2106.01, and the forms titled “Election of Surviving Spouse to Take under Will (Form 8.1) and “Election of Surviving Spouse to Take Against Will” (Form 8.2).

After the appointment of the Executor or Administrator, the Court will issue to the surviving spouse a citation advising the spouse of his or her rights.²⁸ The Court will attach a “Summary of General Rights of Surviving Spouse” (Form 8.3). A surviving spouse may waive service of that citation by filing with the Court a waiver, using the form titled “Waiver of Service to Surviving Spouse to the Citation to Elect” (Form 8.6).

Right to Reimbursement of Funeral Bill.²⁹

The surviving spouse may be entitled to reimbursement for the payment of the funeral bill under R.C. 2106.20.

Right to Contest Antenuptial or Prenuptial Agreement.³⁰

If before the marriage, the Decedent and the surviving spouse entered into a contract, commonly known as an antenuptial or prenuptial agreement, then the surviving spouse may have waived one or more of the spousal rights described above. However, the surviving spouse may contest any antenuptial or prenuptial agreement, provided that the action to contest commenced within four months after the appointment of the Executor or Administrator of the estate of the Decedent. If you decide to contest an antenuptial or prenuptial agreement, then the Help Center highly recommends you retain an attorney.

²⁶ R.C. 2106.01 to 2106.08

²⁷ See generally probate information sheet “Probate Process Overview” for a description of Probate Property.

²⁸ Known as the form titled “Citation to Surviving Spouse to Exercise Elective Rights” (Form 8.0).

²⁹ R.C. 2106.20

³⁰ R.C. 2106.22

Postnuptial Agreement.³¹

Ohio allows a married couple to enter into a contract after their marriage to deal with a variety of issues, which may include establishing or altering spousal rights when their marriage ends by the death of one spouse. If you have entered into such a contract during your marriage with the Decedent, you should obtain legal advice from an attorney of your choosing to determine the effect of that contract upon your spousal rights.

Right of Inheritance.³²

If the Decedent died without a valid Will, then the surviving spouse has rights of inheritance under R.C. 2105.06,³³ depending upon whether the Decedent has surviving children.

- (1) Under R.C. 2105.06(B), if all of the Decedent's children (and their lineal descendants) are the children of the surviving spouse, then the surviving spouse receives all of the probate property.
- (2) Under R.C. 2105.06(C), if the Decedent had only one surviving child (or a lineal descendant(s) of that child if the child does not survive), and that child is not the child of the surviving spouse, then (1) the first \$20,000 of the probate property is paid to the surviving spouse, and (2) the remainder of the probate property is distributed by 50% to the surviving spouse and the remainder to the sole surviving child (or if that child does not survive then per stirpes to surviving lineal descendant(s) of that child).
- (3) Under R.C. 2105.06(D), if the Decedent had more than one surviving child (or a lineal descendant), then
 - a. the first \$60,000 of the probate property is paid to the surviving spouse if the spouse is the parent of at least one of those children, or
 - b. the first \$20,000 of the probate property is paid to the surviving spouse if the spouse is not the parent of any of those children, and

the remainder of the probate property is distributed by 1/3 of the balance of the probate property to the surviving spouse and the balance of the probate property equally to the surviving children (or if a child does not survive then per stirpes to the surviving lineal descendant(s) of that child).

REQUIREMENT TO TIMELY EXERCISE ELECTIONS.³⁴

All the Spousal Rights set forth above are granted under R.C. Chapter 2106. R.C. 2106.25 provides that if a surviving spouse desires to exercise any election described under R.C. Chapter 2106, then, unless otherwise specified in R.C. Chapter 2106, the surviving spouse must exercise the election in a manner that complies with law within five months after the appointment of the Estate Representative. If a surviving spouse desires to make any elections discussed in this Information Sheet, then the spouse should consider obtaining legal advice to assist with the

³¹ On March 23, 2023, under Senate Bill 210, Ohio now permits a married couple to enter into a contract after marriage to deal with various legal issues, including property rights when the marriage ends. See R.C. 3103.06 and 3103.061.

³² R.C. 2105.06

³³ R.C. 2105.06(B), (C), and (D) set forth the surviving spouse's right to inherit if there is no valid Will.

³⁴ R.C. 2106.25

process of making the election. Unless the surviving spouse signs the form titled Waiver of Service to Surviving Spouse of the Citation to Elect (Form 8.6), the Clerk will serve upon the surviving spouse, after the appointment of the Estate Representative, the form titled Citation to Surviving Spouse to Exercise Elective Rights (Form 8.0), together with the form titled Summary of General Rights of Surviving Spouse (Form 8.3).

CREDITOR CLAIMS AGAINST SURVIVING SPOUSE.

Typically, a spouse is not liable to pay the creditors of the other spouse, including if the other spouse is deceased. The creditor may only assert its claim against the probate estate. Of course, a surviving spouse is liable to pay the creditor claims of the deceased spouse if the surviving spouse is a joint debtor or a guarantor of those claims. Moreover, under R.C. 3103.03(C), the surviving spouse may be liable to pay creditors of the deceased spouse if the creditor's claim is based upon providing the deceased spouse with "necessary" goods or services and the creditor is not paid in full from the probate property, if any. Examples would be the claims of a doctor, nursing home, or hospital. However, as noted above in page two, R.C. 2117.06 provides that the creditor must present its claim to a duly appointed Executor or Administrator within six months after the date of death. If not so timely and properly presented, the claim is null and void. In that case, the creditor cannot pursue its claim against the surviving spouse.³⁵ Perhaps this is another reason for a surviving spouse to delay filing an application to be appointed the executor or administrator of an estate until six months after the date of death. You should seek legal advice before making that decision based upon unpaid medical bills of the decedent.

LEGAL PRACTICE IN THE PROBATE COURT IS RESTRICTED BY LAW TO ATTORNEYS WHO ARE LICENSED BY THE SUPREME COURT OF OHIO AND INDIVIDUALS WHO ARE HANDLING THEIR OWN LEGAL MATTERS. IF AN INDIVIDUAL WISHES TO HANDLE HIS OR HER OWN CASE, THAT PERSON MAY ATTEMPT TO DO SO, HOWEVER DUE TO THE COMPLEXITY OF THE LAW AND THE DESIRE TO AVOID COSTLY ERRORS, MANY PERSONS WHO HAVE MATTERS BEFORE THE COURT ARE REPRESENTED BY AN ATTORNEY.

IF YOU CHOOSE TO REPRESENT YOURSELF AND USE THE COURT'S FORMS, BE AWARE THAT STATE LAW PROHIBITS THE JUDGE, MAGISTRATE, AND EMPLOYEES OF THE GEAUGA COUNTY PROBATE COURT, INCLUDING THE HELP CENTER STAFF, FROM PROVIDING YOU WITH LEGAL ADVICE. IF YOU NEED LEGAL ADVICE, THEN YOU SHOULD CONTACT AN ATTORNEY OF YOUR CHOOSING.

³⁵ See *Embassy Healthcare v. Bell*, 155 Ohio St.3d 430, 2018-Ohio-4912.