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Election Rights of a Surviving Spouse in Ohio

Robert C. Bensing

THE PURPOSE of this article is to provide an up-to-date-review and analysis of the case and statutory law governing in Ohio the rights of a surviving spouse in the property of a deceased consort dying with a will.

In all instances where property is disposed of by will, the devisees or legatees must either elect to take under the will or disaffirm its provisions in entirety. Also, an election must be made by the surviving spouse where, as in Ohio, the surviving spouse is given the right to receive dower or some type of forced statutory share in the estate of the decedent instead of simply

accepting the provisions of his will or else rejecting them and receiving nothing at all.

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General Nature of the Right of Election

The doctrine of election as applied to matters testamentary, while governed by statute,¹ is in theory based upon the equitable principle that one cannot accept the benefits of an instrument and at the same time repudiate the obligations imposed upon him by asserting claims wholly inconsistent with the donor's intent as evidenced by the granting document.²

In regard to a relict spouse, the election given by a statute is simply a choice between rights and the amount of property conferred by will and the property given the spouse by law.³

Who May Elect

The Ohio Supreme Court has declared that the right of a surviving spouse to elect whether to take under the will or against it is a personal right

¹ OHIO GEN. CODE §§ 10504-55, 10504-60, 10504-61.

² "The doctrine of election is the peculiar subject of the jurisdiction of courts of equity. It is a creature of equity, although regulated by statute as to time, place, manner, requisites and effect of the election." *Hibbs v. Insurance Co.*, 40 Ohio St. 543, 554 (1884); *Ambrose v. Rugg, Admx.*, 123 Ohio St. 433, 175 N.E. 691 (1931). The doctrine has been assumed to have been derived from the Roman or civil law. See: 3 STORY, EQUITY JURISPRUDENCE § 1454 (14th ed. 1918).

³ OHIO GEN. CODE § 10504-55.

that can be exercised by the spouse alone.⁴ The legislature has effectively precluded any other interpretation of the nature of such right through the passage of Ohio General Code Section 10504-56, which requires that the election be made *in person*, and through Section 10504-60, which provides that:

If the surviving spouse fails to make such election before the expiration of the time limit provided by law without having made such an election, such spouse shall be conclusively presumed to have elected to take under the will and persons may deal with the property of the decedent in accordance therewith.

This proposition is, however, subject to qualification. Ohio General Code Section 10504-63 states that:

When because of unsound mind, or other legal disability, the surviving spouse is unable to make an election, as soon as the facts come to the knowledge of the probate court, at any time within the time allowed by law for election, it shall appoint some suitable person to ascertain the value of the provision made for such spouse in lieu of the provisions made by law, and the value of the rights by law in the estate of the deceased consort.

And Ohio General Code Section 10504-64 provides that:

On the return of the report of the person appointed to make such investigation, the court shall determine whether the provision made by the testator for the surviving spouse, in the will, or the provision by law, is better for such spouse, and shall elect accordingly.

Although the reference to mental incompetency in the first section⁵ is self-explanatory, the phrase "or other legal disability" is not. As defined by the legislature by an act passed the same day,⁶ however, the phrase includes not only persons of unsound mind, persons under guardianship, and minors—again terms that are self-explanatory—but also "persons in captivity."⁷

While it is assumed that an inmate of a penitentiary or other penal institution, would be "a person in captivity" and thus fall within the statute, it does not necessarily follow that the phrase is limited to such persons, for it would appear to apply as well to anyone held in confinement or made prisoner, for whatever reasons, as for example, a prisoner of war. Whether the intent of the legislature was to provide for such a broad coverage is not known, but, due to the nature of the problem involved, it would seem that an interpretation that would favor the interests of the relict would be

⁴ *Millikin v. Welliver*, 37 Ohio St. 460 (1882). The election statutes under which this conclusion was reached were—with the exception of the express inclusion of the conclusive presumption in case of death found in Ohio General Code Section 10504-60, as effective in 1947—identical with the current provisions concerning the nature of the right to elect.

⁵ OHIO GEN. CODE § 10504-63.

⁶ Both OHIO GEN. CODE §§ 10504-63 and 10512-2 became effective January 1, 1932.

⁷ OHIO GEN. CODE § 10512-2.

more indicative of the possible legislative intent than any other. Until judicial interpretation is made, however, any comment is nothing more than speculation.

Once the facts are sufficient to invoke the jurisdiction of the court under Section 10504-63,⁸ the question arises whether anything short of the removal of the disability before an election has been entered⁹ would divest the court of its discretionary powers to elect either in favor of or against the will. The problem could arise only in the event of the death of the spouse before an election by the court has been perfected.

In such a case, the issue becomes that of whether Section 10504-63 governs the situation in respect to the incompetent spouse, thereby making inability to make the election the factor of controlling importance, or whether the conclusive presumption of election to take under the will in event of the death of the relict spouse, as set out in Section 10504-60, is paramount and applies to an incompetent as well as a competent spouse.

In 1882, in *Milliken v. Weaver*,¹⁰ a case involving a *competent* spouse, the Ohio Supreme Court held that the right to elect was a personal one that could be exercised by the spouse alone, and that if she died within the time permitted for election, without making an election, the effect was the same as if she had lived and failed to elect within the period allowed. The case is cited and felt significant for the reason that when it was decided there was no code provision expressly creating a presumption of election in case of death as does the current Code.¹¹ By judicial decision, therefore, the same result was reached as that effected by statute today.

In 1931, the case of *Ambrose v. Rugg, Admx.*,¹² presented for the first time the problem of the death of an *incompetent* spouse within the time allowed for election to be made by the court under a statute comparable to Section 10504-63 of the present Code.¹³

⁸ Not only must the relict spouse be of unsound mind or under other legal disability before the court can act under Ohio General Code Sections 10504-63 and 10504-64, but also the fact of the disability must come to the knowledge of the court within the time limits set by Ohio General Code Section 10504-55. In re Estate of Iwinski, 83 Ohio App. 463, 77 N.E.2d 375 (1947).

⁹ Once an election has been made and entered upon the journal by the court, the removal of the disability should not affect the court's election, for Ohio General Code Section 10504-64 provides that such election "shall have the same force and effect as an election made by one not under such disability."

¹⁰ 37 Ohio St. 460 (1882).

¹¹ See OHIO GEN. CODE § 10504-60. At the time of the *Milliken* case the Code merely stated: "If the widow shall fail to make such election, she shall retain her dower, and such share of the personal estate of her husband as she would be entitled to by law, in case her husband had died intestate leaving children" OHIO REV. STAT. § 5964 (1880).

¹² 123 Ohio St. 433, 175 N.E. 691 (1931)

¹³ OHIO GEN. CODE § 10574 (1931). "When, because of unsound mind, the

The court recognized the principle laid down in the *Milliken* case, *supra*, but declared that:

The provisions of Section 10571, General Code,¹⁴ that if the widow or widower fails to make election as provided within the time specified, it shall be deemed that he or she has elected to take under the will, have no application in a case where the widow was mentally incompetent at the time of the death of the testator and continued in such condition until her death two months later.

The decision was based upon the principle that the doctrine of election grew up independently of statute in equity and that surely the hand of equity may intervene in a proper case, such as the one presented.¹⁵

In the light of these two cases and the statutes under which they were decided, one might assume that since the current statute¹⁶ differs in application to the problem only to the extent that it expressly provides that if the relict spouse "dies before the expiration of the time limit provided by law without having made such election, such spouse shall be conclusively presumed to have elected to take under the will" the problem would be decided under the present statutes¹⁷ in exactly the same way as decided by the *Ambrose* case in 1931.

However, when the problem was presented to the Ohio Supreme Court in 1944, in *In re Estate of Knofler*,¹⁸ in construing Section 10504-60 and its death provision¹⁹ in connection with Sections 10504-63 and 10504-64, the court held the conclusive presumption of the death statute superior.

The court recognized the merits of the holding in *Ambrose v. Rugg*,

widow or widower of a testator is unable to make an election, as soon as the facts come to the knowledge of the probate court, at any time within one year after the testator's death, it shall appoint some suitable person to ascertain the value of the provision made for such widow or widower in lieu of the provisions made by law, and the value of the rights by law in the estate of the deceased consort."

And Ohio General Code Section 10575 provided that: "If, on the return of the person appointed to make such investigation, the court is satisfied that the provision made by the testator for the widow or widower, in the will, is more valuable, it shall record an entry that such widow or widower elects to take under the will"

¹⁴ Ohio General Code Section 10571 reads as follows: "If the widow or widower fails to make such election in person within the time limit provided in this section, then it shall be deemed that he or she has elected to take under the will and he or she shall be bound accordingly"

¹⁵ *Ambrose v. Rugg*, Admx., 123 Ohio St. 433, 175 N.E. 691 (1931)

¹⁶ OHIO GEN. CODE § 10504-60.

¹⁷ OHIO GEN. CODE §§ 10504-60, 10504-63 and 10504-64.

¹⁸ 143 Ohio St. 294, 55 N.E.2d 262 (1944).

¹⁹ In the *Knofler* case, the court was construing Section 10504-60 as effective in 1935. The current Section 10504-60 became effective Sept. 23, 1947. The provisions of the two statutes as far as the present problem is concerned, are, however, identical.

Admx., but found the case inapposite due to the change in the statutory law.²⁰ The majority of the court felt that when Section 10504-60 was viewed from its four corners, the intent of the legislature was that in case of death the conclusive presumption applied—*regardless* of the reason for non-election. "Inability to make the election is not a factor of controlling importance," they felt, "for the applicable part of the statutory provision applies to an insane as well as a sane person."²¹

It is believed that the court made the only decision that could logically be made in view of the factors that must be taken into consideration in deciding the problem. The first of these is that by Sections 10504-63 and 10504-64, the legislature has provided that in case of a spouse under legal disability the probate court has the authority to make the election for the surviving spouse. While these provisions are, in effect, recognition of the fact that the personal nature of the right of election should be qualified in the event of legal disability, the consequence of such recognition is nothing more than to give the court the right to do for the incompetent spouse that which a competent spouse would have the right and ability to do for himself. The court is merely the statutory agent of the spouse, with authority to exercise the *spouse's* election rights—for Sections 10504-63 and 10504-64 cannot be interpreted as creating new and independent rights in the probate court.

If this is true, then whatever finally determines the right to elect in the case of a competent spouse, should also determine the same right in the case of an incompetent spouse. Section 10504-60, and its conclusive presumption in case of death, is such a final determinant.

Also, while the result reached by the *Ambrose* case may have been justified, perhaps, under the statutes existing at the time—for without the express inclusion of the death provision the court could merely qualify the extent of the personal nature of the right to elect—with the inclusion of the conclusive presumption in case of death existing in Section 10504-60, the entire *right to elect* is taken away by death, *regardless of the nature of such right*.

Another inroad was made into the personal nature of the right of election by the Ohio Supreme Court in the case of *Raleigh v. Raleigh*,²² decided March 8, 1950. In that case the court held that the conclusive presumption of Section 10504-60 is not applicable if the surviving spouse referred to by the statute dies before the probate of the will of the deceased consort. It was reasoned that since, by virtue of Ohio General Code Section 10504-55,

²⁰ See note 14, *supra*, and OHIO GEN. CODE § 10504-60.

²¹ In re Estate of Knoefler, 143 Ohio St. 294, 301, 55 N.E.2d 262, 265 (1944).

²² 153 Ohio St. 160, 91 N.E.2d 241 (1950).

election cannot be made until after the will is probated and the inventory, appraisement, and schedule of debts filed, the surviving spouse who dies before the deceased spouse's will is probated is not bound by the provisions of Section 10504-60, and in such a case the probate court, under its equitable powers, is authorized to make an election for the estate of the relict spouse.

While the decision is, perhaps, entirely correct in the light of the existing statutes, it is most alarming in view of the fact that there is no apparent time limit set by the court within which the heirs of the deceased relict must petition the court to elect.²³ It also produces the incongruous result that whereas the surviving spouse is compelled by Section 10504-55 to act within a definite time limit, the heirs of such relict are placed under no time limit whatever.

The case clearly points out the existence of a situation that would seem to call for prompt legislative action.

How Election is Made

The manner and form of making an election are regulated by Ohio General Code Sections 10504-56 and 10504-62. The first section stipulates that:

Whether or not a citation be issued, the election of the surviving spouse shall be made in person, in the probate court of the proper county, except as hereinafter provided.

And the second section provides the exception by stating that:

On an application in behalf of a surviving spouse, the probate court may issue a commission directed to any suitable person, to take the election of such spouse

Although the language of these sections clearly possesses a certain exclusiveness, such legislative regulation of the manner and form of election has never been regarded as completely mandatory by the Ohio Supreme Court.²⁴ The position has been taken that there may be an implied election arising from the conduct of the relict spouse. If the acts of the spouse are of such nature as to establish an election in fact, he or she will be estopped to deny that an election has not been made.²⁵

²³ That under certain circumstances the heirs may be estopped to deny election, however, see: *Stockton v. Wooley*, 20 Ohio St. 184 (1870).

²⁴ At least it has not been so regarded after 1856, when in *Thompson v. Hoop*, 6 Ohio St. 481 (1856), the inference in *Stilley v. Folger*, 14 Ohio 610 (1846), was overruled.

²⁵ *Colored Industrial School v. Bates*, 90 Ohio St. 288, 107 N.E. 770 (1914); *Mellinger v. Mellinger*, 73 Ohio St. 221, 76 N.E. 615 (1906); *Posegate v. South*, 46 Ohio St. 391, 21 N.E. 641 (1889); *Millikin v. Welliver*, 37 Ohio St. 460 (1882); *Nimmons v. Westfall*, 33 Ohio St. 213 (1877); *Stockton v. Wooley*, 20 Ohio St. 184 (1870); *Baxter v. Bowyer*, 19 Ohio St. 490 (1869); *Gardner v. Gardner*, 13 Ohio St. 426 (1862); *Thompson v. Hoop*, 6 Ohio St. 481 (1856); *Ewalt v. Ames*, 6 Ohio App. 374 (1917)

The determination of just what acts of the widow or widower will be held sufficient to create an equitable estoppel is a matter that does not lend itself to precise definition.²⁶ It does seem, however, that three conditions are necessary before estoppel will be found: (1) the act or acts relied upon as constituting an election by conduct must be plain and unequivocal; (2) they must be done with a full knowledge of the rights under the law respectively and of the true condition of the estate; and (3) they must generally be of such long duration²⁷ that an intent to make a specific choice is clearly shown.²⁸

Not only may the spouse be estopped to deny that he has not made an election in fact, but if his conduct has been acquiesced in by the heirs and legatees, these parties are mutually estopped to deny the election.²⁹

Whenever the conduct of the spouse is not sufficient for equitable estoppel, however, it is submitted that Sections 10504-56 and 10504-62 are exclusive in respect to the manner and form of election that will be held binding upon the relict spouse.

While the language of these sections alone would clearly appear to prohibit election in any other manner, if further evidence of legislative intent is felt necessary it may be found in the committee comment explaining the omission in the current Probate Code of the provision which, prior to the 1947 amendment, had permitted election to be made by written instrument signed and acknowledged by the spouse.³⁰ This provision was omitted from the present Code because it was felt that such optional method of election did not adequately safeguard the rights of the relict spouse for the reason that there was no statutory requirement that when

²⁶ The fact that the current statutes (10504-56 and 10504-62) are more explicit on the subject of the manner of election than were the statutes at the time when the cases in note 25, *supra*, were decided should not affect the application of the doctrine of estoppel at the present time. The older election statutes were designed to secure the spouse against an entry upon the record of an election until the fact of such election should be clearly ascertained, and to require that it should be made only upon full information and advice given the spouse as to his rights. The current statutes make no change in this respect. (See OHIO GEN. CODE §§ 10504-59 and 10504-62). If the spouse could be estopped under the former sections, the doctrine should be applicable today. See *Stockton v. Wooley*, 20 Ohio St. 184, 186, (1870).

²⁷ See *Thompson v. Hoop*, 6 Ohio St. 481 (1856), where real estate was devised to a widow for life with a remainder in fee to her sons, and she in fact took under the will and occupied the premises for more than *sixteen years*. She was estopped to deny her election. Also, *Stockton v. Wooley*, 20 Ohio St. 184 (1870), where the premises were occupied for more than *eleven years* and the estoppel doctrine was applied.

²⁸ *The Colored Industrial School v. Bates*, 90 Ohio St. 288, 296, 107 N.E. 770, 772 (1914); also, see *Millikin v. Welliver*, 27 Ohio St. 460 (1882).

²⁹ *Stockton v. Wooley*, 20 Ohio St. 184 (1870).

³⁰ See OHIO GEN. CODE § 10504-56 as effective January 1, 1932.

this method was used, an explanation be made of the rights of the spouse under the will and by law.³¹

Under both sections prescribing the manner of election in the current Probate Code the legislature has expressly directed that the provisions of the will, the rights, if any, under it, and the rights of the spouse under the law be explained.³² If assurance that the relict's rights will be fully explained by a competent person was the foremost concern of the legislature in providing for the present manner of election, only election made after explanation by the court³³ or by someone appointed by the court should suffice. This can be guaranteed only by the use of the procedure set out in Sections 10504-56 and 10504-62.³⁴

Revocation of Election

As a general proposition, once an election has been made and entered upon the records of the probate court, it cannot be set aside.³⁵ And this is so even though the time limit for making election has not expired.³⁶

The rule is only applicable, however, when the election is made in the absence of fraud and undue influence, and not as a result of ignorance or mistake of material facts. If any of these elements are present and the rights of innocent third parties will not be seriously affected, the election may be set aside.³⁷ And this may be done even after the time limit set by statute for election has expired.³⁸

An action to have the election set aside must, however, be brought in a court possessing general equity jurisdiction, such as the court of common pleas.³⁹ The probate court, being of limited jurisdiction and not possessing

³¹ See OHIO GEN. CODE (1949 Supp.) and the Committee comment following Section 10504-56.

³² See Ohio General Code Section 10504-59, which governs when the election is made in person in the probate court, and Ohio General Code Section 10504-62, which governs when the election is made before the person appointed by the court.

³³ See *Mellinger v. Mellinger*, 73 Ohio St. 221, 76 N.E. 615 (1906), where it was held, under a statute similar to current Sections 10504-56 and 10504-59, that the duties imposed upon the probate court were judicial and could not be performed by a deputy clerk of such court.

³⁴ Once the election is made by either of these two methods, it must be entered upon the journal of the probate court. OHIO GEN. CODE § 10504-55.

³⁵ *Bell v. Henry*, 121 Ohio St. 241, 167 N.E. 880 (1929); *Davis v. Davis*, 11 Ohio St. 386 (1860)

³⁶ *Davis v. Davis*, 11 Ohio St. 386 (1860)

³⁷ *Bell v. Henry*, 121 Ohio St. 241, 167 N.E. 880 (1929); *Mellinger v. Mellinger*, 73 Ohio St. 221, 76 N.E. 615 (1906); *Millikin v. Welliver*, 37 Ohio St. 460 (1882); *Ohio Merchant's Trust Co. v. Conrad*, 42 Ohio App. 150, 181 N.E. 274 (1931); see *Davis v. Davis*, 11 Ohio St. 386 (1860).

³⁸ *Mellinger v. Mellinger*, 73 Ohio St. 221, 76 N.E. 615 (1906).

³⁹ *Bell v. Henry*, 121 Ohio St. 241, 167 N.E. 880 (1929); *Mellinger v. Mellinger*, 73 Ohio St. 221, 76 N.E. 615 (1906); *Davis v. Davis*, 11 Ohio St. 386 (1860).

general equity powers, has no authority to set aside the election once an entry has been made. The court's duties and authority terminate with the entry, even though fraud or mistake might have been present.⁴⁰

Due to the strictness of the statutes in regard to the manner of election at the present time, and the requirement that the spouse be given a full explanation of his rights,⁴¹ very few instances are likely to arise where sufficient grounds for revocation will exist. Of course, if the court or the person appointed to take the spouse's election fails to explain at all, or fully or mistakenly explains the rights of the spouse under the law and by will, and the interests of the relict are materially affected in an adverse manner, the election may be set aside.⁴² It is earnestly suggested that if the spouse's interests are to be completely protected, counsel make certain that the journal entry recording the election not only shows that an explanation was made to the spouse as required by law, but also sets forth, specifically, all that was said by the judge or person appointed by the court to take the election of the spouse. If this is not done and the explanation was not of the standard that it should have been, the burden of overcoming the presumption that "everything is presumed to be rightly done and duly performed until the contrary is shown"⁴³ may be insurmountable.

Nature of the Right of Revocation

Since the right to elect is a personal right that can be exercised only by the relict spouse, it would seem that the right to revoke the election should also be a personal one, not exercisable by the heirs or personal representative of the relict.

⁴⁰ *Davis v. Davis*, 11 Ohio St. 386 (1860). While the statutes have been changed since the decision in the *Davis* case, and since 1932 the Code has provided that "The probate court shall have plenary powers at law and in equity fully to dispose of any matter properly before the court" (OHIO GEN. CODE § 10501-53) it is not felt that the rule of the *Davis* case has been affected. Under § 10501-53, the court is empowered to exercise thirteen items of specific jurisdiction and the quoted section would appear to have to be read in the light of these thirteen items. The only effect of the quoted material would seem to be a conferring of such incidental powers in law and in equity as are necessary to carry the thirteen specific powers therein conferred into effect. No part of Section 10501-53 makes any grant of general jurisdiction such as would be necessary to enable the *Davis* rule to be changed.

⁴¹ See OHIO GEN. CODE §§ 10504-56, 10504-59 and 10504-62.

⁴² *Mellinger v. Mellinger*, 73 Ohio St. 221, 76 N.E. 615 (1906); *Davis v. Davis*, 11 Ohio St. 386 (1860). The fact that the spouse is not fully aware of his rights after explanation will not prevent the election from being conclusive if the misapprehension is attributable solely to the spouse's own laches and indiscretion. *Davis v. Davis*, 11 Ohio St. 386, 390 (1860). That greater caution should be exercised and a fuller explanation made to a person of advanced age, see *Bell v. Henry*, 121 Ohio St. 241, 167 N.E. 880 (1929).

⁴³ *Davis v. Davis*, 11 Ohio St. 386, 389 (1860).

While the Probate Code is silent and Ohio cases are non-existent on the matter of revocation, such view is the logical one and has been adopted in the majority of jurisdictions in which the problem has arisen.⁴⁴

Certainly in the case of a *competent* spouse, a third party should not be permitted to have the election of the relict set aside without the consent of the spouse, for even though fraud or imposition might have been present, the election of the relict is only voidable and not void. If this were not so, it would not be necessary to seek the aid of a court of general equity jurisdiction to have the election set aside.⁴⁵

The question of whether the spouse should be able to delegate his powers of revocation to a duly authorized agent or attorney also arises. While again no Ohio authority exists which specifically answers this question, the legislature has provided in the case of initial election that the election should be made *in person*.⁴⁶ Such requirement would appear to prohibit delegation by the spouse. If the right of election is so restricted, there is no reason to allow greater latitude to the spouse in revoking an election.

It is not in the case of the competent spouse, however, that the real difficulty occurs, for even though the right of revocation be held personal, the spouse is not, because of such fact, precluded from having the initial election set aside.

What, however, is going to be the position taken in the case of an *incompetent* spouse? For example, what is to be done in a case where the spouse at the time of electing was competent, or where the spouse was incompetent, and the election was made and duly entered by the court under the authority of Ohio General Code Sections 10504-63 and 10504-64, and where, in either instance, fraud or other sufficient grounds for revocation existed? Once the election is recorded, the probate court has no authority to set it aside on its motion or on that of any person. And, if the right of revocation is strictly personal it could not, therefore, be exercised at all in the use of the incompetent spouse.

Again, the Probate Code is silent on the matter and no cases exist in which the problem has arisen. Since there are no statutory prohibitions against allowing a petition for revocation to be filed by someone besides the surviving spouse in cases of incompetency, however, a court of general equity jurisdiction such as the common pleas court would assuredly have

⁴⁴ *Eltzroth v. Binford*, 71 Ind. 455 (1880); *Dolbear v. Bowser*, 254 Mass. 57, 149 N.E. 626 (1925); *Stoepler v. Silberberg*, 220 Mo. 258, 119 S.W. 418 (1909); *Fergus v. Schiabe*, 91 Neb. 180, 135 N.W. 448 (1912).

⁴⁵ See *Davis v. Davis*, 11 Ohio St. 386 (1860) where it was held that relief can only be had in equity.

⁴⁶ OHIO GEN. CODE § 10504-56.

the authority to set the election aside if it so desired. After all, the legislature, through Ohio General Code Section 10504-63, has qualified the personal nature of election in cases of incompetents, and there would appear no reason for the Ohio Supreme Court not to allow judicial qualification under such circumstances,⁴⁷ at least to the extent of permitting the guardian of the spouse to petition the common pleas court to have the election set aside. To allow this would not place the rights of the relict in the hands of the guardian other than to allow him to file a petition asking for revocation, for, if the election is set aside, the matter would then come within Ohio General Code Sections 10504-63 and 10504-64, and the probate judge would be the one to determine the rights of the spouse from that time on.

Effect of Election to take under the Will

(a) In Testate Property

Under the current Probate Code, Section 10504-61, election by a surviving spouse to take in accordance with the will of the deceased consort limits the relict's share in the property passing by will to the provisions made for the relict, if any, in such will " unless it plainly appears from the will that the provision therein for the spouse was intended to be in addition to an intestate share."⁴⁸

In cases where provision has been made in the will for the relict, and the exception does not apply, the spouse electing to take under the will, therefore, receives the share of real and personal property given her in the will, and can obtain no part of the property bequeathed or devised to other beneficiaries under the will. And, even if no provision for the relict has been made in the will of the deceased consort, the relict is still barred from taking any part or share of the property passing under the will⁴⁹ if he does not elect to take by law instead of under the will.

No other conclusion could be reached under the present code, for Section 10504-55 provides for the issuance of a citation to elect in *all* cases where there is a will, and is not limited merely to instances where provision

⁴⁷ Twice before when the Ohio Supreme Court had such a chance it very zealously acted. See *Raleigh v. Raleigh*, 153 Ohio St. 160, 91 N.E.2d 241 (1950); *Ambrose v. Rugg, Admx.*, 123 Ohio St. 433, 175 N.E. 691 (1931).

⁴⁸ Effective Aug. 22, 1941.

⁴⁹ The statements made in *Doyle v. Doyle*, 50 Ohio St. 330, 34 N.E. 166 (1893); *Coon v. DeMoore*, 2 Ohio C. C. (N.S.) 444, 15 Ohio C. Dec. 776 (1903), *Aff'd Mem. Sub. Nom.* *Coon v. Coon*, 71 Ohio St. 537, 74 N.E. 1134 (1905); and *In re Davis*, 12 Ohio C. Dec. 29 (1901), to the effect that, where no provision is made in the will for the relict, the relict has the same rights as if the decedent had died intestate, cannot be cited as authoritative under the present Code. They were decided under a statute which required a citation to elect to be issued *only when provision had been made in the will for the relict* and the question was: when no provision has been made, could the relict ever obtain a share of the property? Today, a citation must be issued in all cases. OHIO GEN. CODE § 10504-55.

is made for the spouse in the will;⁵⁰ Section 10504-60 provides for a conclusive presumption of election to take under the will in all cases where an actual election is not made, and Section 10504-61 is unambiguous and admits of no limitations.⁵¹

Whether provision is made for the relict in the will or not, however, unless the will expressly directs otherwise, such election shall not bar the right of the surviving spouse to remain in the mansion of the deceased consort, or to claim and receive the property, or money in lieu thereof, not to be deemed assets of the estate for administration, as provided by law, nor the right of the widow to receive the statutory allowance for the support of herself and her children.⁵²

(b) In Intestate Property

Although the question of whether a spouse who elects to take under the will is barred of an intestate share in property not passing under the will, in cases of partial testacy, has been answered both affirmatively and negatively at different times in the past,⁵³ the present statute clearly gives the surviving spouse a share in intestate property in such cases. Ohio General Code Section 10504-61, as effective August 22, 1941, states that:

Such election, however, shall not bar the right of the surviving spouse to an intestate share of that portion, if any, of the estate as to which the decedent dies intestate.⁵⁴

No attempt at evasion as, for example, an express stipulation by the testator in the will that if the relict accepts the provision in the will, he shall thereby be barred of an intestate share in property not disposed of by the will, should be successful.

The decedent dies either testate or intestate in regard to specific prop-

⁵⁰ As was the case when the *Doyle* and *Coon* cases, *supra*, note 49, were decided.

⁵¹ "If the surviving spouse elects to take under the will, such spouse shall be thereby barred of all right to an intestate share of the property passing under the will, and shall take under the will alone."

⁵² OHIO GEN. CODE § 10504-61.

⁵³ Upon construction of the statutes in existence at the time the decisions were rendered, the question was answered: (1) negatively in *Bane v. Wick*, 14 Ohio St. 505 (1863) (as to personality only); see *Carder v. Fayette County*, 16 Ohio St. 353 (1865); (2) affirmatively in *Jones v. Webster*, 133 Ohio St. 492, 14 N.E.2d 928 (1938); *Swihart v. Swihart*, 7 Ohio C.C. 338, 4 Ohio C. Dec. 624 (1893); see *Corry v. Lamb*, 45 Ohio St. 203, 12 N.E. 660 (1887) (realty).

⁵⁴ In general, any property not disposed of by will is "intestate" property. *Gardner v. Gardner*, 13 Ohio St. 426 (1862); also, see: *Goff v. Moore*, 3 Ohio App. 170, *Aff'd without opinion Sub. Nom. Gregg v. Keener*, 91 Ohio St. 406, 110 N.E. 1060 (1914); *Holmden v. Craig*, 16 Ohio C.C. (N.S.) 157, 31 Ohio C. Dec. 461 (1909), *Aff'd without opinion* 83 Ohio St. 483, 94 N.E. 1108 (1910); *Geiger v. Bitzer*, 80 Ohio St. 65, 88 N.E. 134 (1909), *Bowen v. Bowen*, 38 Ohio St. 426 (1882); *Gilpin v. Williams*, 25 Ohio St. 283 (1874); *Ditoe v. Cluny*, 22 Ohio St. 436 (1872); *Jennings v. Jennings*, 21 Ohio St. 56 (1871); *Gilpin v. Williams*, 17 Ohio St. 397 (1867).

erty, and Section 10504-61⁵⁵ governs the course of each piece of property in accordance with the category the property falls into. Not being dispositive in nature, any attempted "disinheritance" of the relict as to property not disposed of by will, should not alter the character of the decedent's estate or the relict's rights.

The discussion has been limited so far to property in which the decedent possessed an unencumbered inheritable or distributable interest, or both, at the time of death. The rights of the surviving spouse in relation to property coming within this category are completely covered and controlled by Ohio General Code Section 10504-61.

What, however, are the rights of the relict under the Probate Code in regard to property in which at some time during coverture the decedent possessed an unencumbered, inheritable or distributable interest, but which at the time of death was no longer possessed by the deceased, or, although still possessed was encumbered by mortgage or other lien?

As far as the personal estate is concerned, it has generally been assumed that either spouse has absolute dominion over his personal property during his life and may by a bona fide, completely executed inter-vivos transaction deprive the other of all share in such property. The reason for the disposition of the property is immaterial and the disposition cannot be in fraud of the other spouse's rights, for no rights of the other in the property exist.⁵⁷ Whether election is made to take under the will or not, as far as the share of the relict is concerned, no problem can arise from the disposition or encumbrance of personal property during the decedent's life.

In the case of real property, however, once one is seized of an estate of inheritance at any time during marriage, the dower statute⁵⁸ comes into play and such property cannot be conveyed away or encumbered so as to defeat the rights of the spouse of the grantor unless the rights of such spouse have been barred or relinquished.⁵⁹ While the Probate Code expressly declares that dwelling in adultery,⁶⁰ divorce,⁶¹ or the acceptance of a con-

⁵⁵ As effective Aug. 22, 1941.

⁵⁶ For a statement of such principle, see: *Oglesbee v. Miller*, 111 Ohio St. 426, 145 N.E. 846 (1924); *Matthews v. Krisher*, 59 Ohio St. 562, 53 N.E. 52 (1899); *Bane v. Wick*, 14 Ohio St. 505 (1863); *Crane v. Doty*, 1 Ohio St. 279 (1853); *City Trust & Sav. Bank v. Hanley*, 17 Ohio App. 467 (1923); *Leopold v. Weaver*, 9 Ohio App. 379 (1918).

⁵⁷ See: *Neville v. Sawicki*, 146 Ohio St. 539, 67 N.E.2d 323 (1946); *Mark v. Mark*, 145 Ohio St. 301, 61 N.E.2d 595 (1945); *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E.2d 381 (1944); *Doyle v. Doyle*, 50 Ohio St. 330, 34 N.E. 166 (1893); *Rose v. Rose*, 34 Ohio App. 89, 170 N.E. 181 (1929); *Hayes v. Lindquist*, 22 Ohio App. 58, 153 N.E. 269 (1926).

⁵⁸ OHIO GEN. CODE § 10502-1.

⁵⁹ *Neville v. Sawicki*, 146 Ohio St. 539, 67 N.E.2d 323 (1946).

⁶⁰ OHIO GEN. CODE § 10502-5.

⁶¹ OHIO GEN. CODE § 10502-1.

veyance in lieu of dower⁶² will effect such bar,⁶³ and while it is most probable that Ohio General Code Section 10503-17 would bar a spouse convicted of murdering the decedent from receiving dower, no other provision exists that might affect the problem unless it is Ohio General Code Section 10504-61.

If the surviving spouse elects to take under the will, such spouse shall be thereby barred of all right to an intestate share of the property passing under the will, and shall take under the will alone, unless it plainly appears from the will that the provision therein for the spouse was intended to be in addition to an intestate share. Such election, however, shall not bar the right of the surviving spouse to an intestate share of that portion, if any, of the estate as to which the decedent dies intestate; and, unless the will expressly otherwise directs, such election shall not bar the right of the surviving spouse to remain in the mansion of the deceased consort, or to claim and receive the property, or money in lieu thereof, not to be deemed assets of the estate for administration, as provided by law, nor the right of the widow to receive the statutory allowance for the support of herself and children.

Whether this provision might affect the problem would appear to depend upon the meaning of the phrase " and shall take under the will alone ," and upon the applicability of the maxim *expressio unius est exclusio alterius* as a result of the enumerated exceptions appearing after the restricting phrase. If the phrase " and shall take under the will alone " does not have an independent meaning in addition to emphasizing the phrase immediately preceding it, and if the statute read as a whole does not limit the surviving spouse's interest in property — other than that given the relict by will — to the property expressly mentioned in the exceptions, the dower rights of the survivor would not be affected by Section 10504-61. For this section would then regulate only the relict's interests in *testate* and *intestate* property. It would affect the interests of a relict spouse only in regard to the survivor's assertion of rights as an heir or a devisee and not interests in which the relict's claim is that of a widow or widower under the dower statute. For example, suppose the decedent, during coverture and without the consort's release, made an absolute conveyance of Black-

⁶² OHIO GEN. CODE § 10502-2.

⁶³ The spouse also is barred of dower in land sold for taxes. See OHIO GEN. CODE § 10502-1(b) And in land dedicated or appropriated to public use. Long v. Long, 99 Ohio St. 330, 124 N.E. 161 (1919); Gwynne v. Cincinnati, 3 Ohio 24, 17 Am. Dec. 576 (1827) Estoppel by judgment bars Dower, Julier v. Julier, 62 Ohio St. 90, 56 N.E. 661 (1900) Where consort exchanges one tract of land for another, his spouse must elect in which tract she is to have dower. Fleming v. Morningstar, 4 Ohio N.P. (N.S.) 405 (1904), *aff'd without opinion* 3 Ohio Law Rep. 21 (Cir. Ct.) *aff'd without opinion* 72 Ohio St. 647, 76 N.E. 1124 (1905); McArthur v. Porter, 1 Ohio 99 (1823) A deed of a husband and wife executed for a sufficient consideration and invalid only by reason of its being an attempt to defraud the husband's creditors bars wife's dower in the land thus deeded. Woodworth v. Paige, 5 Ohio St. 71 (1855) See also, OHIO GEN. CODE §§ 10105 and 12025.

acre to X, mortgaged the premises to X, defaulted and lost Blackacre by reason of foreclosure and sale; or lost all interest in the property as a result of a judicial sale.⁶⁴ In all these instances, the decedent possessed no inheritable estate or interest in Blackacre at the time of death—in fact, he possessed no interest at all. Consequently, Blackacre could be neither testate nor intestate property in the estate of the decedent. There would be, therefore, as far as any interest in Blackacre is concerned, a lack of subject matter to which the provisions of Section 10504-61 could be applied.

It is submitted, however, that the phrase “ and shall take under the will alone ” not only emphasizes the first part of the statute relating only to testamentary property; it also has an independent meaning which can admit of only one interpretation—that of barring all interest of the relict in property disposed of or encumbered during the life of the decedent without the relict's release, unless the interest be one of those enumerated in the latter portion of the statute. Dower rights are not one of those set out. The expression of exceptions⁶⁵ and the fact that dower is not one of them would seem further substantiation of the thesis that election to take under the will bars any dower rights the relict spouse would otherwise have in the estate of the decedent.⁶⁶

(b) Election to Take Against the Will

In Ohio at the present time it is axiomatic that neither spouse can be precluded from sharing in property of the other, real or personal, in which the latter, upon death, possessed an inheritable or distributable estate. No matter what disposition is made by the will of the deceased spouse, the relict is given the unrestricted right either to abide by the testamentary provisions or to reject them and take the share given by law. This is guaranteed by Ohio General Code Section 10504-55, which provides that:

the probate court shall issue a citation to the surviving spouse
to elect whether to take under the will or under the statute of descent
and distribution

(a) Size of the Share

A relict who elects to take under the statute of descent and distribution will, of course, take an intestate share in both testate and intestate property.

⁶⁴ Other than a tax sale.

⁶⁵ See the importance placed upon the enumeration of the exceptions in Ohio General Code Section 10504-61 by the Ohio Supreme Court in *Jones, Admx. v. Webster*, 133 Ohio St. 492, 14 N.E.2d 928 (1938).

⁶⁶ It is recognized that the only case authority that can be found has barred a spouse electing to take under the will from also claiming dower. See *Corry v. Lamb*, 45 Ohio St. 203, 12 N.E. 660 (1887). The statute under which the case was decided, however, left room for no other decision. It stated: “ If she elected to take under the will, she shall be barred of her dower and such share, and take under the will alone . . . ”

The maximum amount that a relict can take, under any circumstances, however, is a share "not to exceed one-half of the net estate."⁶⁷ As a result of this provision, the question for determination then becomes whether the restriction applies to both testate and intestate property of the deceased consort.

In regard to testate property, it appears settled that the surviving spouse is bound by the limitation and can receive no more than one half of the property.⁶⁸

In regard to intestate property, that is, property not effectively disposed of in any manner by will, only one reported case can be found that has construed the "one half" limitation. That is the case of *Goodfellow v. Wilson*, decided in 1940.⁶⁹ In this instance, the testator died leaving no children or parents and no relatives closer than second cousins; so, had he died completely intestate, the relict spouse, as heir under Ohio General Code Section 10503-4(4), would have been entitled to all of the property. The widow, after electing to take under the statute of descent and distribution, contended that the "one half" limitation, set out in Section 10504-55, referred only to testate property and restricted the share that she took in property which had been disposed of by the will of her consort, but that it did not govern property as to which there was actual intestacy. The court agreed, and by syllabus stated that:

The purpose of that part of sec. 10504-55 G.C., stating that in the event of election to take under the statute of descent and distribution "such spouse shall take not to exceed one-half of the net estate" is to limit a widow who declines to take the provision made by her husband to not more than one-half of the estate in lieu of the provision made for her in the rejected will, relates entirely to testamentary disposition of estates and does not limit the widow's rights to intestate property by virtue of sec. 10503-4(4) G.C.

The majority of the court felt that any other decision would be contrary to legislative intent in that it would repeal in part the provisions of Section 10503-4 and change the devolution of property through an act of a disappointed spouse rather than by the act of the testator himself.

The court also placed great emphasis upon the statement made in the

⁶⁷ OHIO GEN. CODE § 10504-55. For example, if the relict fell within either category of classification (4) of 10503-4, an election to take against the will would restrict the spouse to one half by virtue of Ohio General Code Section 10504-55. It must be remembered, however, that 10504-55 only restricts — it does not increase. If the relict were only entitled to one third under 10503-4 because of falling under classification (3) of 10503-4, he would not receive one half under 10504-55.

⁶⁸ *Barlow v. Winters National Bank & Trust Co.*, 145 Ohio St. 270, 61 N.E.2d 603 (1945); *Davidson v. Trust Co.* 129 Ohio St. 418, 195 N.E. 845 (1935); *Miller v. Miller*, 129 Ohio St. 230, 194 N.E. 450 (1935); *In re Estate of Ellis*, 66 Ohio App. 121, 32 N.E.2d 23 (1940); *Shearn v. Shearn*, 60 Ohio App. 317, 21 N.E.2d 133 (1937)

⁶⁹ *Goodfellow v. Wilson*, 32 Ohio L. Abs. 569 (1940)

case of *Mathews v. Krisber*:⁷⁰ "The statute of descent operates upon all intestate property, and the course which it indicates can be changed only by a testamentary disposition."⁷¹

It is true that to restrict the relict to one half of *all* the net estate would in part repeal the statute of descent and distribution. To presume, however, that such effect could not have been intended by the legislature seems questionable. Might not the legislature have intended that a spouse should, but for a certain share of his property which ought to be preserved for his relict, be allowed to dispose of his property exactly as he sees fit, and that, so long as the relict spouse's share is guaranteed, then the testator's wishes and scheme of disposition should be given effect as fully as possible? In other words, might not the legislature have been attempting to arrive at a satisfactory accord between the principle of carrying out the testator's desires as completely as possible and the contrary doctrine of allowing a spouse by election to disrupt that scheme, by effecting a scheme that would assure the relict a definite share and yet disrupt the shares of the devisees and legatees as little as possible?

Under the rule laid down in the *Goodfellow* case the testamentary scheme will, in most cases, be subject to great disturbance. For example, suppose that the testator dies possessed of an estate of \$50,000. He leaves nothing to his wife, \$10,000 to X, and \$10,000 to Y, and dies intestate as to the remaining \$30,000. If the wife takes against the will and falls into a classification under Section 10503-4 where, had the consort died wholly intestate, she would have inherited all the estate, she will take one half of the sums bequeathed to X and Y, which will be \$10,000, and all of the remaining \$30,000. If, however, the "one half" restriction of Section 10504-55 were construed as applying to all the estate, both testate and intestate, the relict would receive \$25,000, X and Y \$10,000 each, and the remaining \$5,000 would descend to the next of kin of the decedent, or, in an appropriate case, might even escheat to the state.

While the idea of the possibility of an escheat to the state is generally repulsive as far as the relict spouse is concerned — is not the idea of automatically cutting all the bequests in half, with no possibility of recoupment or contribution from any source, just as repulsive from the point of view of the legatee or devisee! And certainly, in a case like the one assumed, the testator has shown his intent to prefer these others to his consort.

I do not profess to know what the legislative intent was at the time of the passage of Ohio General Code Section 10504-55, but it is clear that

⁷⁰ 59 Ohio St. 562, 53 N.E. 52 (1898).

⁷¹ While there was no election in the *Mathews* case, it was held that a widow who had been given a life estate by her deceased husband's will also took the remainder in fee as an heir, such remainder being undisposed of by the will and no issue of the husband being involved.

under either of the above rules inequitable results are going to result in some instances. Merely because equitable principles might have favored the rule adopted in the light of the facts in the *Goodfellow* case, however, does not absolutely establish that it was the legislative intent to adopt the view advanced in that case.

Clearly the legislature has the power to define the extent to which a relict may share in property of the deceased consort when an election is made.⁷² The whole matter seems simply to be one of statutory construction and interpretation. The language of Ohio General Code Section 10504.55 seems definite and unrestricted on its face.

The fact that the "one half" limitation occurs within the chapter of the statutes entitled "Wills" would seem of little significance in construing it, for even if it was the purpose of the legislature to apply the limitation to the entire estate, what better chapter could it appear in? For it purports to regulate the rights of a relict taking against a will.

Also, cases like *Mathews v. Krisher*⁷³ — cases in which the question was not whether after taking against the will a share could be had in intestate property, but whether after electing to take under the will an intestate share could also be taken — would not seem to control the problem under discussion. After all, the testamentary intent and scheme of disposition is not disturbed at all by allowing a relict to take intestate property after electing to abide by the terms of the will.

Therefore, Section 10504-61, which simply settles the *Mathews v. Krisher* question by permitting the relict who elects to take under the will to take also an intestate share in intestate property, would likewise not appear to affect the problem under discussion. The situations and problems in the event of election to take under the will are too dissimilar from those presented in an instance of election against the will to apply axiomatically the reasoning in the one type of case to the other.⁷⁴

It should also be remembered that when *Mathews v. Krisher* was decided election by a surviving spouse was a choice between the relict's rights as a widow or widower and his rights as a devisee or legatee, and not between his rights as heir and as legatee or devisee, which is the case today.

Another point upon which the majority of the court relied in the

⁷² See: *State ex Taylor v. Gilbert*, 70 Ohio St. 229, 71 N.E. 636 (1904); and *Carder v. Board of Commissioners*, 16 Ohio St. 354 (1865)

⁷³ 59 Ohio St. 562, 53 N.E. 52 (1898)

⁷⁴ It is felt that cases decided under statutes prior to the "one half" restriction of Ohio General Code Section 10504-55 are not controlling under the present statute, due to the difference in wording of the statutes. Under prior statutes, two cases are in agreement with the results of the *Goodfellow* case, and one is contra. In agreement: *Armstrong v. Armstrong*, 11 Ohio C.C. (N.S.) 474, 21 Ohio C. Dec. 261 (1907); *March v. McClintic*, 24 Ohio C.C. (N.S.) 413 (1907); 34 Ohio C. Dec. 655. Contra: *Zizelman v. Mayer*, 27 Ohio App. 512, 161 N.E. 550 (1927).

Goodfellow case was the fact that the Ohio Supreme Court, in the case of *Miller v. Miller*,⁷⁵ had laid down the general principle that Section 10504-55 does not mean that the surviving spouse takes under the statute of descent and distribution, but that the statute of descent and distribution is merely definitive or descriptive of the size of the share to be taken by the surviving spouse, and that the actual taking of the share by the surviving spouse is under Section 10504-55. The full import of such construction is that the relict's rights under Ohio General Code Section 10504-55 are considered to be those of a widow or widower and not those of an heir, and that Section 10503-4 alone creates the latter. As a consequence, the election by a relict involves only a choice between the relict's rights as a devisee or legatee and those of a widow or widower under Section 10504-55, and not a choice between the rights of a devisee or legatee and those of an heir under Section 10504-3. Under the old law prior to 1932 this was undoubtedly true.⁷⁶ In *Barlow v. Winters National Bank*,⁷⁷ which was decided in 1945, however, the nature of the relict's rights under Section 10504-55 was held to be that of an heir. The court stated:

Where the relict of a deceased husband elects not to take under his will, she takes her share not by way of a distributive share in money, but by way of inheritance as though it came to her from her deceased husband as an estate under Section 10503-4, General Code, limited by the provision of Section 10504-55, General Code.
(Italics added.)

If Ohio General Code Section 10504-55 places the spouse absolutely under the statute of descent and distribution, the *Miller* case is overruled, and election then is a choice between the relict's rights as an heir and his rights of a devisee or legatee. Also, since the "one half" limitation existing in Section 10504-55 is meaningless unless it applies to all property that the relict takes by virtue of Section 10503-4, the authority of *Goodfellow v. Wilson* is impliedly overruled.

In any event, it is doubtful whether the court in the *Goodfellow* case was justified in relying upon the *Miller* case to reach the result that it did, no matter what type of rights Section 10504-55 created in the surviving spouse, for the *Miller* case also held that: "By its terms this section (10503-

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

⁷⁶ *Ogelsbee v. Miller*, 111 Ohio St. 426, 145 N.E. 846 (1924); *Matthews v. Krisher*, 59 Ohio St. 562, 53 N.E. 52 (1898); *Doyle v. Doyle*, 50 Ohio St. 330, 34 N.E. 166 (1893); *Wilson v. Hall*, 6 Ohio C.C. 570, 3 Ohio C. Dec. 589 (1892) *aff'd without opinion* 53 Ohio St. 679, 44 N.E. 1137 (1895); *Carder v. Commissioners*, 16 Ohio St. 354 (1865); *Bane v. Wick*, 14 Ohio St. 505 (1863); *Gardner v. Gardner*, 13 Ohio St. 426 (1862); *Crane v. Dory*, 1 Ohio St. 279 (1853). The only case contra is *Zizelman v. Mayer*, 27 Ohio App. 512, 161 N.E. 550 (1927).

⁷⁷ *Barlow v. Winters National Bank & Trust Co.*, 145 Ohio St. 270, 61 N.E.2d 603 (1945).

4) is limited to the distribution of property when its owner dies intestate."⁷⁸ In the *Goodfellow* case the decedent did not die intestate, although some of his estate passed as intestate property.

No matter which of the two ways the supreme court may see fit to decide the problem presented by the *Goodfellow* case, it seems that such great hardship as may be imposed upon the legatees and devisees under the *Goodfellow* construction because of the taking of one half of their bequests or devises without any chance of recoupment from any source—and the possibility of escheat to the state under the contrary construction, are sufficiently serious to warrant reconsideration of the entire problem by the legislature with, at least, a view toward the drafting of legislation eliminating the evils in the specific instance where, but for the limitation imposed by Ohio General Code Section 10504-55, the surviving spouse would have been entitled under the statute of descent and distribution to the entire estate. For example if it were provided that:

In the event of election to take under the statute of descent and distribution the surviving spouse shall not take more than one-half of the net estate, except that if the relict would have been entitled to all of the estate under the statute of descent and distribution had the decedent died intestate, then, if property remains after provision has been made for the surviving spouse to the extent of one half of the net estate and after complete compensation of affected devisees and legatees, such remaining property shall descend and be distributed to the surviving spouse. The "one half" limitation shall apply to both testate and intestate property,

the surviving spouse would be assured of a minimum of one half of the property of the consort, the legatees and devisees would be assured of their complete shares as designated in the will, if sufficient property remains after the relict's share is taken out, and the relict would not be put in the position of losing property to distant relatives who would not have shared in the estate had the decedent died wholly intestate, or of having the property escheat to the State of Ohio.

Net Estate and Debts

While it has not been expressly settled by the Ohio Supreme Court whether the "one half" provision in Section 10504-55 applies to intestate property, it has been decided that the term "net estate" as used in Section 10504-55 is that portion of the estate which is left after the payment of the decedent's debts, costs of administration, the statutory exemption created by Section 10509-55, and the widow's statutory allowance under Section 10509-74.⁷⁹

⁷⁸ Miller v. Miller, 129 Ohio St. 230, 235, 194 N.E. 450, 452 (1935).

⁷⁹ Barlow v. Winters National Bank & Trust Co., 145 Ohio St. 270, 61 N.E.2d 603 (1945); Davidson v. Trust Co., 129 Ohio St. 418, 195 N.E. 845 (1935); Miller v. Miller, 129 Ohio St. 230, 194 N.E. 450 (1935).

Disposition of the Share Rejected by the Spouse

If provision has been made in the will of the testator for the surviving spouse and the relict elects to take under the law, the question then arises as to the disposition of the rejected portion. If there are legatees and devisees whose interests have been diminished as a result of the relict's election, the interest which the relict renounces is ordinarily used to compensate these disappointed beneficiaries.⁸⁰

While in most cases there will be nothing left after the legatees and devisees whose shares were diminished as a result of the election have been compensated, there will be some instances in which property does remain. When this occurs the problem of how and to whom this property should be distributed arises. In the absence of a residuary clause, or any testamentary provision covering such contingency, the property in regard to heirs in general is disposed of in accordance with the statute of descent and distribution.⁸¹ Whether the relict spouse who has elected to take against the will can take a share of such rejected property⁸² has never been clear in Ohio. Under the laws prior to the passage of the present Probate Code, contrary opinions were reached. In the case of *Armstrong v. Armstrong*, the relict spouse was not allowed to share as an heir in such rejected property.⁸³ In *March v. McClintic*,⁸⁴ however, the court was of the opinion that the surviving spouse would receive such a share under the statute of descent and distribution.

The only case decided under the present Probate Code that involved the problem was *Goodfellow v. Wilson*, in which the relict was, of course, given all the property in the estate of her deceased husband.⁸⁵ It would

⁸⁰ See: *Dunlap v. McCloud*, 84 Ohio St. 272, 95 N.E. 774 (1911); *Holdren v. Holdren*, 78 Ohio St. 276, 85 N.E. 537 (1908); *Jennings v. Jennings*, 21 Ohio St. 56 (1871); *Wilson v. Hall*, 6 Ohio C.C. 570, 3 Ohio C. Dec. 589 (1892). This does not mean that the relict, in rejecting the bequest or devise to her in the will by electing to take under the law, forfeits all right to receive a share in the property willed to her. The relict shares in this property by virtue of Section 10504-55, to the same extent that she shares in any other property deemed assets of the decedent's estate for the purposes of administration. See *Barlow v. Winters National Bank & Trust Co.*, 145 Ohio St. 270, 61 N.E.2d 603 (1945).

⁸¹ *Wilson v. Hall*, 6 Ohio C.C. 570, 3 Ohio C. Dec. 569 (1892); *aff'd without opinion* 53 Ohio St. 679, 44 N.E. 1137 (1895); *Armstrong v. Armstrong*, 11 Ohio C.C. (N.S.) 474, 21 Ohio C. Dec. 261 (1907).

⁸² Property which is now intestate property as a direct result of the relict's election.

⁸³ 21 Ohio C. Dec. 261 (1907), although the spouse was permitted to inherit other intestate property. See: *Wilson v. Hall*, *supra* note 81.

⁸⁴ 34 Ohio C. Dec. 655 (1907)

⁸⁵ Although it is not specifically stated that the relict took such rejected share, the language of the case is broad enough to allow it, and there were provisions in the testator's will giving the wife certain personal effects, and it was decided that *all* the property in the estate went to the relict's wife.

appear that the only question here, as in the case of intestacy in regard to property which did not become intestate property as a result of the rejection by the legatee or devisee, should be whether Ohio General Code Section 10504-55, and its "one half" limitation, applies only to property effectively disposed of by will or whether the limitation applies to the entire estate left by a decedent, whether the property be testate or intestate. To hold under the present statute, as it was held in the *Armstrong* case,⁸⁶ that the relict can inherit intestate property if the intestacy was not the result of the relict's rejection of the will, but cannot inherit the property if the intestacy resulted from the refusal of the spouse to accept the share given the spouse by the will, would be just as absurd today as it was then. The majority of the court in the *Armstrong* case grounded its decision upon the statement that the property bequeathed to the relict and rejected by her "does not become intestate property as to her."⁸⁷ As to everyone else, however, this same property was decided to be intestate property. Never before has the writer seen attributed to property such chameleon qualities. It is submitted that any given property is either *testate* or *intestate* as to all parties. If it is intestate property, it descends to all heirs. The relict is such an heir under the present Code,⁸⁸ and, unless restricted by the "one half" limitation of Section 10504-55, should logically share in such property just as any other heir. The "one half" limitation should apply to the entire estate.

Nature of the Relict's Interest in Realty

An important question in the cases in which real property is involved and the surviving spouse elects to take against the will of the deceased consort is the nature of the interest acquired by the relict in such property.

Ohio General Code Section 10503-4 provides that:

When a person dies intestate having title or right to any real estate or inheritance in this state such real estate or inheritance shall descend and pass in parcenary.

And Ohio General Code Section 10504-55 gives the relict the right to take either according to the provisions in the will or under Section 10503-4.

Upon reading these sections together, it would appear that the relict, upon electing to take under the statute of descent and distribution, would acquire a share and interest in the real property in parcenary and not merely a distributive share, payable in money, in the net estate of the testator. And

⁸⁶ *Armstrong v. Armstrong*, 11 Ohio C.C. (N.S.) 474, 21 Ohio C. Dec. 261 (1907).

⁸⁷ *Ibid.*

⁸⁸ *Barlow v. Winters National Bank and Trust Co.*, 145 Ohio St. 270, 61 N.E.2d 603 (1945).

this was the view adopted by the Ohio Supreme Court in *Barlow v. Winters National Bank and Trust Company*.⁸⁹

Conclusion

While the rights of a surviving spouse in Ohio are, for the most part, well defined, there are at least two important questions that have not been resolved.

The first is whether a spouse electing to take under the will of the deceased consort is also entitled to dower in the limited instances where vested dower is retained in Ohio. While the problem has not been judicially determined, there would appear reason to deny the relict the right to dower in such cases, for the election statute, Ohio General Code Section 10504-61, obviously purports to regulate the interests of the relict not only as a widow or widower but also as an heir and as a devisee. The mandate of the statute that a spouse electing to take under the will shall take under the will alone except in certain enumerated cases precludes any other interpretation, for cases involving dower are not among those enumerated.

The second problem not settled by the Ohio Supreme Court is whether upon an election to take against the will where there is intestate property, the "one half" limitation of the election statute applies to the intestate property and effects a limitation of that property obtained by the spouse, or whether the "one half" limitation applies only to limit the share taken by the relict in the property passing by will of the deceased consort. Ohio General Code Section 10504-55 seems plainly to limit the relict to "one half" of the entire estate, and in the light of the Ohio Supreme Court's decision in *Barlow v. Winters National Bank & Trust Co.*—to the effect that the relict spouse is, upon election, actually placed within the operation of the statute of descent and distribution—the "one half" limitation would be meaningless unless applied to the entire estate.

Whichever of the two constructions is adopted by the Ohio Supreme Court, however, the fact remains that, under such an inelastic "one half" limitation, hardship is going to be worked either upon the relict or upon the devisees or legatees in some instances in which the limitation is applicable. It is therefore hoped that the Committee for Statute Revision will reinvestigate the problem with the purpose of effecting a more elastic statute that will better protect the interests of all parties in all the possible circumstances that may arise.

⁸⁹ *Ibid.*, For contrary holdings prior to the Barlow case, see: In re Estate of Ellis, 66 Ohio App. 121, 32 N.E.2d 23 (1940); Shearn v. Shearn, 60 Ohio App. 317, 21 N.E. 2d 133 (1937).