

Intestacy & Rights of Surviving Spouse

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Who takes with no will?

Start with the statute – R.C. 2105.06

(A) If there is **no surviving spouse, to the children** of the intestate or their lineal descendants, **per stirpes**;

(B) If there is **a spouse and one or more children of the decedent** or their lineal descendants surviving, **and all of the decedent's children** who survive or have lineal descendants surviving also **are children of the surviving spouse, then the whole to the surviving spouse**;

(C) If there is **a spouse and one child of the decedent** or the child's lineal descendants surviving **and the surviving spouse is not the natural or adoptive parent** of the decedent's child, the first **\$20,000 plus one-half of the balance** of the intestate estate to the spouse and the remainder to the child or the child's lineal descendants, **per stirpes**;

(D) If there is **a spouse and more than one child** or their lineal descendants surviving, the **first \$60,000 if the spouse is the natural or adoptive parent of one, but not all**, of the children, or **the first \$20,000 dollars if the spouse is the natural or adoptive parent of none** of the children, **plus one-third of the balance of the intestate** estate to the spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, **per stirpes**;

(E) If there are **no children or their lineal descendants, then the whole to the surviving spouse**;

Who takes with no will?

R.C. 2105.06, Continued

(F) Except as provided in section 2105.062 *[re: parent (or relative thereof) who conceived the decedent via sexual assault cannot inherit from that decedent]* of the Revised Code, if there is **no spouse and no children or their lineal descendants, to the parents of the intestate equally, or to the surviving parent;**

(G) Except as provided in section 2105.062 of the Revised Code, if there is no spouse, no children or their lineal descendants, and no parent surviving, **to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes;**

(H) Except as provided in section 2105.062 of the Revised Code, if there are no brothers or sisters or their lineal descendants, **one-half to the paternal grandparents** of the intestate equally, or to the survivor of them, and **one-half to the maternal grandparents** of the intestate equally, or to the survivor of them;

(I) Except as provided in section 2105.062 of the Revised Code, if there is no paternal grandparent or no maternal grandparent, **one-half to the lineal descendants of the deceased grandparents, per stirpes;** if there are no such lineal descendants, then **to the surviving grandparents or their lineal descendants, per stirpes;** if there are no surviving grandparents or their lineal descendants, then **to the next of kin of the intestate, provided there shall be no representation among the next of kin;**

(J) If there are **no next of kin, to stepchildren or their lineal descendants, per stirpes;**

(K) If there are no stepchildren or their lineal descendants, **escheat to the state**

Intestate Chart

STATUTE OF DESCENT AND DISTRIBUTION R. C. 2105.06

S. S. = SURVIVING SPOUSE
G. P. = GRANDPARENTS

Source: Medina County Probate Court

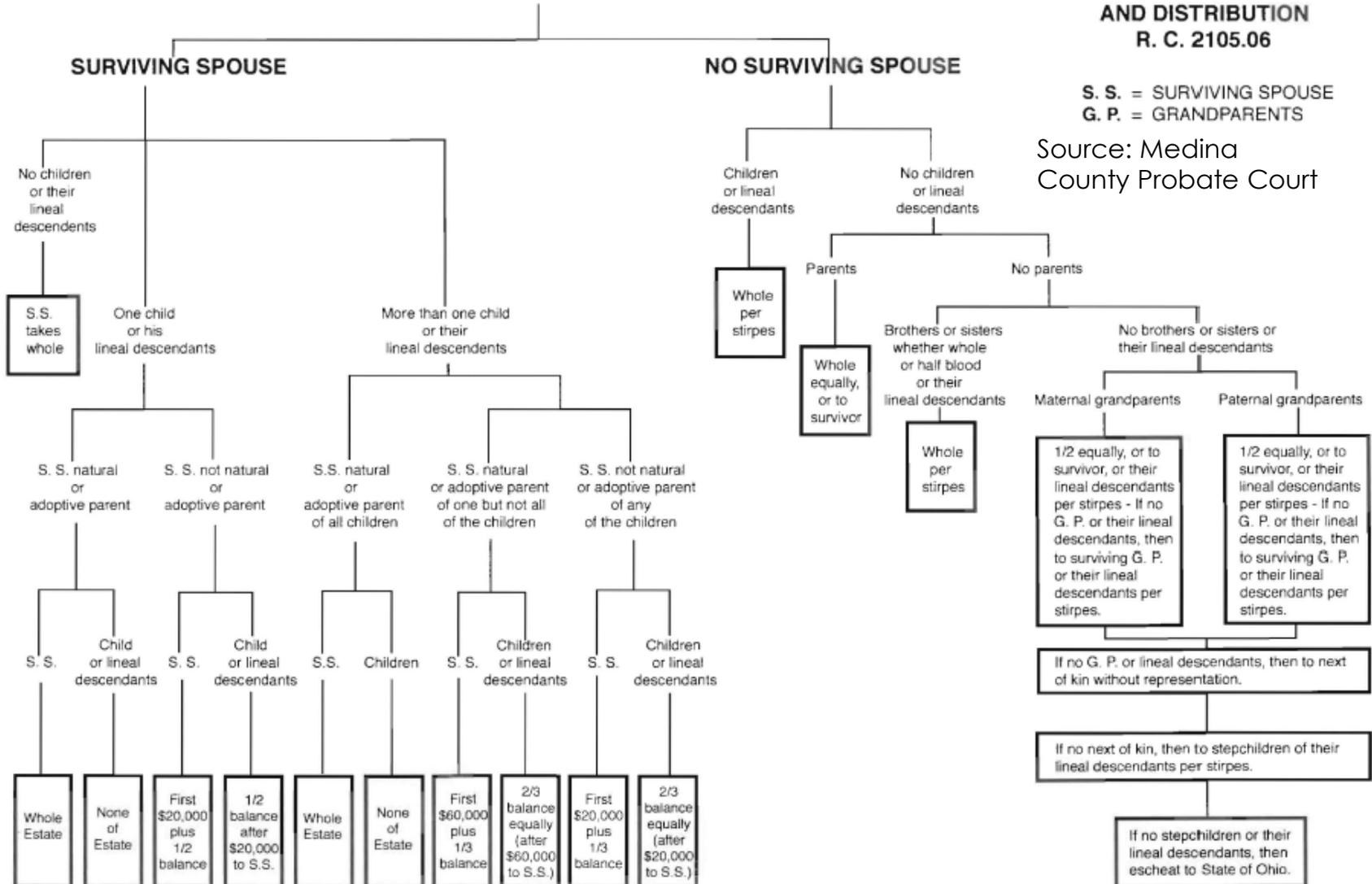
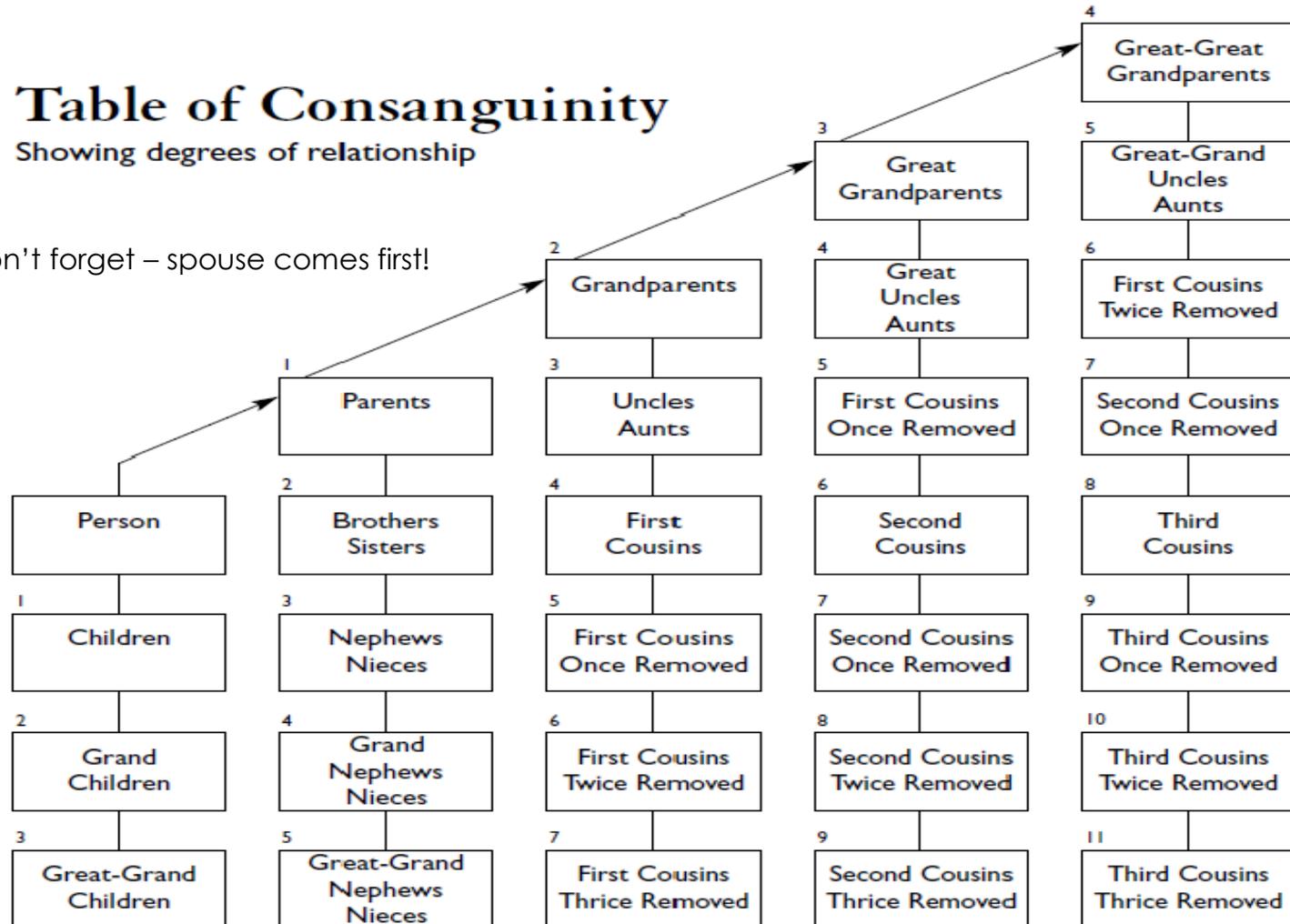


Table of Consanguinity

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Showing degrees of relationship

Don't forget – spouse comes first!



Statutory Bars to Inheritance

- Conceiving a child via rape or sexual battery – R.C. 2105.062
 - A person who commits rape or sexual assault, which conceives a child **cannot** inherit **from** that child or **through** that child
 - No relative of the biological parent may inherit from the deceased through the deceased's parent who committed rape/sexual assault
 - Basic: a person who conceives a child through rape or sexual assault is considered predeceased with regard to the conceived child

Statutory Bars to Inheritance

- Abandoning a child – R.C. 2015.10
 - A parent “failed without justifiable cause to communicate with the minor, care for the minor, and provide for the minor’s...support...as required by law or judicial decree for a period of at least 1 year prior to [the minor’s death].”
 - Fiduciary must seek ruling from court as to abandonment (follow R.C. 2123.02)
 - Only applies when *minor* dies intestate.
 - Treats the abandoning-parent as having pre-deceased

Statutory Bars to Inheritance

- Be born on time; don't die early – R.C. 2105.14
 - **Everyone** who inherits under intestacy must outlive the decedent by at least 120 hours
 - **An unborn child** of an intestate decedent must be born **within 300 days** of decedent's death, and must live 120 hours after birth
 - If the above are not met – treat the person (or unborn person) as pre-deceased.
- Slayer Statute – R.C. 2105.19
 - Finding or plea of guilty (or finding of guilt by insanity) bars the ability to inherit from the victim's estate whether by will or intestacy.

Inclusion to Inheritance

- Child born out of wedlock – R.C. 2105.17 – can inherit from (or pass to) and through their mother, regardless of mom's marital status
- Be designated an heir – R.C. 2105.15 – a person of sound mind may file a written declaration in the presence of the probate court judge and two witnesses that someone is their heir. From then on, unless revoked, that designate person shall be deemed as though a child of the declarant.
- Declared an adult child of a father – R.C. 2105.25 – father, mother, and adult child may appear in court and establish the man as the father of the child. Must include genetic test results.

Inclusion to Inheritance

- A man is presumed the natural father under R.C. 3111.03 if any of the following:
 - Child born during man's marriage to mother (or within 300 days after marriage);
 - Father filed an acknowledgment of paternity R.C. 3111.23 (and, once this acknowledgment becomes final, it is now irrefutable unless rescinded by law)
- The above presumptions can be rebutted only with "clear and convincing evidence" that includes genetic testing

Examples

- Ted died intestate. He lived in Akron, OH with his fiancée, Sally who has one child from a prior marriage. Ted's parents predeceased. Ted had no children. Ted had 1 living brother (B1) and 1 deceased brother (B2), who had 2 children (N1, N2).
 - No spouse
 - No children or their descendants
 - No parents
 - 1 Living Brother & 1 predeceased brother with descendants
 - Estate goes: 50% to B1, 25% N1, & 25% N2

Examples

- Bob died intestate. He lived in Akron, OH with his wife Mary who has one child from a prior marriage. Bob had no children biological or adopted. Bob's mother predeceased and his father is living. Bob was an only child.
 - Spouse
 - No children *of decedent*
 - Estate goes **all** to spouse, Mary

Examples

- Louise died intestate. She was married at her death to Mark. Louise had 2 children from a prior marriage (A, B) and 1 child, C, with Mark – all 3 are minors. Louise's parents predeceased. She has 2 living siblings and no predeceased siblings
 - Spouse is parent of 1 of decedent's children
 - Mark get's first \$60,000 *plus* 1/3 of balance
 - Remaining 2/3 balance – equally to A, B, & C
 - Mark also gets rights of surviving spouse

Rights of the Surviving Spouse

- Spouses can take “under” the will or can “elect against” the will – R.C. 2106.01
 - They can take what the will gives them; **or**
 - They can take a statutory share of probate estate
- **Regardless** of election, spouses are entitled to certain rights; these come “off the top” of the estate, generally
- Spouse has first priority to serve as fiduciary – even if not named such in the will
- Consider if a prenuptial exists! If so, it is considered valid unless challenged within 4 months after appointment of fiduciary (R.C. 2106.22)

Rights of the Surviving Spouse

- Boats & Cars – R.C. 2106.18
 - Up to \$65,000 worth of “automobiles”
 - Could be a truck or motorcycle if used by the decedent/their family as a “method of conveyance”
 - UNLESS car is joint with spouse – then it goes to spouse and doesn’t count towards \$65,000
 - UNLESS car lists a TOD Bene –then it goes to bene
 - UNLESS car is specifically devised in decedent’s will
 - Value of *least expensive* automobile is deducted from SS’s allowance for support if SS does not get full allowance
 - One watercraft (and its trailer to haul it)
 - One outboard motor
- This is outside of probate court – done at the Title Bureau with car title and a death certificate

Rights of the Surviving Spouse

- Right to **Remain in the House** R.C. 2106.15
 - SS may remain in the “mansion house” for 1 year
 - No rent is owed during this time
 - Mansion house can be sold in that 1 year only to pay debts of the decedent – and, SS must be compensated
 - Could rent the house out or live in it themselves
- Right to **Receive the House** R.C. 2106.10
 - SS may receive the house as part of SS’s intestate share plus part of allowance for support
 - Value of house is appraised value less balance of mortgage; SS must assume mortgage

Rights of the Surviving Spouse

- Right to **Buy the House** & its contents – R.C. 2106.16(A)
 - Includes side lots and adjacent farmland
 - Price is the appraised value per inventory
 - Not considered self-dealing if SS is fiduciary
 - UNLESS the house is specifically devised in will
- Right to **Buy personal property** – R.C. 2106.16(B)
 - SS has first choice on other personal property up to 1/3 of the gross value of the estate
 - Price is as set by appraisal in inventory
- Exercise these “rights to buy” via petition with probate court per R.C. 2106.16(B) – court will hold a hearing and will find for SS *unless* the appraised value seems the result of “collusion” and will prejudice other beneficiaries
- SS’s purchase does not affect liens on real property

Rights of the Surviving Spouse

- Allowance for Support R.C. 2106.13
 - A.K.A. “Family Allowance” – automatic right to receive – no claim need be filed
 - \$40,000 – to the spouse and/or minor children of decedent as follows:
 - If no SS and minor children – to be divided among the minor children as probate court determines
 - If no minor children – all to SS
 - If all minor children are children of SS – all to SS
 - If one or more minor children *are not* children of SS – to the SS and minor children as probate court determines
 - When determining division of Family allowance among SS and minor children - probate court shall consider value of *least* expensive car if more than 1 car selected by SS under R.C 2106.18

Rights of the Surviving Spouse

- Receive Assets outside of probate
 - Joint & Survivor motor vehicles
 - Joint & Survivor financial accounts
 - Joint & Survivor real estate
 - Assets that name SS as beneficiary
 - Certain ERISA-qualified retirement benefits
 - Automobiles (up to \$65k) per R.C. 2106.18
 - Final paycheck from employer per R.C. 2113.04

Election Against the Will

- Notice to spouse
 - R.C. 2106.01 (A) - At the time of the filing of the will, the court must serve a citation per by certified mail with a description of the spouse's rights
 - SS may waive this formal service by signature, acknowledging receipt of description of rights
- R.C. 2106.01 (E) - SS must make an election **within 5 months** of appointment of fiduciary (SS can seek extension of time to make election)

Election Against the Will

- R.C. 2106.04 – Failure to elect presumes election to take under the will
 - Silence after service = acceptance
 - Death of SS before election = no election
- R.C. 2106.06 – SS must appear in person at probate court to elect against will
- R.C. 2106.08 – If SS is incapacitated, probate court appoints a person to review the assets and make an election in the best interest of SS

Citation to Surviving Spouse SPF 8.0

PROBATE COURT OF _____ COUNTY, OHIO

ESTATE OF: _____

CASE NO. _____

CITATION TO SURVIVING SPOUSE TO EXERCISE ELECTIVE RIGHTS

[R.C. 2106.01 and 2106.02]

To: _____
Name of Surviving Spouse

Address

City, State, Zip Code

You are hereby cited to elect to exercise your rights as surviving spouse. A summary of these rights is attached and incorporated herein. These rights include the right to elect against the will. Most of the rights must be exercised within five months from the date of the initial appointment of the administrator or executor. If you do not timely elect to exercise any specific right, it will be conclusively presumed you have elected not to exercise that right and the right will be forfeited. If you have questions concerning your rights, you should consult an attorney of your choice.

The date of appointment of the administrator or executor is: _____

The address of the probate court is: _____

The names and addresses of the executor or administrator and his or her attorney are:

Attorney for Applicant

Attorney Registration No.

Address

Phone Number (include area code)

Name

Title

Address

Phone Number (include area code)

Probate Judge

Date: _____

By: _____
Deputy Clerk

Print Form

Summary of General Rights of SS SPF 8.3

PROBATE COURT OF _____ COUNTY, OHIO

ESTATE OF: _____

CASE NO. _____

SUMMARY OF GENERAL RIGHTS OF SURVIVING SPOUSE

[R.C. 2106.02]

To: _____
Surviving Spouse Address
City, State, Zip Code

This is a summary of your general rights as surviving spouse under Chapter 2106 of the Revised Code. Many of these rights have specific time limits in which they must be exercised. If you have questions concerning your rights, you should discuss them with an attorney of your choice. The Court cannot advise you.

1. Election to Take Under or Against the Will (R.C. 2106.01 - 2106.08)

If you elect to take against the Will, you are entitled to one-half of the decedent's net estate, unless there are two or more of the decedent's children or their lineal descendants surviving, in which case you are entitled to one-third of the decedent's net estate. You will not be entitled to receive any assets given to you under the Will.

If you elect to take under the Will, you will receive those assets given to you under the Will.

Whichever choice you make, (unless you elect to take under the Will and the Will specifically precludes you from exercising these rights), you will not be barred from your rights to purchase certain assets at the appraised value, to remain in the mansion house (the residence) for one year, to receive an allowance for support, to receive not more than two automobiles and one watercraft and one outboard motor owned by the decedent, and to such other rights as a surviving spouse may be entitled under law.

Although your election may not affect certain non-probate property, such as joint and survivorship, payable on death, and transfer on death property, it may have an effect on other types of non-probate property, including property held in trust.

Before making your election, you are entitled to file a complaint in this Court asking that the Will be construed.

If you elect to take under the Will, you may do so in writing if you wish, but you may also do so by taking no action.

If you elect to take against the Will, you must do so in person before the Probate Judge or a Magistrate. This election must be exercised within five months from the date of the initial appointment of the administrator or executor of the estate or it is forfeited.

2. Right to Receive Mansion House (R.C. 2106.10)

Depending upon the value of the real estate, you may have the right to receive the mansion house (the residence) as part of your inheritance.

3. Right to Place Charge on Real Estate (R.C. 2106.11)

If there is no Will and there are insufficient assets to pay the specific monetary share due to the surviving spouse pursuant to R.C. 2106.05, you have the right to place a charge (lien) on any real property included in the probate estate in the amount of the unpaid portion of the specific monetary share.

4. Allowance for Support (R.C. 2106.13)

You may be entitled to an allowance for support. For deaths occurring after March 18, 1999, the amount is \$40,000 of probate assets. If there are one or more minor children of the decedent, not the children of the surviving spouse, this Court will apportion the allowance among those children and the surviving spouse.

5. Right to Remain in the Mansion House (R.C. 2106.15)

You have the right to remain in the mansion house (the residence), if it is a probate asset, for a period of one year from the date of death without the payment of rent to the estate. If the mansion house is sold to pay debts during this period of time, you may be entitled to the fair rental value of the mansion house. This election must be exercised within five months from the initial appointment of the administrator or executor or the right is forfeited.

6. Right to Purchase Property (R.C. 2106.16)

You have the right to purchase assets of the probate estate at the appraised values. The application or petition to purchase the assets must be filed within one month of the approval of the inventory or the right is forfeited.

7. Right to Automobiles (R.C. 2106.18)

You may be entitled to receive up to two automobiles, not specifically bequeathed, that would otherwise be included in the probate estate and do not exceed an aggregate value of \$40,000. This right may affect the amount you may receive under the allowance for support. This right must be exercised within five months from the initial appointment of the administrator or executor or the right is forfeited.

8. Right to Watercraft and Outboard Motor (R.C. 2106.19)

You may be entitled to receive one watercraft and one outboard motor, not specifically bequeathed, that would otherwise be included in the probate estate. This right must be exercised within five months from the initial appointment of the administrator or executor or the right is forfeited.

9. Right to Reimbursement of Funeral Bill (R.C. 2106.20)

You may be entitled to be reimbursed for the payment of the funeral bill.

10. Right to Challenge Antenuptial or Separation Agreement (R.C. 2106.22)

You are entitled to file an action to contest the validity of an antenuptial or separation agreement. This action must be filed within four months after the appointment of the executor or administrator or the right is forfeited.

This is a summary of your general rights. There may be additional rights to which you are entitled.

Ohio Revised Code § 2106.25 states:

Unless otherwise specified by a provision of the Revised Code or this section, a surviving spouse shall exercise all rights under Chapter 2106. of the Revised Code within five months of the initial appointment of an executor or administrator of the estate. It is conclusively presumed that a surviving spouse has waived any right not exercised within that five-month period or within any longer period of time allowed by the court pursuant to this section. Upon the filing of a motion to extend the time for exercising a right under Chapter 2106. of the Revised Code and for good cause shown, the court may allow further time for exercising the right that is the subject of the motion.

Print Form

What does SS get if elect against will?

- R.C. 2106.01 (C): "If the surviving spouse elects to take [against the will], the surviving spouse shall take **not to exceed one-half of the net estate**, unless **two or more of the decedent's children or their lineal descendants survive**, in which case the surviving spouse shall take **not to exceed one-third of the net estate.**"
- Spouse *does not* get a full intestate share. The SS does not get the \$20,000 or \$60,000 specific monetary shares set forth under the intestacy rules
- Balance of estate will pass according to will
- By electing against a pour-over will, SS is barred from receiving under the trust (R.C. 2106.01 (D))

What does SS get if elect against will?

- “Net Estate” means the entire probate estate less the following:
 - Expenses of administration
 - Debts and valid claims paid – including reimbursement for paying funeral bill
 - Allowance for Support (paid to SS and/or SS and minor children of decedent)
- SS still gets other rights – cars, boat, allowance for support, right to remain in mansion house, etc.

Example

- Bob dies married to Sally. Bob leaves 2 adult children from a prior marriage and a will that leaves all to his two children, equally. Bob leaves 1 car in his name valued at \$60,000 and 1 bank account with \$100,000 in it. Sally elects against the Will. Assume no estate claims/debts or expenses of administration. What does Sally get?
 - Sally can get car via Title Bureau (R.C. 2106.18)
 - Allowance for Support – Sally gets first \$40,000
 - “Net Estate” is now \$60,000
 - Per intestacy 2105.06, Sally would get next \$20,000 + 1/3 balance (i.e., $\$20,000 + \frac{1}{3}(\$40,000) = \$33,333$)
 - Per election, Sally gets 1/3 of the net estate, i.e., 1/3 of \$60,000 = \$20,000
 - Total Sally gets: Car + Allowance for Support + Elective Share = Car + \$40,000 + \$20,000 = Car + \$60,000.
 - Balance goes according to the will, 50% to each child

Example

- Mary dies intestate, married to Fred. Mary has one predeceased child who left no children. Mary's parents are deceased. She is survived by 2 brothers and niece, daughter of her predeceased sister. Mary's will leaves all her assets to various charities. At her death, Mary owned the following:
 - 2 cars – one \$30,000 and one \$15,000
 - Checking/Savings accounts totaling \$150,000
 - 1 house valued \$100,000 with \$60,000 mortgage
 - Funeral bill \$10,000
 - Attorney fees and probate costs \$4,500
- Fred Elects against will – what does he get?

Example

- Fred first gets two cars - \$45,000 total value – outside of probate
- Fred is entitled to Allowance – \$40,000 – it is not reduced by the 2nd car, because it is not shared with any minor children
- Next, calculate the “net estate”
 - \$250,000 of probate assets – less allowance (\$40,000), less debts (\$10,000 funeral), and less costs of administration (\$4,500) = \$195,500 Next, calculate elective share:
 - No children, so Fred gets half of net estate = $\$195,500/2 = \$97,750$

Example

- Fred gets:
 - 2 cars
 - \$40,000 family allowance
 - \$97,750 elective share
- Some options for Fred:
 - *Remain* in the house rent free 1 year (2106.15)
 - *Receive* the mansion house as part of his elective share (2106.10)
 - Value would be appraisal (\$100,000) less mortgage (\$60,000) = \$40,000 & Fred assumes the mortgage
 - If he chooses this, he would get house (subject to mortgage) plus another \$57,750