1962

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Recommended Citation

William A. Polster, The Use of Will Substitutes to Disinherit the Surviving Spouse, 13 W. Res. L. Rev. 674 (1962)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol13/iss4/5

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The Use of Will Substitutes To Disinherit the Surviving Spouse

William A. Polster

The Ohio Supreme Court's decision last December in Smyth v. Cleveland Trust Company and the court's rejection of its long-standing, controversial decisions in Bolles v. Toledo Trust Company and in Harris v. Harris have done much to clear the air concerning the extent to which a surviving spouse, who elects to take at law, may claim a distributive share of property otherwise passing in accordance with instruments of transfer or contractual arrangements made by the deceased spouse during life. This decision has accordingly been acclaimed by most lawyers engaged in the planning and administration of estates and trusts, who welcome relief from the many uncertain doctrinal implications of the Bolles and Harris cases with which they have been forced to live for the past seventeen years.

Many persons, however, are deeply disturbed by the Smyth decision. They fear that it makes freely available to the scheming husband who wishes to disinherit his wife, or to leave her a lesser estate than is otherwise assured to widows by law, a variety of inter vivos dispositive devices which will preserve for the husband a substantial measure of lifetime economic enjoyment and control, but will nevertheless be invulnerable to attack by the widow at his death.

In view of the wide divergence of opinion concerning the merits and the implications of the Smyth case, it appears appropriate to review this case and its predecessors in some detail, as well as the Ohio statutory law relating to the rights and interests of a surviving spouse in and to the property of the deceased spouse. In the light of these decisions and

1. 172 Ohio St. 489, 179 N.E.2d 60 (1961).
2. 144 Ohio St. 195, 58 N.E.2d 381 (1944).
3. 147 Ohio St. 437, 72 N.E.2d 378 (1947).
5. Scheming wives, if such there be, have attracted little attention to date. It would appear, however, that they have at least equal opportunity to avail themselves of these devices.
6. This article is limited primarily to consideration of the surviving spouses' statutory rights in Ohio to a distributive share and the possible frustration of this right by lifetime arrangements of the deceased spouse. It does not consider the several additional rights which the Ohio probate code affords to the surviving spouse of either sex or to the widow only, such as the right to property exempt from administration, OHIO REV. CODE § 2115.13; the right to a
statutory provisions, consideration will then be given to the question of whether the existing situation warrants legislative action and, if so, what form this legislation might take.

**OHIO STATUTORY LAW**

In Ohio there are two separate sets of statutory provisions to be taken into account in considering marital property rights. One set is found in the chapters devoted to domestic relations and is concerned with such rights as exist during the marriage or in the event of divorce or separation. The other is found in the chapters of the probate code and relates to the rights of the surviving spouse after dissolution of the marriage by death. Each stands on its own feet and contains few cross-references to the other.

Under the common law there were substantial limitations upon a woman's capacity during marriage to contract and to take, hold, and dispose of property. The husband, on the other hand, had substantially unrestricted freedom in these matters, except to the extent affected by his wife's inchoate right of dower in his real property.

Although many of the wife's traditional common-law disabilities with respect to property and rights of contract were abolished early in Ohio history, it was not until the passage in 1887 of legislation known as the Married Woman's Act7 that the last vestiges of these disabilities were removed and wives were given substantial equality with their husbands. This act was the first to include the set of statutory provisions still in force today which are concerned with the property rights of husband and wife during marriage.

Under these statutory provisions a married man has the primary duty to "support himself, his wife, and his minor children out of his property or by his labor."8 Otherwise, each spouse is expressly denied "any interest in the property of the other,"9 except for an inchoate right of dower in real estate. Moreover, each spouse is expressly permitted to "take, hold, and dispose of property, real or personal, the same as if unmarried,"10 and to "enter into any engagement or transaction . . . with any other person which either might if unmarried."11

The provisions of the Ohio probate code relating to the disposition of a married decedent's property and to the rights and interests of the

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7. 84 Ohio Laws 132 (1887).
8. OHIO REV. CODE § 3103.03.
9. OHIO REV. CODE § 3103.04.
10. OHIO REV. CODE § 3103.07.
11. OHIO REV. CODE § 3103.05.
surviving spouse therein are of more ancient origin and may be traced back in Ohio to the Ordinance of 1787 and to a number of statutes adopted by the territorial legislators and the early general assemblies of the state.

The Ordinance of 1787 provided for the descent and distribution of intestate estates to the descendants of the decedent or, if none, to his next of kin, "saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate." It further recognized the right of both men and women "of full age" to dispose of real and personal property by written will.

Statutes enacted by the early Ohio general assemblies confirmed and elaborated upon these basic rules but made no substantial change. They provided, for example, that a widow's right to dower in the real property of her husband "shall not be prejudiced by any devise thereof;" and that a widow for whom provision is made in her husband's will must elect "whether she will take by the will or by her right of dower." It was also the duty of the administrators of an intestate estate, after the payment of debts, to distribute to the widow that specified fractional part of all remaining goods and chattels for which these early statutes variously provided.

Under provisions such as these, the dower right vesting in the widow at her husband's death afforded her substantial protection as to all real property owned by the husband at any time during his life, whether he died testate or intestate; and the widower had the protection incident to a common-law estate by the curtesy. As to personal property, however, protection was substantially non-existent. The widow was entitled to a distributive share only in the event of intestacy; the widower had not even this.

Not until 1840 did the Ohio General Assembly enact legislation protecting the widow against complete disinherition with respect to her husband's personal estate. The statute then adopted gave to the widow who failed to take under her husband's will not only her dower but also "such share of the personal estate of her husband as she would be entitled to by law in case her husband had died intestate." Nearly fifty

12. 1 CHASE 66 (1833).
13. Despite the language employed, this provision did not confer upon a married woman the right to make a devise of land. Allen & Young v. Little, 5 Ohio 65 (1831). This right was granted, however, by statute in 1808. 1 CHASE 571 (1833).
14. 1 CHASE 571 (1833).
15. 1 CHASE 472 (1833).
16. See, e.g., 1 CHASE 496 (1833).
17. 1 CURWEN 685 (1853). By the terms of this first statute and all subsequent statutes until 1931, the widow, and subsequently the widower as well, was given an elective right only if some provision for the surviving was made in the will. However, in Doyle v. Doyle, 50 Ohio St. 330, 34 N.E. 166 (1893), it was held that the right of election was also available to a surviving spouse for whom no provision had been made by will.
years more elapsed before widowers were accorded the same protection and were also given the same dower rights as women in place of any estate by the curtesy.18

These dual statutory rights of the surviving spouse, to dower in the real property of the deceased spouse and to a distributive share of the personal estate, continued in effect without any basic change until 1931, when the Ohio probate code was completely revised.19 At that time dower in real property owned at death was abolished, and the statutes concerning descent and distribution and the elective right to take at law were amended to give to surviving spouses substantially the same unified interest in both real property and personal property accorded to them under existing law.20

**Ohio Decisions Prior to Bolles**

So long as the law accords to the owner of property freedom of disposition both during life and at death, neither the surviving spouse nor any other person taking by will or under the statutes of descent and distribution can complain simply because the estate remaining at death has been diminished by otherwise legally effective dispositions made by the property owner during life. Such persons are entitled only to the property actually remaining at death, not to what there might have been.

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18. Estates by the curtesy were abolished, and a dower right substituted, by the Married Woman's Act of 1887, supra note 7. Two years later the right of election to take a distributive share of personality was extended to widowers. 86 Ohio Laws 184 (1889).

19. 114 Ohio Laws 357 (1931).

20. Ohio Revised Code section 2105.06 (Supp. 1961) constitutes the basic Ohio statute of descent and distribution, providing in part as follows:

> "When a person dies intestate having title or right to any personal property or to any real estate or inheritance in this state, such personal property shall be distributed and such real estate or inheritance shall descend and pass in parcnery, except as otherwise provided by law, in the following course:

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

>  "(B) If there is a spouse and one child or its lineal descendants surviving, one half to the spouse and one half to such child or its lineal descendants, per stirpes;

>  "(C) If there is a spouse and more than one child or their lineal descendants surviving, one third to the spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes;

>  "(D) If there are no children or their lineal descendants, three fourths to the surviving spouse and one fourth to the parents of the intestate equally, or to the surviving parent, if there are no parents, then the whole to the surviving spouse."

Ohio Revised Code section 2107.39 sets forth the current basic provision for the surviving spouse's election to take at law:

> "After the probate of a will and filing of the inventory, appraisement, and schedule of debts, the probate court on the motion of the executor or administrator, or on its own motion, forthwith shall issue a citation to the surviving spouse, if any be living at the time of the issuance of such citation, to elect whether to take under the will or under section 2105.06 of the Revised Code. If such spouse elects to take under such section, such spouse shall take not to exceed one half of the net estate and . . . the balance of the net estate shall be disposed of as though such spouse had predeceased the testator."
Once it is decided, however, as a matter of public policy, that a surviving spouse should be protected from the "caprice or waywardness" of the deceased spouse by the right to some minimum interest in the decedent's estate of which the survivor cannot be deprived by will, the question arises whether there should be implied from the existence of this right any limitation upon the freedom otherwise possessed by the married property owner during life to make transfers or other arrangements for the disposition of property which substantially reduce the size of his estate at death. During the period of approximately one hundred years that elapsed between the 1840 legislation, which first gave to the Ohio widow electing to take at law the right to insist upon a distributive share of her deceased husband's personal estate, and the Ohio Supreme Court's decision in the Bolles case, there were five reported cases in the Ohio courts directly involving this question.

The first reported decision was rendered by the Superior Court of Cincinnati in 1859. An elderly married man made a deed in trust of all his personal property in favor of his grandchildren less than an hour before his death. Immediately before this deed of trust, a will had also been executed which made no mention of the testator's personal estate and merely devised his real property to his grandchildren subject to the dower right of his wife. When the widow, who apparently had been estranged from her husband, attacked the validity of the deed of trust on the ground that it had been made in fraud of her legal claim to a distributive share, the court decided in her favor. Although the court might have invalidated the trust on the ground that it constituted an ineffective testamentary disposition, it did not undertake to do so. Instead, the court held that the widow's right to a distributive share gave her the status of a quasi creditor who could not be prejudiced by the transfer, even though otherwise absolute, since it had been made for the purpose of defeating her statutory rights.

The next reported decision involving this question was rendered in 1890, when the Athens County Common Pleas Court had the occasion to consider a similar situation. An intestate decedent, during his last illness and at a time when he realized he would not recover, transferred to his only child (by a prior marriage) all of his personal property, worth $60,000 or more. After death, the administrators of his estate brought suit to set aside the transfer, alleging that the property had been transferred with the deliberate intent of depriving the widow of the intestate share to which she would otherwise have been entitled. In granting the defendant's motion to strike these and other allegations

22. Ibid.
from the petition on the ground of irrelevancy, the court took a view diametrically opposed to that taken in the 1859 decision. Asserting that the wife did not have the status of a quasi creditor by reason of the marriage contract or as a matter of the statutory or common law, and further asserting that her rights in her husband's property, both during his life and after his death, were only such as were given to her by statute, the court concluded that her sole interest in her husband's personal property arose at his death under the prevailing statute which gave to her, as next of kin of a husband who died intestate with a surviving child, the right to one-half of the first $400 and to one-third of the remainder of "the personal property which is subject to distribution upon settlement of the estate." Inasmuch as the legislature had not seen fit to give to the widow any inchoate interest in her husband's personal property during life, or to impose any limitation upon his freedom of inter vivos transfer, as a means of protecting the widow's statutory right at death, the court stated that even though the transfer in question had been made for the purpose of defeating the widow's right to an intestate share, its invalidation by the court would constitute improper judicial legislation granting to the widow a new right and would not merely protect her existing rights.

A year later the Ohio Supreme Court affirmed without opinion an unreported decision of the Circuit Court of Ashland County reversing a common pleas court judgment in favor of a widower who sought to attack a gift causa mortis of all chattel property which his wife had made to her sister shortly before death and after a substantial period of separation occasioned by her husband's failure to provide support. From published notes of the case, the circuit court appears to have concluded that since the Ohio law provided for dower only in real estate and not in personal property, a wife could make a gift of all her personal property in anticipation of death without making any provision for her surviving husband. Accordingly, it held erroneous a charge to the jury containing contrary instructions concerning the applicable law.

24. R.S. (Ohio) § 4176 (1880).
25. South v. Fair, 60 Ohio St. 595, 54 N.E. 1109 (1899).
26. 41 WEEK. L BULL. (Ohio) 343.
27. The erroneous portion of the charge, according to the circuit court, was as follows:
"The marriage relation is one of trust and confidence, and while each have an absolute dominion over their own separate personal property, the marriage is to be sacred and the law is too humane to permit either of them after the use and enjoyment of this property during all the healthful, active and useful years of life and in view of death, to give it away in any form to any person, however kind and near such recipient may be, without first making a reasonable provision out of such property for the survivor.
"So that if you find from a preponderance of all the evidence that the deceased wife, Louisa South, in contemplation of death and believing that she would not get well from her then present sickness, and of which she afterwards died, made a gift of this property to her sisters, the defendants, or either of them, without making any provision whatever for her
The remaining two decisions, involving the attempted invalidation for a widow’s benefit of inter vivos transfers made by her deceased husband, are of a more recent date. A 1943 decision by the Court of Appeals for Sandusky County involved an action brought by the administrator of an estate of an elderly incompetent widow, who had died three months after her husband, in which it was sought to set aside a transfer of all real and personal property which her husband had made to children by a prior marriage some five months before his death. In dismissing the petition, the court held that the 1931 revision of the Ohio probate code giving to the surviving spouse a share of the deceased spouse’s real estate in lieu of dower

placed no new restraints upon the rights of one in life to dispose of his or her property, and only preserved to the survivor a vested dower estate in any lands conveyed during marriage in which such survivor had not relinquished or been barred of dower.30

husband, the plaintiff, it is, in law, a fraud upon his rights, and he is entitled to recover in this action, however deserving you may find these defendants to have been for the care and attentions they bestowed upon their dying sister.” 41 Week. L. Bull. at 343. Since the Ohio Supreme Court affirmed without opinion, it is uncertain whether it approved the circuit court’s legal conclusions or merely the result reached. Although the question of inter vivos transfers was not involved, the opinion by Judge Minshall six years earlier in Doyle v. Doyle, supra note 17, intimated that a widow’s rights should be regarded as superior to those of a widower and cited with approval two decisions from other jurisdictions (both of which involved factual situations very similar to those presented in McCammon v. Summons, supra note 21) in which inter vivos transfers by a husband had been held “in fraud of her right.” See also Ward v. Ward, 63 Ohio St. 125, 57 N.E. 1095 (1900), where a widow was awarded dower in real property which, without her knowledge and immediately prior to their marriage, her deceased husband had transferred to children by a former marriage, the court holding it was a transfer made in fraud of her marital rights.

28. Two other relatively modern Ohio decisions involving the successful invalidation of inter vivos transfers should also be noted, although not strictly in point. Hayes v. Lindquist, 22 Ohio App. 58, 153 N.E. 269 (1926), involved a successful action brought by a widow, in her capacity as administratrix of her deceased husband’s estate, to set aside an inter vivos transfer which her husband had made to his sister of the record ownership of stock representing a controlling interest in a corporation with which the husband was closely associated. Finding that the purported transfer was merely “illusory and colorable” and had never been intended by the parties to be effectual (In other words a mere sham), the court held that the decedent’s estate, rather than his sister, was the real owner of the stock involved. There is some indication in the opinion, however, that a similar result might have been reached even though there had been reality of transfer so long as the donor had retained substantial dominion and control. Rose v. Rose, 34 Ohio App. 89, 170 N.E. 181 (1929), involved a transfer of a similar nature made by a husband to children by a former marriage at a time when he was separated from his wife, who subsequently was granted a divorce. Although, as in Hayes v. Lindquist, supra, the court found that the transaction was “a mere scheme or contrivance,” having as its object the appearance that “gifts were made when none was actually intended,” the court further stated that a wife who has been separated from her husband achieves the status of a quasi creditor and, as such, has rights in her husband’s property which she would not have if the parties were living together amicably.


30. Id. at 109, 55 N.E.2d at 138. The court further held that this vested dower right did not survive to the widow’s estate because she had failed to bring an action for its assignment during her life.
A 1938 decision\(^{31}\) by the Court of Appeals for Hancock County concerned the validity, as against the widow, of an otherwise irrevocable and legally valid conveyance of real property, in trust, which the husband had made during his life for the benefit of his descendants by a former marriage, reserving to himself a life interest therein. The court held that, from the standpoint of the widow's right to a statutory share of the husband's estate, the transfer was neither actually nor constructively fraudulent even though made for the purpose of defeating such right.\(^{32}\)

**Bolles Case**

Although the reported decisions mentioned above were not necessarily indicative of the position which might ultimately be taken by the Ohio Supreme Court, they did demonstrate that the lower courts were generally reluctant to detract from the married person's well established freedom of disposition by imposing any limitation which could only be implied from the surviving spouse's statutory right to a distributive share of the decedent's estate. If there was evidence establishing that the transfer was a mere sham,\(^{33}\) then, of course, the courts had every reason to invalidate it and treat the property involved as an asset of the transferor's estate, available not only to the surviving spouse but also to such other persons as might be entitled under the decedent's will or the statutes of descent and distribution. But where the transfer had, or was assumed to have, inter vivos reality, the courts seldom were willing to permit any invasion of the transferred property for the benefit of the surviving spouse, even though the transfer had been made shortly before death and with the acknowledged purpose of evading the surviving spouse's statutory rights.

It is in this setting, then, that one comes to *Bolles v. Toledo Trust Company*,\(^{34}\) which involved an intermediate situation not previously considered by the Ohio courts. In this case the transfer had reality, in that it was not a mere sham; but, on the other hand, it was not irrecoverable and was subject to the transferor's recall at any time during his life.

George A. Bolles was a man of substantial means who, in 1920, had married a widow with two small children.\(^{35}\) His wife apparently had


\(^{32}\) The court did, however, impress a lien on the transferred property to secure payment of the year's allowance for support awarded to the widow, holding that the transfer had been constructively fraudulent as against her right to such allowance, which the court concluded was held by her as a creditor. No consideration appears to have been given in the opinion to the question of whether the widow was not also entitled at least to a vested dower right in the real property, since it apparently had been conveyed without her consent.

\(^{33}\) As in the *Hayes* and *Rose* cases, *supra* note 28.

\(^{34}\) 144 Ohio St. 195, 58 N.E.2d 381 (1944).

\(^{35}\) These children were subsequently adopted by Bolles.
inherited a considerable estate from her deceased husband. A year later, a daughter was born of this marriage; and in 1928 Bolles created for her benefit at the Toledo Trust Company an irrevocable trust, known as Trust No. 328, to which he transferred $110,000 of life insurance plus $1,000 of stock.

Having thus provided for his daughter in the event of his death, Bolles two weeks later created at the Toledo Trust Company another trust, known as Trust No. 331, which had an initial corpus of only $4,000; and in 1930, three years before his premature death, Bolles created at the Toledo Trust Company a third trust, known as Trust No. 520, to which he transferred securities worth $80,000. Bolles reserved life interests in Trust No. 520 and in Trust No. 331, both of which were fully revocable and amendable by him during his life.\(^8\)

Concurrently with the creation of Trust No. 331, Bolles executed a new will bequeathing the entire residue of his probate estate to the Toledo Trust Company in augmentation of the corpus of this trust. The corpus of Trust No. 520 was to be added to Trust No. 331 upon Bolles’ death.

The only provision made for Mrs. Bolles in these complex arrangements was contained in the agreement establishing Trust No. 331. After Mr. Bolles’ death, Mrs. Bolles was to receive $500 monthly for her life, payable out of income or, if insufficient, out of principal. In addition, the trustee was authorized to pay to her, out of any excess income or out of principal, such sums as the trustee might deem necessary or proper to provide for her suitable support, or to take care of any sickness or other emergencies, taking into consideration her income from all sources.

Upon the death of Mrs. Bolles, the remaining principal of Trust No. 331 was to be added to Trust No. 328 for the daughter; and it was further provided that any trust property held under Trust No. 331 which the trustee should regard as excessive to satisfy the provisions for Mrs. Bolles could be added during her life to Trust No. 328 as well. By the terms of Trust No. 331, all payments to Mrs. Bolles thereunder were to be cancelled, and the trust was to be terminated as soon as possible, in the event she did not elect to take under the provisions of Mr. Bolles’ will.

Had the $500 monthly amount payable to Mrs. Bolles under Trust No. 331 been the only provision which Mr. Bolles had undertaken to make for her, there might have been good cause to believe that his complex dispositive arrangements had been designed to deprive Mrs. Bolles of what might otherwise have been regarded as a fair share of his assets.\(^9\)

36. No amendment to either trust was ever made, but Bolles apparently made several withdrawals from and additions to Trust No. 520. Unlike many typical revocable trust agreements, there was no provision reserving to Bolles any right of investment supervision, but there was testimony at the trial to the effect that he actually exerted substantially complete investment control over Trust No. 520.
However, this was not the case. In a safe deposit box under the joint control of Mr. and Mrs. Bolles, securities were found, then having a value of approximately $215,000 and constituting a substantial part of his total assets, which Mr. Bolles apparently believed he had effectively given to his wife. The securities were still registered in Mr. Bolles' name. Unfortunately, the Toledo Trust Company, as executor, felt obliged to take the position that no effective gift had been made. In an earlier decision the Supreme Court of Ohio had reluctantly held that Mr. Bolles had failed to take any action constituting a legally effective gift despite his belief that he had done so.\(^3\)

Pending a determination of the ownership of these securities, Mrs. Bolles filed in the Lucas County Court of Common Pleas an action by which she sought a determination either that the two revocable trusts were wholly invalid\(^3\) or that she would at least be entitled to a distributive share of the property in both of these trusts if she elected to take at law.\(^9\) After conflicting decisions in the common pleas court and in the court of appeals, this case finally reached the Ohio Supreme Court nearly eleven years after Mr. Bolles' death.

In the court's opinion, written by Justice Turner with the unanimous concurrence of four other members of the court,\(^4\) the principal question was stated to be:

> Whether, by the device of a revocable living trust, a husband relinquishes such dominion over the personal property in such trust as will bar his widow's right to a distributive share of such personal property upon her election to take under the statute of descent and distribution.\(^4\)

The court's answer to the question was a vehement "No!," with the result that Mrs. Bolles was held to have the right, if she elected to take at

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37. There were, in fact, two earlier Bolles cases, Bolles v. Toledo Trust Company, 132 Ohio St. 21, 4 N.E.2d 917 (1936) and Bolles v. Toledo Trust Company, 136 Ohio St. 517, 27 N.E.2d 145 (1940). The first of these cases arose pursuant to exceptions filed by Mrs. Bolles to the inventory of the executor. After failing to establish her ownership of the securities, she brought a second action alleging that the securities had been held by Mr. Bolles in trust for her benefit, but the court concluded that res judicata prevented any consideration of this claim.

38. This was predicated on the ground that they constitute mere agencies or were otherwise testamentary in character.

39. Mrs. Bolles was faced with a serious dilemma in any effort to secure for herself a financial interest in her husband's property of a size commensurate with his obvious intentions rather than merely the $500 monthly amount provided by Trust No. 331. If she elected to take under the will, her only chance to receive more than this monthly amount depended upon a judicial determination that the securities belonged to her. If she elected to take at law, she would receive at least an intestate share of these securities and such other assets as remained in Mr. Bolles' estate after payment of debts, taxes, and expenses; but she would lose her interest in Trust No. 331, as augmented by Trust No. 520, unless these trusts were found to be invalid at least as to her. As a means of resolving her dilemma, Mrs. Bolles sought and obtained an extension of the period provided for a widow's election until the several questions affecting her election had been judicially determined.


law, to the same distributive share of the property in the two revocable trusts at Mr. Bolles' death that she would have received had these trusts not been created.

Despite Mrs. Bolles' claims, the court held that these trusts were basically valid and were not mere agencies or ineffective testamentary dispositions. In reaching this conclusion, the court relied on an Ohio statute enacted in 1921\(^{42}\) which, according to a number of earlier decisions,\(^{43}\) had firmly established the validity in Ohio of inter vivos trusts "as to all persons," except creditors, even where the settlor reserves to himself a life interest and the power to amend or revoke. The court further acknowledged that in Ohio a husband has the statutory right to dispose of his personal property during his life without the consent of his wife. However, the court asserted that this right of a lifetime disposition could be used by a husband to deprive his wife of her statutory right to a distributive share of his property at death only where there had been "an absolute, bona fide disposition."

The creation of Trust No. 331 and of Trust No. 520 did not, in the court's view, constitute absolute, bona fide dispositions even though the trusts were otherwise valid. Instead, they were found by the court to be "illusory" as to the widow's rights\(^{44}\) and to constitute mere devices by which the husband could use and enjoy his property during life despite a technical divestment of title. Using broad language, the court indicated that the widow, irrespective of the husband's intention, should be able to

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\(^{42}\) That statute, Ohio Revised Code section 1335.01 (Supp. 1961), now provides:

"All deeds of gifts and conveyances of real or personal property made in trust for the exclusive use of the person making the same are void, but the creator of a trust may reserve to himself any use of power, beneficial or in trust, which he might lawfully grant to another, including the power to alter, amend, or revoke such trust, and such trust is valid as to all persons, except that any beneficial interest reserved to such creator may be reached by the creditors of such creator, and except that where the creator of such trust reserves to himself for his own benefit a power of revocation, a court, at the suit of any creditor of the creator, may compel the exercise of such power of revocation so reserved, to the same extent and under the same conditions that such creator could have exercised the same."

\(^{43}\) Schofield v. Cleveland Trust Co., 135 Ohio St. 328, 21 N.E.2d 119 (1939); Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N.E.2d 627 (1938); Union Trust Co. v. Hawkins, 121 Ohio St. 159, 167 N.E. 389 (1929). In the Schofield case the court held that under the statute even a creditor lost his rights once the settlor's death had occurred and the trust had become irrevocable, but any embarrassment which the court may have had in the Bolles case by reason of this decision was blithely overcome by the amazing statement that "a wife's right to elect to take under the law places her in a higher position than a mere creditor." Bolles v. Toledo Trust Co., 144 Ohio St. 195, 213, 58 N.E.2d 381, 391 (1944). In the Bolles case the court completely ignored a holding of the White case that a provision for charity made an irrevocable trust agreement executed less than a year before the settlor's death was not affected by the provisions of the Ohio probate code, Ohio Revised Code section 2107.06, which would have invalidated this provision had it been contained in the settlor's will.

\(^{44}\) Although the court stated that it was using the term "illusory" in the dictionary sense of "deceiving, or tending to deceive; fallacious, illusive," it is obvious that the court did not mean that the trusts lacked reality or constituted a sham. What the court apparently meant was that these two trusts, together with Bolles' will, constituted for all practical purposes a single testamentary package having no real significance during Bolles' life.
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invasive any device involving the retention of the husband’s dominion and control during life if the effect is to “cut down or deprive the widow” of her right to a statutory distributive share.45

The result reached in the *Bolles* case was at least equitable, in that it gave to Mrs. Bolles property constituting an apparently satisfactory substitute for the securities which the court had been reluctantly forced to conclude in its earlier decisions that she could not have. However, the apparent rationale of the decision reaching this result and the sweeping statements contained in the court’s opinion created consternation in legal circles. If the court really meant what it seemed to say, all revocable trusts were invalid per se as against attack by the settlor’s surviving spouse, irrespective of the facts or the equities involved. Moreover, if the decedent’s retention of any substantial measure of lifetime dominion or control was alone to be regarded as sufficient to support the surviving spouse’s claims, many other widely employed inter vivos arrangements for the disposition of property had also become vulnerable to attack at death.46

45. The first three paragraphs of the syllabus of the opinion in the *Bolles* case set forth the general rules announced by the court. They provide:

1. A husband may dispose of his personal property during his lifetime without the consent of his wife; but a husband may not bar his widow of her right to a distributive share of any property which he owns and of which he retains the right of disposition and control up to the time of his death.

2. Section 8617, General Code, which provides that a revocable and amendable living trust ‘shall be valid as to all persons’ except creditors, does not deprive the settlor of all dominion over the trust *rer so that* a widow electing to take under the statute of descent and distribution is barred from claiming a distributive share of the property in such trust.

3. The transfer of property to a trustee under an agreement whereby the settlor reserves to himself the income during his life with the right to amend or revoke, is valid by virtue of Section 8617, General Code, but under such a trust agreement settlor does not part absolutely with the dominion of such property and his widow electing to take under the statute of descent and distribution may assert her right to a distributive share of the property in such trust at settlor’s death.” 144 Ohio St. at 195, 58 N.E.2d at 383 (1944).

46. A number of such other inter vivos arrangements involving the retention of a substantial measure of dominion and control during life have been recognized in Ohio as valid and effective to accomplish the exclusion of the property involved from the decedent’s estate for probate and administration purposes. Joint and survivor accounts in banks and other financial institutions have long been regarded as effective for this purpose so long as there is evidence of an intent to transfer to the joint owner a present interest in the fund. See *Fecteau v. Cleveland Trust Co.* 171 Ohio St. 121, 167 N.E.2d 890 (1960), and cases cited therein. Legislation adopted in 1961 establishes the validity for the same purpose of so-called “P.O.D.” accounts in banks and other financial institutions, which are held in the name of the owner during life but are payable upon his death to another person. *Ohio Rev. Code* § 2131.10 (Supp. 1961). U.S. Savings Bonds similarly payable are also recognized as valid for these purposes. *In re Di Santo’s Estate*, 142 Ohio St. 223, 51 N.E.2d 639 (1943). Equally effective for these purposes would appear to be arrangements for the payment of post-death benefits to one or more named beneficiaries of life insurance policies, annuity contracts, and pension and profit-sharing plans. Although there appears to be no reported Ohio decision relating to the question, this conclusion is perhaps fortified by an amendment made in 1961 to the statute validating revocable trusts as to all persons except creditors, which added at the end a provision that a trust is not invalid because its corpus consists only of the “primary or contingent right to receive the proceeds of life insurance contracts, endowment contracts, or other contractual interests payable at death or by reason of death . . . .” *Ohio Rev. Code* § 1335.01 (Supp. 1961).
HARRIS CASE

Less than three years after its decision in the Bolles case, the Ohio Supreme Court in Harris v. Harris47 again had the occasion to consider a widow's claim to a distributive share of property held in a revocable trust created by her deceased husband during his life. The court was concerned with an inter vivos trust of one hundred shares of stock representing a twenty per cent interest in a closely-held corporation of which there were five equal shareholders. When placed in trust, the stock had a value of $40,000; and at the settlor's death three years later, it was worth $75,000. The settlor not only had retained a life interest in the trust property and the unrestricted power to revoke or amend but also had failed to give to the trustee, who was an individual, any investment powers. Moreover, pursuant to a provision in the trust agreement, the trustee three days later entered into a further trust agreement with the other four shareholders whereunder voting control over all 500 shares was vested in the five shareholders as trustees under this second agreement. The activities of the trustee were thus negligible.

No provision was made in the trust for the settlor's wife, who apparently had no knowledge of its existence prior to her husband's death. The beneficiaries were the children of the settlor's brother and a woman with an unindicated relationship to the settlor who was to receive $100 a month out of the trust estate after his death. Under another trust established by the settlor's will, the widow was entitled to $5,000 annually for life, payable out of income only; but the assets of this trust were sufficient to produce only a small fraction of this amount of income.

Once again the widow prevailed, although on this occasion three of the seven members of the court dissented despite the existence of a factual situation and equities more favorable to the widow's position than those involved in the Bolles case. The majority opinion was written by Chief Justice Weygandt, who gave a sweeping endorsement to the "rule of law" enunciated in the first three paragraphs of the syllabus48 of the court's opinion in the Bolles case. On the basis thereof, the court in the Harris case affirmed a decision of the court of appeals which held that the settlor had retained such dominion and control over the trust property as to make the trust ineffective to deprive the widow, who had elected to take at law, of her interest in the assets as the surviving spouse.49 In the dissenting opinions, positions were taken which fore-

47. 147 Ohio St. 437, 72 N.E. 2d 378 (1947).
48. See note 45 supra.
49. The syllabus of the opinion in the Harris case provides:
"Under the provisions of Section 8617, General Code, the transfer of property to a trustee is valid under an agreement whereby the settlor reserves to himself the income during his life with the right to amend or revoke; but when such settlor does not part with dominion and control over the trust property, his widow may elect to take under the statutes of descent
shadowed the position which the court finally adopted nearly fifteen years later in the *Smyth* case.\textsuperscript{50}

**Smyth Case**

As already indicated, the rules laid down by the Ohio Supreme Court in the *Bolles* case and endorsed by the majority opinion in the *Harris* case appeared to be applicable regardless of the husband's purpose or intent in making the inter vivos arrangements in question and regardless of the adequacy of any provisions made by the husband for his wife's benefit after his death. However, in each of these cases the factual situation actually involved was such that the widow, as a result either of the husband's design or of his mistake, would have been inadequately provided for had the court not permitted an invasion of the revocable trust in question. Any certainty as to how far the court would go in following the rules which it had announced had to await the court's opportunity to consider a situation where provisions for the widow were clearly adequate although not completely consistent with her statutory right to a distributive share. This situation was finally presented in *Smyth v. Cleveland Trust Company*.\textsuperscript{51}

In September 1949 Walter B. Smyth, a seventy-year-old resident of suburban Cleveland, Ohio, entered into a revocable trust agreement with the Cleveland Trust Company, transferring to it, as trustee, cash and miscellaneous securities then having an aggregate value of approximately $72,000. On several subsequent occasions Smyth made additions to the trust; and when he died on October 1, 1954, the trust assets had grown in value to approximately $136,000.\textsuperscript{52}

Except for substantial differences in the dispositive plan after the settlor's death, the arrangements embodied in the trust agreement for the management and disposition of the trust assets were similar to those involved in the *Bolles* case.

Subject to unrestricted rights of revocation and modification reserved by the settlor, broad powers and duties with respect to the investment and distribution and may assert her right to a distributive share of such property after his death. (Paragraph three of the syllabus in the case of *Bolles v. Toledo Trust Co., Exr.*, 144 Ohio St., 195, approved and followed.)” 147 Ohio St. 437, 72 N.E.2d 378 (1947).

\textsuperscript{50} There were two such dissenting opinions, one by Justice Zimmerman, and a second by Justice Matthias (not the Justice Matthias currently a member of the court) in which Justice Hart concurred.

\textsuperscript{51} 172 Ohio St. 489, 179 N.E.2d 60 (1961).

\textsuperscript{52} In addition to miscellaneous marketable securities, the trust assets held at Smyth's death included a residence occupied by Mr. and Mrs. Smyth which Smyth had purchased with funds withdrawn from the trust early in 1954. The residence was then added to the trust with Mrs. Smyth's consent. The trust assets also included a promissory note of Smyth's son and his wife secured by a mortgage on their residence, which Smyth had added to the trust in 1951 after he had withdrawn from the trust and lent to his son sufficient funds for the purchase of this residence.
and sale of trust assets and other administrative matters were vested solely in the trustee except in two respects: the trustee was permitted to make advances or borrow money during the settlor's life only after first obtaining his written consent; and, in connection with sales and purchases of securities, the trustee was directed, whenever practicable, to secure advance approval from the settlor or, if he should be deceased or otherwise incapable of acting, from either the settlor's wife or his son.\footnote{As previously indicated, these additional reserved rights were not included in the Bolles trust agreements.}

During the life of the settlor, the trustee was directed to distribute to him the entire net income from the trust property plus such further amounts from the principal as the trustee deemed proper or necessary for his maintenance, support, comfort, and enjoyment. Upon the settlor's death, the trustee was directed to pay out of the principal all estate and inheritance taxes assessed with respect to the trust property or any property passing under the settlor's will; and the remaining trust property was to be retained for the life benefit of the settlor's wife, with provision for the distribution to her of the entire net income plus so much of the principal as in the opinion of the trustee would be necessary for her care, maintenance, comfort, and support, the settlor expressing in the agreement the desire that his wife "be amply and comfortably provided for at all times." Upon the death of the survivor of the settlor and his wife, the trust property became distributable to the settlor's son, his only child, or, in the event of his prior death, was to be held for the life benefit of the son's wife, with ultimate distribution to his descendants.

Smyth also left a will, executed on the same day as the trust agreement, which gave to his wife his tangible personal property and left any residue of the probate estate to his son.\footnote{The will also devised to Mrs. Smyth the residence which Smyth then owned. However, this residence was sold shortly before Smyth's death and the proceeds added to the trust.} Mrs. Smyth was named executrix. Shortly after Smyth's death, the will was duly admitted to probate and Mrs. Smyth qualified as executrix. Because so much of Smyth's property had been placed in the trust, however, the total value of the gross probate estate was only $2,385 and was more than offset by funeral and other expenses and by the exempt property and year's allowance awarded to Mrs. Smyth. Accordingly, no property passed under the will either to Mrs. Smyth or to the son as residuary legatee.

Mrs. Smyth did receive, however, approximately $10,000 of life insurance which Mr. Smyth had made payable to her as beneficiary. She also became sole owner at Mr. Smyth's death of certain bank accounts and U. S. Savings Bonds having an aggregate value of approximately $27,000 which had been held in joint and survivorship form during his life.

At her husband’s death, Mrs. Smyth was a woman seventy-three years
old who had been happily married for over fifty years. Although her husband did not customarily discuss with her any business or financial affairs, and although she was not aware of the contents of the trust or of its precise terms prior to her husband's death, she did know that it had been established to avoid for her "any bother and trouble." It is thus improbable that Mrs. Smyth was surprised or disappointed after her husband's death over the arrangements made by him, which gave her the sole ownership of approximately $37,000 of cash and U. S. Savings Bonds and made her the sole life beneficiary of the entire trust property.

From the standpoint of Mrs. Smyth and her family, the only real disadvantage of the arrangements made by Mr. Smyth was that they failed to achieve the maximum marital deduction permissible under the federal estate tax laws. Mrs. Smyth's interest in the trust constituted a terminable interest with respect to which no marital deduction was allowable. As a result, the federal estate tax payable by reason of Mr. Smyth's death was approximately $10,000 more than it would have been under provisions accomplishing a maximum marital deduction.

Apparently for the primary purpose of achieving the tax saving which a maximum marital deduction would accomplish, Mrs. Smyth set out after her husband's death to acquire an outright interest in the trust property which would qualify for this purpose rather than the non-deductible terminable interest provided for her under the trust agreement. She first filed in the Cuyahoga County Probate Court a statutory election to take an intestate share in lieu of the provisions made for her by her husband's will. Then she filed in the Cuyahoga County Court of Common Pleas an action by which she sought to obtain a judgment declaring the trust invalid, at least as to her, and an order directing distribution of one-half of the trust property as her distributive share under the statutes of descent and distribution.

55. This factual material appears in the testimony of Mrs. Smyth during the course of the trial in the Cuyahoga County Court of Common Pleas.

56. The trust produced during the four years following Smyth's death an annual income averaging nearly $5,000 and had a value at the end of this period of approximately $190,000.

57. An assertion to this effect was made by counsel for Mrs. Smyth during the course of the trial.

58. The tax saving purpose of Mrs. Smyth's activities does not appear to have been expressly acknowledged or mentioned during the course of the litigation but has been informally substantiated by at least one of the parties.

59. Mrs. Smyth brought the action in her individual capacity, naming as defendants the Cleveland Trust Company, herself as executrix, her son and daughter-in-law and their three minor children, and the unborn and unascertained issue of her son. The son and daughter-in-law filed an answer acknowledging that Mrs. Smyth should be entitled to the distributive share claimed. The individual appointed as guardian ad litem for the minor children and as trustee for the unborn unascertained issue of the son filed a general denial. The Cleveland Trust Company filed an answer specifically denying the allegations in controversy and also filed a cross-petition affirmatively seeking a declaration by the court that the trust was a valid and subsisting trust, that no part of its assets constituted a part of Smyth's estate, and that Smyth's
Although not separately stated, Mrs. Smyth’s petition appears to have advanced two distinct grounds in support of her claim. On the one hand, it was alleged that “because of the reservations in said Trust Agreement and the control and powers reserved and exercised by the said decedent such agreement constituted no more than an Agency Agreement, and, therefore, terminated upon the decease of the creator thereof.” This contention was subsequently not strongly pressed, however, in the face of the statute\(^6\) and the prior decisions\(^6^1\) on which the supreme court had relied in the Bolles case for its decision upholding the basic validity of such a trust.

The second ground alleged in the petition was the one on which Mrs. Bolles and Mrs. Harris had earlier prevailed. Even though the trust should be held otherwise valid, Mrs. Smyth claimed, the dominion and control retained by the settlor during his life made the trust “colorable and illusory” and rendered the trust ineffective to deprive her of the distributive share of the trust assets which would have been hers as the result of her election to take at law had the trust property been included in her husband’s probate estate.

The case came to trial in the fall of 1958, and approximately a year later Judge Joseph H. Silbert, the trial judge, rendered his opinion.\(^6^2\) Although he found that “no fraud was shown as to the creation or continuance of said trust” and that, despite the rights and interests reserved by the settlor during his life, the trust was otherwise “a valid, continuing and subsisting trust” and did not constitute a part of Mr. Smyth’s probate estate, Judge Silbert concluded that the supreme court’s decisions in the Bolles and Harris cases were controlling. He held that, because of the dominion and control over the trust estates reserved by Mr. Smyth during his life, his widow was entitled, as a matter of law, to outright distribution of one-half of the net trust estate, in lieu of any other interest therein, by reason of her election to take a distributive share under the Ohio statutes of descent and distribution.

An appeal from the judgment of the trial court was taken by the Cleveland Trust Company on questions of law and fact. This appeal was heard by the Cuyahoga County Court of Appeals, which, by a split decision a year later, entered a decree for Mrs. Smyth for the same reasons advanced by the trial court.\(^6^3\) Judge Skeel, in dissent, distinguished the Bolles and Harris cases, however, on the basis that in those cases the de-

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\(^6^0\) See note 42 supra.
\(^6^1\) See note 43 supra.
\(^6^3\) Not reported.
cedents involved had not made provisions for the benefit of their respective widows as substantial as those made by Mr. Smyth.

A motion to certify the record was allowed; and on December 20, 1961, more than seven years after Mr. Smyth's death, the Ohio Supreme Court rendered its decision, reversing the judgment of the lower courts in the widow's favor and overruling the Bolles and Harris cases in no uncertain terms. The opinion was written by Judge Doyle, a member of the Summit County Court of Appeals sitting by designation, and had the unanimous concurrence of all five of the regular members of the court who participated.\(^{64}\)

In its opinion, the supreme court reviewed its prior decisions concerning the basic validity in Ohio of inter vivos trusts wherein the settlor had reserved not only a life interest and powers of revocation and amendment but also powers of approval or control of trust investments. On the basis of these decisions,\(^{65}\) and the Ohio statutory provision\(^{66}\) relied upon by the court in the Bolles case, the court concluded that the trust created by Mr. Smyth was not testamentary in character, and was not a mere agency, despite the extensive powers which he had retained during his life. Instead, the court concluded that there had arisen at the instant of the creation of the trust a vested equitable interest in the remaindermen named in the trust agreement which was merely subject to defeasance by the exercise of Mr. Smyth's reserved power to revoke or modify.

Having found that the trust was valid for all other purposes and was accordingly not "illusory" in any generally accepted sense of the word, the court concluded that there was no basis for giving the widow any preferential treatment simply because the trust agreement served to deprive her of the distributive share of the settlor's property which she would have been entitled to receive at his death had the trust not been created. In reliance on the Ohio statute\(^{67}\) relating to revocable inter vivos trusts, which expressly declares such trusts to be valid "as to all persons," excepting only the settlor's creditors during his life, and in further reliance on what the court believed to be the weight of authority in other jurisdictions, as stated in the Restatement of the Law of Trusts,\(^{68}\) the

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\(^{64}\) Except for Justice Zimmerman, who had written a strong dissent in the Harris case but had not participated in the decision in the Bolles case although then a member of the court, none of the judges who participated in the Smyth case had been members of the court when the Bolles and Harris cases were decided. The only other remaining member of the court at the time of the Bolles and Harris cases was Chief Justice Weygandt, who had written the majority opinion in the Harris case; but he did not participate in the Smyth decision. This substantial change in the composition of the court no doubt had much to do with the result reached.

\(^{65}\) See note 43 supra.

\(^{66}\) See note 42 supra.

\(^{67}\) Ibid.

\(^{68}\) In RESTATEMENT (SECOND), TRUSTS section 57 (1959) it is stated:

"Where an interest in the trust property is created in a beneficiary other than the settlor,
court rejected the rule of the Bolles and Harris cases, stating that the continued recognition of this rule in Ohio was not justified.

**Present State of Ohio Law**

As a result of the Ohio Supreme Court's decision in the Smyth case and its rejection of the rule of the Bolles and Harris cases, it is clearly the law of Ohio today that an otherwise valid revocable trust is not vulnerable to attack by the surviving spouse of the settlor simply because the settlor retained a life interest in the trust property and powers of revocation, amendment, and investment supervision. Moreover, the court's opinion in the Smyth case strongly implies that the Ohio statute validating such trusts as against all persons, except creditors, means precisely what it says and that under no circumstances, short of fraud, is the surviving spouse of the settlor of such a trust entitled to a distributive share of the property held thereunder at his death, regardless of the equities involved or the settlor's motives in establishing the trust.

Although the opinion in the Smyth case does not consider the question, it is also relatively clear in Ohio today that absolute, bona fide transfers of property are equally invulnerable to attack by the surviving spouse of the transferor, even though a life interest has been reserved. As already indicated, this appears to have been the prevailing view among the lower courts prior to the Bolles case; and even in that case the court, by the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust."

Among the Comments on this rule are the following:

"c. Restrictions on testamentary disposition. The rule stated in this Section is applicable although the trust is one which could not be created by will. If the owner of property transfers it inter vivos to another person in trust, the intended trust is not invalid merely because the settlor reserves a beneficial life estate and a power to revoke or modify the trust, even though he was prohibited by statute from creating a similar trust by will.

"Thus, if it is provided by statute that the wife of a testator shall be entitled to a certain portion of his estate of which she cannot be deprived by will (see § 146A), a married man can nevertheless transfer his property inter vivos in trust and his widow will not be entitled on his death to a share of the property so transferred, even though he reserves a life estate and power to revoke or modify the trust. Where, however, an outright gift would not operate to deprive the wife of her distributive share, a trust created under the same circumstances would be equally ineffective.

"d. Purpose of the settlor. A trust in which the settlor reserves the beneficial life estate and a power to revoke and modify the trust is not invalid for failure to comply with the requirements of the Statute of Wills merely because the purpose of the settlor in creating the trust was to avoid the requirements of the Statute of Wills or to avoid the necessity of probate administration, or to avoid restrictions on testamentary dispositions."

69. The supreme court reiterated the finding of the trial court that no fraud was involved.

70. Since the Bolles case, there have been three additional reported decisions in the lower courts involving a widow's claim to a distributive share of property irrevocably transferred by the husband during his life: Neville v. Sawicki, 64 N.E.2d 685 (Ohio Ct. App. 1945), aff'd, 146 Ohio St. 539, 67 N.E.2d 323 (1946); MacLean v. J. S. MacLean Co., 123 N.E.2d
way of dictum, flatly stated that a widow may not assert her right to a distributive share of personal property of which her husband made an absolute, bona fide transfer during his life. There is no reason to believe that in the Smyth case the court intended to reject this dictum. On the contrary, it would indeed be an anomaly if there were accorded to a surviving spouse greater rights with respect to absolute transfers than those afforded with respect to revocable transfers in trust.

Still to be considered is the present state of Ohio law as it affects the right of a surviving spouse to a distributive share of funds or property payable or held at the deceased spouse's death pursuant to any of the numerous other types of dispositive arrangements which an individual may adopt during life as a means of retaining a substantial measure of lifetime economic enjoyment and control and, at the same time, accomplishing the exclusion of the funds or property involved from his estate for probate or administration purposes. Many of these devices, such as joint accounts with provision for survivorship and life insurance contracts, to name only two, are far more widely employed as will substitutes by the average individual than either absolute inter vivos transfers or revocable trusts.

Prior to the Ohio Supreme Court's decision in the Bolles case, there were no reported decisions in Ohio involving this question, and it appears generally to have been assumed that unless the property involved in any such arrangement was otherwise includible in the decedent's estate for probate or administration purposes, it was no more vulnerable to attack by the surviving spouse than by any other person. As already mentioned, however, serious doubts concerning the validity of this assumption arose by reason of the sweeping language in the opinion of the Bolles case, indicating that the surviving spouse had the right to insist upon a distributive share of property held pursuant to any device involving the retention by the deceased spouse of lifetime dominion and control.71

71. In Guitner v. McEowen, 99 Ohio App. 32, 124 N.E.2d 744 (1954), decided since the Bolles case, the Court of Appeals for Darke County held that neither the widow nor the estate of an intestate decedent acquired any interest in a joint and survivorship bank account which the decedent had created with his sister. Although the decedent did not manifest an intent to divest himself of all his right in the account by way of gift inter vivos, his delivery of the passbook to the surviving joint owner prior to his death established that he did not retain any control or interest in the account "at variance with the terms under which it was opened." Id. at 38, 124 N.E.2d at 748. This fact apparently served to distinguish the Bolles case.
Although the *Smyth* case involved a revocable trust and the Ohio Supreme Court's decision was apparently based in large part upon the conclusion that surviving spouses were included among the persons against whom a revocable trust is expressly made valid by statute, there is at least strong reason to conclude from the tenor of the court's opinion that the dominion and control test which it so unequivocally rejected in connection with revocable trusts will be likewise rejected in connection with any of the other inter vivos arrangements generally recognized as valid under Ohio statutory or case law. This conclusion is fortified, moreover, by the fact that in those other American jurisdictions where many of these various inter vivos arrangements have been judicially reviewed in connection with claims for a distributive share made by a surviving spouse, there has been an even greater reluctance to permit an attack in situations such as these than where a revocable trust or even an absolute transfer is involved. As recently as 1958, for example, one author who attempted to examine all the previously reported cases in every American jurisdiction was unable to find any decision permitting the surviving spouse to set aside or invade an otherwise valid joint bank account, nor was he able to find any case not involving unusual factors in which a surviving spouse was permitted to invade life insurance proceeds payable to a designated beneficiary.

It thus appears, under the present Ohio law, that the property, of which the surviving spouse is entitled to a distributive share in the event of intestacy or an election to take at law, is limited in almost every situation to the property otherwise comprising the decedent's estate for probate or administration purposes. The distributive share does not extend to property which, by reason of transfers or other arrangements made by the decedent during life, is otherwise property excludible from the estate.

In the *Smyth* case, the supreme court was careful to reiterate the finding of the trial court that no "fraud" was involved. This absence of "fraud" is very commonly emphasized by the courts in many jurisdictions whenever a surviving spouse's claim is denied, the implication being that a different result would have been reached if "fraud" had been present. Although an infinite variety of meanings has been attributed to this word in evasion cases by American courts, it appears in a number of such cases where strong equitable considerations dictated the necessity of finding some basis for allowing the surviving spouse to prevail that the court justified its decision simply by finding the existence of what approximated constructive fraud without any specific point of reference. If it is per-

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72. MacDonald, *Fraud on the Widow's Share* 212-45 (1960), contains a detailed discussion of these matters. Other portions of the treatise exhaustively consider other aspects of the evasion problem.

73. *Id.* at 217, 235-42.
possible for the Ohio courts to rely on a finding of fraud in this vague, undefined sense, there may still exist in Ohio the opportunity of achieving an equitable result in the "hard" case, such as one involving a deserving widow who would otherwise be left substantially penniless or whose husband had made inter vivos arrangements of a particularly unreasonable or reprehensible nature.

**NEED FOR LEGISLATIVE ACTION**

It is no doubt relatively easy in Ohio, as the critics of the *Smyth* decision suggest, for the scheming husband to disinherit his wife by the deliberate use of various will substitutes. It is also entirely possible that a widow may be unintentionally disinherit by her husband, as Mrs. Bolles presumably would have been had the Ohio Supreme Court taken the view since adopted in the *Smyth* decision.

This does not mean, however, that the court decided the *Bolles* and *Harris* cases correctly and the *Smyth* case incorrectly. On the contrary, responsibility for the indignation which the *Smyth* case has caused must rest with the court in the *Bolles* case. Had it simply adopted some equivocal rule designed to achieve the desired result on the facts involved, or even if it had adopted a dominion and control test limited in application to those cases where special consideration for the widow is warranted, there would probably have been no *Smyth* case to decide. But when the court in the *Bolles* case adopted a sweeping rule which not only was plainly inconsistent with existing statutes but also seemingly gave to surviving spouses extensive rights to attack inter vivos transfers without regard to where the equities lay, it lit a slow but steadily burning fuse for the explosion which the *Smyth* case ultimately produced.\(^\text{74}\)

It is true, of course, that the court in the *Smyth* case could also have restrained itself and avoided any complete reversal of the *Bolles* rule simply by placing limitations on that rule or adopting in its place some other rule of a more or less equivocal nature which would warrant the denial of any claim such as Mrs. Smyth's but still providing a basis on which particularly deserving widows might succeed in future cases. Why the court failed to take this more limited action is a matter for speculation.

Since the *Bolles* rule had been in effect for seventeen years, it is possible that the court may have concluded that it could not effectively dispel the many uncertainties produced by the *Bolles* case and at the same time provide for the deserving widow or other surviving spouse rights with

respect to inter vivos transfers having any real significance. Accord-
ingly, the court may deliberately have decided that, in this area where a substantial degree of certainty is clearly desirable, it could best be achieved by flatly rejecting the Bolles rule as inconsistent with existing Ohio statutes and by adopting in its place a rule restricting the surviving spouse, in almost every situation, to a distributive share of the decedent's actual "estate." Within this framework the legislature could then provide by statute for surviving spouses such protection against inter vivos transfers as it might choose to give.

It will be unfortunate if the legislature, as a matter of political expediency, responds to the court's implied invitation by adopting some hastily conceived measure designed to satisfy the demands of those who fear that widespread disinherition of widows may otherwise immediately result. In the light of past experience and the low incidence of reported Ohio decisions involving the evasion problem prior to the Bolles case, there is little reason to conclude that there will be any sudden increase in the use of evasive inter vivos arrangements as the result of eliminating the Bolles rule from Ohio law.

This is not to say that the legislature should ignore the question. The rights of election accorded to surviving spouses under existing Ohio law have their origins in legislation enacted well over a century ago and were designed to meet the social and economic needs of a predominantly rural and relatively uncomplicated society where property interests were confined largely to land and chattels, and inter vivos arrangements for their disposition were necessarily limited. As a result, the time may well have come for a complete reappraisal of all aspects of this right of election and the purpose which it should serve in our modern society. Only after such a reappraisal has been made can any intelligent conclusion be reached concerning the nature and scope of the changes that may be warranted, including changes designed to prevent evasion by inter vivos arrangements.

Under the existing law a surviving spouse is always entitled, unless the right has been effectively relinquished by an ante-nuptial agreement, to renounce the deceased spouse's will and to take outright either a one-third or a one-half share of the items of real and personal property remaining in the deceased spouse's probate estate after the payment of debts, taxes, and expenses. In other words, the law appears to regard the surviving spouse of either sex as having an absolute right to an arbitrary share of the deceased spouse's property simply by reason of the marital relationship. Whether this is desirable is one of the questions which any reappraisal of the right of election should involve.

75. See MACDONALD, supra note 72.
There are a number of reasons for concluding that a change in this respect is warranted. First, there is no reason why a surviving spouse should have any right of election if the decedent's will gives to the surviving spouse property having a value equivalent to the property which the surviving spouse would be entitled to receive pursuant to an election to take at law. Yet, it is possible under the existing provisions for a surviving spouse, either out of spite or out of a desire to receive a distributive share of an asset specifically devised or bequeathed to a third person, to insist upon this result and thus frustrate the decedent's intentions.

Secondly, there is serious question whether the surviving spouse should necessarily be entitled to insist upon an outright share of the deceased spouse's property if the decedent has instead undertaken to create for the surviving spouse's benefit a testamentary trust of a commensurate amount of property. This is the rule currently prevailing in New York, where a statute was enacted in 1930 which deprives the surviving spouse of any right of election if the will gives him or her at least $2,500 outright and the income for life from a trust of a principal sum equal to the difference between the surviving spouse's intestate share and the amount of the outright bequest. Such a provision does involve the abandonment of any notion that the surviving spouse is entitled to an absolute share in the deceased spouse's property simply by reason of the marital relationship. It adopts instead the premise that the purpose of the elective right is satisfied if sufficient provision is made for the surviving spouse's continuing support comparable to the support which the widow enjoyed under the common law and the Ohio statutes prior to 1931 as the result of her dower right to a life estate in one-third of the deceased husband's real property. Unless a community property concept is adopted as to property acquired during the marriage presumably through the spouses' joint efforts, there is little basis in reason for concluding that a surviving spouse should be entitled to any more than such a life interest. Every lawyer has encountered countless situations where, because of mental instability or lack of financial experience, it would be palpably contrary to the surviving spouse's own best interests, as well as the best interests of the other members of the decedent's family, for the surviving spouse to elect to take an outright distributive share at law and thereby upset a program carefully designed by the deceased spouse to meet the surviving spouse's real needs.

76. N.Y. DEC. ESTATE LAW § 18 (1930).
77. Situations of this sort are aggravated when the surviving spouse is under a legal disability because of the Ohio statutory provision requiring the probate court to make on behalf of such spouse that election which the court shall determine "is better for such spouse." OHIO REV. CODE § 2107.45. The courts appear to make this determination almost entirely on the basis
It is likewise questionable whether the share of the surviving spouse should in all events be either one-third or one-half, depending only upon the number of children or their descendants. In the case of the small estate, the widow at least should perhaps have a larger share of the total, particularly if there are no children or the surviving children are no longer dependent. Provisions for the year's allowance and for property exempt from administration scarcely give to the widow the additional protection which she perhaps should have in such cases.

Likewise, in the case of the very large estate, it is questionable whether the surviving spouse should be entitled to as much as one-third in all events. If, for example, a man having a wife and one child leaves an estate of $10,000,000, inherited from his family, and decides to give half to charity, it is difficult to justify the widow's right to insist upon an outright distribution of a half also, with the result that either the child receives nothing or the decedent's charitable purposes are substantially frustrated.

Another question that might be considered is whether the surviving spouse of a second or subsequent marriage of the decedent should have elective rights as extensive as those available to the surviving spouse of a first marriage, particularly if there are surviving lineal descendants of the first marriage. North Carolina, at least, has decided that a surviving spouse should have lesser rights in such a case. Considerations of a similar nature may also dictate the desirability of according lesser rights to surviving husbands than are accorded to widows, particularly if the surviving husband has substantial property of his own.

Whatever conclusions may be reached in connection with the questions already mentioned, it is believed that inter vivos arrangements made by the deceased spouse for the surviving spouse's benefit should generally be taken into account in determining the extent of the rights of the surviving spouse who elects to take at law. If, following the New York practice, any right of election is denied to a surviving spouse for whom the deceased spouse has made such minimum provision as the law may specify as adequate, it is believed that inter vivos arrangements for the surviving spouse should be taken into account for this purpose as well. Under existing law such inter vivos arrangements are entirely ignored.

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If, for example, a woman of substantial means with one child gives $500,000 to her husband and dies a month later with a “net estate” of another $500,000, the husband nevertheless has the right to elect to take at law and thereby receive one-half of the net estate in addition to the inter vivos gift.\(^7\)

**Possible Legislative Solutions**

Once decisions of policy have been made concerning such basic aspects of the right of election as those mentioned, statutory protection against evasion of the right of election can conceivably be accomplished in a number of ways.\(^8\) One form of solution of the evasion problem, adopted by several states, involves the application of a “fraud” test to the decedent’s inter vivos arrangements. As far back as 1784, Tennessee enacted such a statute, which is still in effect. It provides:

Any conveyance made fraudulently to children or others, with an intent to defeat the widow of her dower, or distributive share, shall be voidable, and such widow shall be entitled to dower in the land so fraudulently conveyed, as if no conveyance had been made.\(^8\)

Vermont has a similar statute which is limited, however, to conveyances that not only are made with intent to defeat the widow’s share but also did not take effect until after the husband’s death.\(^8\) A recent Missouri statute also adopts a “fraud” test as applied to both husbands and wives, providing in part:

Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse’s share, as in case of his election to take against the will.\(^8\)

Necessarily, not every inter vivos gift by the deceased spouse can be taken into account, and any statutory provision will accordingly have an arbitrary effect that may or may not be entirely reasonable in any given case.

It is assumed in this article that a solution of the evasion problem and of the other aspects of the right of election question can be achieved within the basic framework of existing statutes and that it is neither necessary nor expedient to adopt an entirely different approach. Accordingly, no attempt is made to discuss such solutions as those embodied in the family maintenance legislation adopted by England and by several members of the British Commonwealth, or various suggested variations of such legislation, which do not recognize any right of election as such, but instead vest in the court broad discretion to make out of the decedent’s estate such awards for the maintenance of the surviving spouse and other dependents of the decedent as the court thinks fit. In effect, this form of solution gives to the courts discretion to remake the decedent’s will or vary the intestacy laws to such extent as may be necessary to effect an equitable result on a case by case basis. For a discussion of this family maintenance legislation and a suggested variation thereof, see Macdonald, supra note 72.

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81. TENN. CODE ANN. § 31-612 (Williams 1956).

82. VT. STAT. tit. 13, § 3039 (1947).

83. MO. ANN. STAT. § 474.150 (1956).
A rebuttable presumption of fraud as to conveyances of real property is also provided.

Statutes such as these accomplish little more than legislative recognition that a married person does not have complete freedom to dispose of property during life and that inter vivos transfers without adequate consideration may be deemed to have been made in fraud of the marital rights of the surviving spouse. It remains with the courts to determine in any specific case whether, in the light of all the facts, the inter vivos transfer involved was fraudulent. Proponents of this form of statute apparently not only believe that the lack of any definition of fraud contributes to the achievement of an equitable result but also conclude that no statute could adequately indicate all the situations in which fraud might properly be found.84 In Ohio, however, the enactment of a statute of this kind would unquestionably lead to much initial confusion and uncertainty inasmuch as there is substantially no existing case law on which the development of a "fraud" concept in this area could be based.

If "fraud" is to be the test adopted as a solution of the evasion problem, it appears that some statutory definition of this term should be attempted even though it is limited to certain frequently occurring situations and the courts are given substantial discretion in other situations not specifically covered. A report made in 1939 by the Commission on Revision of the Laws of North Carolina Relating to Estates85 contains a proposal along these lines. By this proposal (which is limited to the rights of widows), any gratuitous transfer of property by a husband not assented to by his wife is deemed to be in fraud of the wife if the husband retains a power to revoke either alone or in conjunction with any other person, or if the transfer is made in contemplation of the husband's death which takes place within a year. Transfers within a year of death are rebuttably presumed to be in contemplation of death.

Turning from the "fraud" test, one finds in Pennsylvania a relatively recent statute which approaches the problem of evasion by inter vivos arrangements from the standpoint of whether the arrangements constitute a "testamentary disposition." As originally enacted, this statute provided in part:

A conveyance of assets by a person who retains a power appointment by will, or power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned.

84. As expressed in a comment thereto, this was the conclusion reached in drafting that portion of the Model Probate Code relating to gifts in fraud of marital rights, which suggests the same provisions adopted by Missouri, except that it further contains a rebuttable presumption that any gift made by a married person within two years of death is in fraud of the marital rights of the surviving spouse. MODERN PROBATE CODE § 33 (1946).
85. REPORT OF THE COMMISSION ON REVISION OF THE LAWS OF NORTH CAROLINA RELATING TO ESTATES, § 5 (1939).
to the extent to which the power has been reserved, but the right of
the surviving spouse shall be subject to the rights of any income ben-
eficiary whose interest in income becomes vested in enjoyment prior to
the death of the conveyor... 86

In 1956, as the result of a court decision indicating that a contrary
result would otherwise be achieved, 87 the legislature was persuaded to add
a provision excluding from the operation of the statute "any contract of
life insurance purchased by a decedent, whether payable in trust or other-
wise." 88 At the same time it added a provision requiring a spouse who
wished to take advantage of this statute to elect to take against the de-
ceased spouse's will and also against any conveyance within the scope of
the statute of which the surviving spouse was a beneficiary. "Conveyance"
is defined in this statute as "an act by which it is intended to create an
interest in real or personal property whether the act is intended to have
inter vivos or testamentary operation." 89

This statute constitutes the legislative adoption of a dominion and
control test extremely similar to the test which the Ohio Supreme Court
appeared to have adopted in the Bolles case. If the life insurance exclu-
sion added by the 1956 amendment were eliminated or modified 90 and
if provision were also made for the treatment, as testamentary disposi-
tions, of certain absolute inter vivos transfers involving no retention of
dominion or control, such as those apparently made in contemplation of
death or involving an unreasonably large amount of property, substan-
tially complete protection of the surviving spouse would be achieved. 91

The suggestion is reiterated, however, that the adoption of any all-
inclusive evasion statute such as this would afford to the surviving spouse
far more protection than is warranted unless it also provided that inter
vivos arrangements made for the surviving spouse by the decedent are
taken into account in determining whether and to what extent an elective
right exists.

89. PA. STAT. ANN. tit. 20, § 301.1 (1950).
90. A possible compromise of the evasion problem as it relates to life insurance proceeds
would be to subject to the surviving spouse's claims only the cash surrender value at the
decedent's death. This is the approach taken in Switzerland. SWISS CIVIL CODE § 476
(Williams 1925).
91. Another approach producing substantially the same result is that adopted by those
provisions of the federal estate tax laws which relate to the determination of the "gross estate." INT. REV. CODE OF 1954, §§ 2031-44. This approach has been suggested by several writers.
SIMES, PUBLIC POLICY AND THE DEAD HAND 28-31 (1955). As Professor Simes sug-
gests, however, it may not be appropriate to subject to the claims of a surviving spouse all
of the inter vivos transfers falling within the purview of federal estate tax legislation, such
as absolute transfers made by a decedent a substantial period of time before death where only
a life interest has been retained.