Bill Analysis

Lisa Sandberg *Legislative Service Commission*

Sub. H.B. 51*

125th General Assembly
(As Reported by S. Judiciary on Civil Justice)

Reps. Hughes, Willamowski, Oelslager, Harwood, Book, Brown, Carmichael, C. Evans, Fessler, Flowers, Gilb, Hartnett, Latta, Martin, McGregor, T. Patton, Perry, Reidelbach, Schmidt, Schneider, Skindell, S. Smith, D. Stewart, Yates

BILL SUMMARY

- Specifically permits a surviving spouse to waive in writing the service of the citation to elect whether to exercise the surviving spouse's statutory rights, including the right to elect to take under the will or under the Intestate Succession Law, and requires the probate court to serve the citation on the surviving spouse pursuant to Civil Rule 73.

- Requires the certificate of giving notice of the admission of the will to probate to be filed with the court not later than two months after the admission of the will to probate, if no fiduciary has been appointed.

- In an estate of a decedent in which the sole legatee, devisee, or heir is also the administrator or executor of the estate, requires the administrator or executor to file a final account or final and distributive account or, in lieu of filing a final account, permits the filing of a certificate of termination of the estate within 30 days after the completion of its administration.

- Requires the creditors of an estate to present their claims, if the final account or certificate of termination has been filed, in a writing to those distributees of the estate who may share liability for the payment of the claims.

---

* *This analysis was prepared before the report of the Senate Judiciary on Civil Justice Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- Requires the creditors of an estate to present their claims within six months after the death of the decedent.

- Requires that the executor's or administrator's notice on the account that is delivered to each distributee indicate that the distributee may be liable to the estate if a claim is presented prior to the filing of a final account and may be liable to the claimant if the claim is presented after the filing of the final account.

- Requires an administrator or executor filing an account of an estate to file with the probate court a certificate of service of account prior to or simultaneously with the filing of the account.

- Authorizes a probate judge to establish by rule procedures for the resolution of disputes, including mediation, between parties to any civil action or proceeding within the probate court's jurisdiction and to charge and collect additional filing fees, not to exceed $15, to be used to implement the procedures.

- Specifies the date when the General Assembly intended the Revised Code sections in Section 2 of Sub. H.B. 85 of the 124th General Assembly to be repealed.

- Enacts mechanisms for taking and using in a criminal proceeding or delinquent child proceeding depositions, including videotaped depositions, of a victim of specified offenses who is a mentally retarded or developmentally disabled person.

- Provides for closed circuit telecast into the courtroom of testimony of such a victim that was taken outside the courtroom, recording the testimony of the victim for showing in the courtroom, and, in criminal proceedings, use of preliminary hearing testimony.

- Creates the offense of patient endangerment, which prohibits an "MR/DD caretaker" from creating a substantial risk to the health or safety of a mentally retarded or developmentally disabled person and prohibits a person who owns, operates, administers, or is an agent of a care facility from condoning or knowingly permitting any such conduct by an MR/DD caretaker under that person's control.

- Provides certain exemptions and affirmative defenses to the patient endangerment offense, including exemptions regarding treatment by spiritual means through prayer alone, in accordance with the tenets of a recognized religious denomination.

- Specifies that an "MR/DD employee" cannot engage in any sexual conduct or have any sexual contact with a person with mental retardation or another developmental disability for whom the employee is employed or under a contract to provide care and who is not the MR/DD employee's spouse.

- Requires the Department of Mental Retardation and Developmental Disabilities (DMRDD), each county board of mental retardation and developmental disabilities, and other specified persons to annually notify each MR/DD employee of the conduct for which an MR/DD employee may be included in the registry regarding misappropriation, abuse, neglect, or other misconduct by MR/DD employees.

- Requires each county board of mental retardation and developmental disabilities to prepare a memorandum of understanding related to abuse, neglect, and exploitation of persons in the county who are mentally retarded or developmentally disabled.

- Modifies provisions of current law regarding reporting of abuse or neglect of a person with mental retardation or a developmental disability by: (1) requiring a person in any profession that is subject to the mandatory reporting requirement to make a report when the person has reason to believe that a person with mental retardation or a developmental disability faces a substantial risk of suffering any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect, (2) revising the entity to which the mandatory reports must be made, or the discretionary reports may be made, in specified circumstances, (3) limiting the application of the mandatory reporting provisions to clergymen and persons who render spiritual treatment through prayer to circumstances in which they are employed in a position that includes providing specialized services to an individual with mental retardation or another developmental disability and are acting in that capacity, (4) adding a limited exemption from the mandatory reporting requirement for attorneys and physicians, (5) specifying that any person who fails to make a report under the mandatory reporting provisions is

eligible to be included in the registry regarding abuse by MR/DD employees, (6) requiring investigations of a mandatory or discretionary report by a law enforcement agency or DMRDD to be in accordance with the memorandum of understanding, (7) revising the penalties provided for specified violations of the reporting law, (8) requiring a county board that receives a report in circumstances it believes are an emergency to attempt a face-to-face contact with the alleged victim within one hour, and (9) requiring DMRDD to adopt rules under the Administrative Procedure Act that provide standards for the substantiation of reports of abuse or neglect filed under the mandatory and discretionary reporting provisions.

- Revises provisions of current law regarding reports of abuse, neglect, and misappropriation of property by an MR/DD employee and the registry of employees who have engaged in such conduct by: (1) requiring DMRDD to review a report it receives from a prosecutor when DMRDD receives it, (2) modifying the matters a hearing officer must determine at a hearing conducted regarding the report and requiring the hearing officer and Director to consider any relevant facts presented at the hearing, (3) repealing the prohibition against DMRDD's Director including in the registry of MR/DD employees an individual who has been found not guilty of an offense arising from the same facts as the allegation in question, (4) requiring that the disposition of a criminal proceeding regarding the same allegation be noted on the registry next to the employee's name, (5) providing qualified immunity for persons and government entities that fail to hire or retain a person based on a finding that there is a reasonable basis for the allegation in the report, (6) specifying that, if the Administrative Procedure Act requires DMRDD to give notice of an opportunity for a hearing and the employee subject to the notice does not timely request a hearing, DMRDD is not required to hold one.

- Requires the prosecutor, in any case involving a victim that the prosecutor knows is a mentally retarded or developmentally disabled person, to send written notice of the charges to DMRDD.

- Modifies provisions regarding a probate court's issuance of an order authorizing a county board of mental retardation and developmental disabilities to arrange services for an adult with mental retardation or a developmental disability by: (1) extending the period for the provision of

services under the order to six months and extending the possibility of renewal of the services to an additional six months, (2) enacting provisions regarding *ex parte* emergency orders for protective services by a probate court or magistrate on receipt of a notice from the county board or an authorized employee of the county board, (3) enacting provisions regarding temporary orders related to protective services, and (4) providing procedures and guidelines regarding the orders.

- Expands the list of convictions for which the Bureau of Criminal Identification and Investigation checks when conducting a records check of persons under final consideration for appointment or employment with DMRDD, county boards of MR/DD, or entities under service contracts with a county board and the list of disqualifying offenses to include the offense of patient endangerment.

- Requires specified health care, emergency, and law enforcement personnel to notify the office of the coroner when any mentally retarded or developmentally disabled person dies.

- Permits DMRDD or a county board of MR/DD to seek a court order for an autopsy or post-mortem examination if a person with mental retardation or a developmental disability dies under circumstances DMRDD or the county board has a good faith reason to believe are suspicious and the coroner, after being apprised of the circumstances, declines to conduct an autopsy.

- Clarifies that a provision requiring a court to appoint an interpreter to assist a party or witness to a legal proceeding applies to the language and descriptions of any mentally retarded or developmentally disabled person who cannot be reasonably understood, or who cannot understand questioning, without the aid of an interpreter.

- Provides evaluation standards for the appointment of interpreters that must be complied with before the appointment, requires interpreters to take a special oath, and permits an interpreter to aid the parties in formulating methods of questioning the person with mental retardation.

- Expands the professions that are subject to the mandatory child abuse and neglect reporting provision to include superintendents, board members, and employees of a county board of mental retardation and

developmental disabilities, investigative agents contracted with by a county board, and employees of DMRDD.

TABLE OF CONTENTS

CONTENT AND OPERATION

Election by surviving spouse to exercise rights

Existing law

Citation to make the election. R.C. Chapter 2106. grants a surviving spouse certain rights and the right to make an election regarding the exercise of those rights. After the initial appointment of an administrator or executor of the estate, the probate court must issue a citation to any surviving spouse to elect whether to exercise the surviving spouse's rights under that chapter, including, after the probate of a will, the right to elect to take under the will or under the Intestate Succession Law. The citation is accompanied by a general description of the effect of the election to take under the will or under the Intestate Succession Law and the general rights of the surviving spouse. The description must include a specific reference to the following: (1) the procedures available to the surviving spouse to file a complaint requesting the construction of the will in favor of the surviving spouse and (2) the presumption that the surviving spouse elects to take under the will if the surviving spouse does not make the election before the expiration of five months from the date of the initial appointment of an administrator or executor of the estate. The *description of the general rights* of the surviving spouse must include a specific reference to the presumption that the surviving spouse has waived any right not exercised within five months after the initial appointment of the administrator or executor of the estate or within any longer period of time allowed by the probate court if the surviving spouse *does not make the election* within that time period. The description of the effect of the

election and of the general rights of the surviving spouse need not relate to the nature of any particular estate. (R.C. 2106.01(A) and (E) and 2106.02(B), and R.C. 2106.25--not in the bill.)

Service of citation to make the election. The citation to the surviving spouse to make the election as described above must be sent to the surviving spouse by certified mail. Notice that the citation has been issued by the court must be given to the administrator or executor of the estate of the deceased spouse. (R.C. 2106.02(A).)

Operation of the bill

Citation to make the election--waiver. The bill specifically permits a surviving spouse to waive the service of the citation required as described above, by filing in the probate court a written waiver of the citation. The waiver must include an acknowledgment of receipt of that description of the general rights of the surviving spouse. The *description of the general rights* of the surviving spouse must include a specific reference to the presumption that the surviving spouse has waived any right not exercised within five months after the initial appointment of the administrator or executor of the estate or within any longer period of time allowed by the probate court *if the surviving spouse does not exercise the rights under R.C. Chapter 2106.* (instead of *if the surviving spouse does not make the election*) within that time period. (R.C. 2106.01(A) and 2106.02(B) and R.C. 2106.25--not in the bill.)

Service of citation to make the election. The bill requires that the citation to the surviving spouse to make the election as described above be served on the surviving spouse pursuant to Civil Rule 73.

Notice of admission of will to probate

Existing law

Generally, when a will has been admitted to probate, the fiduciary for the estate, the applicant for the admission of the will to probate, the applicant for a release from administration, or any other interested person, or the attorney for any of those persons (hereafter referred to as "notice givers"), within two weeks of the admission of the will to probate, must give a *notice* to the surviving spouse of the testator, to all persons who would be entitled to inherit from the testator if the testator had died intestate, and to all legatees and devisees named in the will (hereafter referred to as "notice recipients"). The notice must mention the probate of the will and, if a particular person being given the notice is a legatee or devisee named in the will, must state that the person is named in the will as beneficiary. A copy of the will admitted to probate is not required to be given with the notice. A

person entitled to be given the notice may waive that right by filing a written waiver of the right to receive the notice in the probate court. The fact that the above notice has been given generally to all of the notice recipients who have not waived their right to receive the notice, and, if applicable, the fact that certain of those potential notice recipients have waived their right to receive the notice must be evidenced by a *certificate of giving notice* that must be filed by any of the notice givers required to give the notice, in the probate court *not later than two months after the appointment of the fiduciary, unless the court grants an extension of that time*. Failure to file the certificate in a timely manner will subject the fiduciary to specified citation and penalty provisions. (R.C. 2107.19(A)(1) to (4).)

Operation of the bill

The bill provides that the *certificate of giving notice* must be filed not later than two months after the appointment of the fiduciary *or, if no fiduciary has been appointed, not later than two months after the admission of the will to probate* (added by the bill), unless the court grants an extension of that time. The bill further provides that failure to file the certificate in a timely manner will subject the fiduciary *or applicant* to specified citation and penalty provisions (R.C. 2107.19(A)(4).)

Accounts of executors and administrators

Existing law

Not later than 13 months after appointment, every administrator and executor must render an account of the administrator's or executor's administration, unless a certificate of termination is filed. Generally, after the initial account is rendered, every administrator and executor must render further accounts at least once each year. An administrator or executor must render an account at any time other than a time otherwise mentioned in the statute that specifies when accounts must be rendered upon an order of the probate court issued for good cause shown either at its own instance or upon the motion of any person interested in the estate. Except as otherwise described in the following paragraph, an administrator or executor must render a final account within 30 days after completing the administration of the estate or within any other period of time that the court may order. (R.C. 2109.301(A) and (B)(4).)

In estates of decedents in which the sole legatee, devisee, or heir is also the administrator or executor of the estate, no partial accountings are required, and the administrator or executor *is not required* to file a final account or final and distributive account. In lieu of filing a final account, the administrator or executor of an estate of that type *must be discharged* by filing with the court within 30 days

after completing the administration of the estate a certificate of termination of an estate that states specified statements. (R.C. 2109.301(B)(2).)

Operation of the bill

The bill modifies the requirements for the filing of a final account or final and distributive account and the filing of a certificate of termination of an estate of a decedent in which the sole legatee, devisee, or heir is also the administrator or executor of the estate. Under the bill, the administrator or executor of an estate of that type *must file* (instead of "shall not file") a final account or final and distributive account *or, in lieu* of filing a final account, the administrator or executor *may file* (instead of "shall be discharged by filing") with the court within 30 days after completing the administration of the estate a certificate of termination of the estate. An administrator or executor filing an account pursuant to the statute that specifies when accounts must be rendered must file with the probate court a certificate of service of account prior to or simultaneously with the filing of the account. The bill further provides that in an estate of the type described in this paragraph, a sole legatee, devisee, or heir of a decedent may be liable to creditors for debts of and claims against the estate that are presented after the filing of the certificate of termination of the estate and within the time allowed by law for presentation of the creditors' claims. (R.C. 2109.301(B)(2) and (3) and 2109.32(B)(2).)

Distribution of estate assets; creditors' claims

Distribution of estate assets

Existing law. At any time after the appointment of an executor or administrator, the executor or administrator may distribute to the beneficiaries entitled to assets of the estate under the will, if there is no action pending to set aside the will, or to the heirs entitled to assets of the estate by law, in cash or in kind, any part or all of the assets of the estate. Each beneficiary or heir is liable to return the assets, or the proceeds from the assets, if they are necessary to satisfy the share of a surviving spouse who elects to take against the will pursuant to the spouse's right to make that election, *if they are necessary to satisfy any claims against the estate as provided in R.C. 2113.53*, or if the will is set aside. After the distribution, a distributee is personally liable to a claimant who presents a claim within one year after the death of the decedent, subject to the limitations described in this statute (see **COMMENT** 1). (R.C. 2113.53(A) and (B).)

Operation of the bill. The bill modifies existing law in the following manners (R.C. 2113.53(A) and (B)):

(1) It provides that each beneficiary or heir to whom the estate assets are distributed as described above is liable to return the assets or the proceeds from the assets *to the estate* (added by the bill) if they are necessary to satisfy the share of a surviving spouse who elects to take against the will pursuant to the spouse's right to make that election or if the will is set aside (the bill eliminates the condition for the return of the assets or the proceeds of the assets *if they are necessary to satisfy any claims against the estate as provided in R.C. 2113.53* to conform to the bill's changes discussed under "***Operation of the bill***" in "***Presentation of creditors' claims***," below).

(2) It provides that after distribution of the estate assets, a distributee is personally liable to a claimant who presents a *valid* (added by the bill) claim within six months after the death of the decedent, subject to the limitations described in **COMMENT** 1.

(3) It provides that if presentation of a claim is made in a writing to those distributees of the decedent's estate who may share liability for the payment of the claim (see clause (2) under "***Operation of the bill***" in "***Presentation of creditors' claims***," below), only those distributees who have received timely presentation of the claim have any liability for the claim, subject to the limitations described in **COMMENT** 1.

Presentation of creditors' claims

Existing law. Current law requires all creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, to present their claims in one of the following manners (R.C. 2117.06(A)):

(1) To the executor or administrator in a writing;

(2) To the executor or administrator in a writing, and to the probate court by filing a copy of the writing with it;

(3) In a writing that is sent by ordinary mail addressed to the decedent and that is actually received by the executor or administrator within one year after the death of the decedent. If an executor or administrator is not a natural person, the writing is considered as being actually received by the executor or administrator only if the person charged with the primary responsibility of administering the estate of the decedent actually receives the writing within that one-year period.

If the executor or administrator makes a distribution of the assets of the estate prior to the expiration of the time for the filing of claims, the executor or

administrator must provide *notice* on the account delivered to each distributee that the distributee may be liable to the estate up to the value of the distribution and may be required to return all or any part of the value of the distribution if a valid claim is subsequently made against the estate within the permitted time (R.C. 2117.06(K)).

Current law requires all creditors having claims against an estate to present the claims within one year after the death of the decedent, whether or not the estate is released from administration or an executor or administrator is appointed during that one-year period. A claim that is not presented within one year after the death of the decedent is forever barred as to all parties, including, but not limited to, devisees, legatees, and distributees. (R.C. 2117.06(B) and (C).)

Operation of the bill. The bill modifies the manners of presenting creditors' claims. It requires all creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, to present their claims in one of the following manners (R.C. 2117.06(A)):

(1) *After the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination,* (added by the bill) in one of the manners specified above in clauses (1), (2), and (3) under "***Existing law***";

(2) *If the final account or certificate of termination has been filed, in a writing to those distributees of the decedent's estate who may share liability for the payment of the claim* (added by the bill).

The bill decreases the period of time during which a claim must be presented from one year to six months. Therefore, under the bill a claim against an estate must be presented within six months after the death of the decedent. If the claim is not presented within the six-month period it is forever barred. (R.C. 2117.06(B) and (C) and 2117.07.)

The bill further modifies existing law's notice requirement if the estate assets are distributed prior to the expiration of the six-month period for the filing of claims. It provides that if the executor or administrator makes a distribution of the assets of the estate *pursuant to R.C. 2113.53* (added by the bill and referring to "***Distribution of estate assets***," above) prior to the expiration of the time for the *presentation* (changed from *filing*) of claims, the executor or administrator must provide notice on the account delivered to each distributee that the distributee may be liable to the estate *if a claim is presented prior to the filing of the final account and may be liable to the claimant if the claim is presented after the filing of the final account* (added by the bill) up to the value of the distribution and may be

required to return all or any part of the value of the distribution if a valid claim is subsequently made against the estate within the permitted time (R.C. 2117.06(K)).

Rejection of creditors' claims

Existing law. An executor or administrator must reject a creditor's claim against the estate that the executor or administrator represents by giving the claimant written notice of the disallowance of the claim. The notice must be given to the claimant personally or by *registered* mail with return receipt requested, addressed to the claimant at the address given on the claim. Notice by mail is effective on delivery of the mail at the address given. A claim may be rejected in whole or in part. A claim that has been allowed may be rejected at any time after the allowance of the claim. A claim is rejected if the executor or administrator, on demand in writing by the claimant for an allowance of the claim within five days, which demand may be made at presentation or at any time after presentation, fails to give to the claimant, within that period, a written statement of the allowance of the claim. The rejection becomes effective at the expiration of that period. (R.C. 2117.11.)

When a claim against an estate has been rejected in whole or in part but not referred to referees, or when a claim has been allowed in whole or in part and thereafter rejected, the claimant must commence an action on the claim, or that part of the claim that was rejected, within two months after the rejection if the debt or that part of the debt that was rejected is then due, or within two months after the debt or part of the debt that was rejected becomes due, or be forever barred from maintaining an action on the claim or part of the claim that was rejected. If the executor or administrator dies, resigns, or is removed within that two-month period and before action is commenced on the claim or part of the claim that was rejected, the action may be commenced within two months after the appointment of a successor. For the purposes of this provision, the action of a claimant is commenced when the *petition* and praecipe for service of summons on the executor or administrator have been filed. (R.C. 2117.12.)

Operation of the bill. The bill modifies existing law to provide for the rejection of claims that are presented to distributees of the estate if the final account or the certificate of termination has been filed as provided in the bill (see "***Presentation of creditors' claims***," above), and to make technical changes. It provides that an executor or administrator, *or a distributee who receives the presentation of a claim as provided in R.C. 2117.06(A)(2)*, (*after the final account or certificate of termination has been filed*) must reject a creditor's claim against the estate by giving the claimant written notice of the disallowance of the claim. The notice must be given to the claimant pursuant to Civil Rule 73. Notice by mail is effective on delivery of the mail at the address given. A claim may be rejected in whole or in part. A claim that has been allowed may be rejected at any

time after the allowance of the claim. A claim is rejected if the executor or administrator, *or a distributee who receives the presentation of a claim after the final account or certificate of termination has been filed*, on demand in writing by the claimant for an allowance of the claim within five days, which demand may be made at presentation or at any time after presentation, fails to give to the claimant, within that *five-day* period, a written statement of the allowance of the claim. The rejection becomes effective at the expiration of that period. (R.C. 2117.11.)

The bill further modifies the provision pertaining to a claimant's action on the claim by providing that for purposes of that provision, the action of a claimant is commenced when the *complaint* (changed from *petition*) and praecipe for service of summons on the executor or administrator, *or on the distributee who received the presentation of the daim after the final account or certificate of termination has been filed* (added by the bill), have been filed. (R.C. 2117.12.)

Dispute resolution procedures

The bill authorizes a probate judge to establish by rule procedures for the resolution of disputes between parties to any civil action or proceeding that is within the jurisdiction of the probate court. Any procedures so adopted must include, but are not limited to, mediation. If the probate judge establishes any such dispute resolution procedures, the probate judge may charge, in addition to the fees and costs authorized under continuing law, a reasonable fee, not to exceed $15, that is to be collected on the filing of each action or proceeding and that is to be used to implement the procedures. The probate court must pay to the county treasurer of the county in which the court is located all of those fees collected. The treasurer must place the funds from the fees in a separate fund to be disbursed upon an order of the probate judge. If the probate judge determines that the amount of the moneys in that fund is more than the amount that is sufficient to satisfy the purpose for which the additional fee was imposed, the probate judge may declare a surplus in the fund and expend the surplus moneys for other appropriate judicial expenses of the probate court. (R.C. 2101.163.) (See **COMMENT** 2.)

Applicability

R.C. 2106.01 and 2106.02 (election by surviving spouse to exercise rights), R.C. 2107.19 (notice of admission of will to probate), R.C. 2109.301 (accounts of executors and administrators), and R.C. 2113.53, 2117.06, 2117.07, 2117.11, and 2117.12 (distribution of estate assets; creditors claims), as amended by the act and as described in this analysis, apply to estates that are in existence or are initiated on or after the act's effective date of this act. R.C. 2101.163 (dispute resolution procedures), as enacted by the act, applies to civil actions and proceedings that are

pending in or brought before the probate court on or after the act's effective date. (Section 3.)

Intent of the General Assembly

The bill declares that it was the intent of the General Assembly that the sections of the Revised Code described in Section 2 of Sub. H.B. 85 of the 124th General Assembly were to be repealed effective December 31, 2001, to coincide with Section 5 of Sub. H.B. 85 of the 124th General Assembly, and that the repeal of such Revised Code sections in Section 2 of Sub. H.B. 85 of the 124th General Assembly was not to be effective October 31, 2001 (Section 4).

Special testimonial procedures

The bill enacts mechanisms for the taking and use in criminal proceedings and in delinquent child proceedings of depositions, including videotaped depositions, of a victim of specified offenses who is a mentally retarded or developmentally disabled person;[1] closed circuit telecast into the courtroom of

---

[1] *"Mentally retarded or developmentally disabled victim" includes (1) any mentally retarded or developmentally disabled person who was a victim of any violation listed in "**Depositions in general**" as a violation to which that provision applies, an offense of violence regarding criminal defendants, or an act that would be an "offense of violence" (see **COMMENT** 2) if committed by an adult regarding delinquent children, or (2) any mentally retarded or developmentally disabled person against whom was directed any conduct that constitutes, or that is an element of, any violation listed in "**Depositions in general**" as a violation to which that provision applies, an offense of violence regarding criminal defendants, or an act that would be an offense of violence if committed by an adult regarding delinquent children. Regarding the preliminary hearing provisions, the meaning of the term is limited to felony violations. (R.C. 2152.821.)*

"Mentally retarded person" means a person having significantly subaverage general intellectual functioning existing concurrently with deficiencies in adaptive behavior, manifested during the developmental period. (See R.C. 5123.01.)

"Developmentally disabled person" means a person with a developmental disability. As used in this definition, "developmental disability" means a severe, chronic disability that is characterized by all of the following: (1) it is attributable to a mental or physical impairment or a combination of mental and physical impairments, other than a mental or physical impairment solely caused by mental illness, (2) it is manifested before age 22, (3) it is likely to continue indefinitely, (4) it results in one of the following: (a) in the case of a person under three years of age, at least one developmental delay or an established risk, (b) in the case of a person at least three years of age but under six years of age, at least two developmental delays or an established risk, or (c) in the case of a person six years of age or older, a substantial functional limitation in at least three of the following areas of major life activity, as appropriate for the person's age: self-care, receptive and

testimony of such a victim that is taken outside the courtroom; recording, for showing in the courtroom, of the testimony of such a victim; and, in criminal proceedings, the use of preliminary hearing testimony, including recorded preliminary hearing testimony (see **COMMENT** 1). A summary of each of the mechanisms follows.

Deposition

(R.C. 2152.821 and 2945.482)

Depositions in general. Under the bill, in any proceeding in the prosecution of a charge of any of the violations specified below (or in juvenile court involving a complaint, indictment, or information in which a child is charged with any of those violations) and in which an alleged victim is a mentally retarded person or a developmentally disabled person, the judge, on motion of the prosecution, must order that the testimony of the victim be taken by deposition. The prosecution also may request that the deposition be videotaped, as described below. The judge must notify the victim whose deposition is to be taken, the prosecution, and the attorney for the person charged of the date, time, and place for taking the deposition. The notice must identify the victim who is to be examined and indicate whether a request that the deposition be videotaped has been made. The person who is charged has the right to attend the deposition and to be represented by counsel. Depositions must be taken in the manner provided in civil cases, except that the judge must preside at the taking of the deposition and rule on objections at that time. The prosecution and the attorney for the person charged have the right to full examination and cross-examination of the victim whose deposition is to be taken.

The violations to which this provision applies are: (1) for both criminal prosecutions and for delinquent child proceedings, knowingly failing to provide for a functionally impaired person, recklessly failing to provide for a functionally impaired person, patient abuse, gross patient abuse, patient neglect, rape, sexual battery, gross sexual imposition, compelling prostitution, procuring, soliciting, engaging in solicitation after a positive HIV test, pandering obscenity, pandering obscenity involving a minor, pandering sexually oriented matter involving a

---

expressive language, learning, mobility, self-direction, capacity for independent living, and, if the person is at least 16 years of age, capacity for economic self-sufficiency, and (5) it causes the person to need a combination and sequence of special, interdisciplinary, or other type of care, treatment, or provision of services for an extended period of time that is individually planned and coordinated for the person. As used in this definition, "substantial functional limitation," "developmental delay," and "established risk" have the meanings established pursuant to R.C. 5123.011, not in the bill. (See R.C. 5123.01.)

minor, illegal use of a minor in a nudity-oriented material or performance, the new offense of patient endangerment, and offenses of violence (see **COMMENT** 2) or, regarding juveniles, acts that would be an offense of violence if committed by an adult, and (2) for criminal prosecutions, unlawful restraint, sexual imposition, and public indecency.

If a deposition taken under this provision is intended to be offered as evidence, it must be filed with the court and is admissible in the manner described below. If the deposition is admitted as evidence at the proceeding, the victim cannot be required to testify in person at the proceeding.

Before the conclusion of the proceeding, the attorney for the person charged may file a motion requesting that another deposition of the victim be taken because new evidence material to the defense has been discovered that the attorney could not with reasonable diligence have discovered prior to the taking of the deposition. In delinquent child proceedings, any motion requesting another deposition must be accompanied by supporting affidavits, and, on the filing of the motion and affidavits, the court may order that additional testimony be taken by another deposition. In any case, if the court orders the taking of another deposition, it must be taken in the manner described above. If the deposition was a videotaped deposition described below, the new deposition also must be videotaped in accordance with that provision. In other cases, the new deposition may be videotaped in accordance with that provision.

Videotaped depositions. If the prosecution requests that a deposition to be taken as described above be videotaped, the judge must order that the deposition be videotaped. If a judge issues an order to videotape the deposition, the judge must exclude everyone from the room in which the deposition is to be taken except (1) the victim giving the testimony, (2) the judge, (3) one or more interpreters if needed, (4) the attorneys for the prosecution and the person charged, (5) any person needed to operate the equipment to be used, (6) one person chosen by the victim, and (7) any person whose presence the judge determines would contribute to the welfare and well-being of the victim. The person chosen by the victim cannot be a witness in the proceeding and, both before and during the deposition, cannot discuss the testimony of the victim with any witness in the proceeding. To the extent feasible, any person operating the recording equipment must be restricted to a room adjacent to the room in which the deposition is being taken, or to a location in the room in which the deposition is being taken that is behind a screen or mirror, so that person can see and hear, but cannot be seen or heard by the victim.

The person charged must be permitted to observe and hear the testimony on a monitor, provided with an electronic means of immediate communication with his or her attorney during the testimony, and restricted to a location from which he

or she cannot be seen or heard by the victim, except on a monitor provided for that purpose. The victim must be provided with a monitor on which he or she can observe the person charged. The judge may preside at the deposition by electronic means from outside the room in which the deposition is to be taken. If the judge presides by electronic means, the judge must be provided with monitors to view each person in the room in which the deposition is to be taken and with an electronic means of communication with each person. Each person in the room must likewise be provided with a monitor on which that person can see the judge and with an electronic means of communication with the judge.

A deposition videotaped under this provision must be taken and filed in the manner described above and is admissible in the manner described in this paragraph and "***Use of depositions***," below. If a deposition videotaped under this provision is admitted as evidence at the proceeding, the victim cannot be required to testify in person at the proceeding. No deposition videotaped under this provision may be admitted as evidence at any proceeding unless the provisions described below in "***Use of depositions***" are satisfied relative to the deposition and all of the following apply relative to the recording: (1) the recording is both aural and visual and is recorded on film, videotape, or by other electronic means, (2) the recording is authenticated under the Rules of Evidence and the Rules of Criminal Procedure as a fair and accurate representation of what occurred, and it is not altered other than at the direction and under the supervision of the judge, (3) each voice on the recording that is material to the testimony on the recording or the making of the recording, as determined by the judge, is identified, and (4) both the prosecution and the person charged are afforded an opportunity to view the recording before it is shown in the proceeding.

The authority of a juvenile judge to close the taking of a deposition under this provision in a delinquent child proceeding is in addition to the authority of a judge to close a hearing pursuant to existing law.

Use of depositions. At any proceeding in relation to which a deposition is taken under the bill's provisions described above, the deposition or a part of it is admissible in evidence on motion of the prosecution if the testimony in the deposition or the part to be admitted is not excluded by the Hearsay Rule and is otherwise admissible under the Rules of Evidence.[2] The bill provides that, for

---

[2] *Hearsay is generally defined as an out-of-court statement made by a person other than the one testifying that is offered for its truth. The Ohio version of the Hearsay Rule provides that*

> *[h]earsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General*

purposes of this provision, testimony is not excluded by the Hearsay Rule if: it is specifically excluded from the definition of hearsay under the Ohio Rules of Evidence;[3] it falls within an exception to the Hearsay Rule that does not depend on the witness' availability;[4] the victim who gave the testimony is unavailable as a witness, as defined in Evidence Rule 804, and the testimony is admissible under that Rule; or both of the following apply: (1) the person charged had an opportunity and similar motive at the time of the taking of the deposition to develop the testimony by direct, cross, or redirect examination, and (2) the judge determines that there is reasonable cause to believe that, if required to testify in person at the proceeding, the victim would experience serious emotional trauma as a result of participating at the proceeding.

The bill provides that objections to receiving a deposition or a part of it in evidence under the provision described above must be made as provided in civil actions. Further, the provisions pertaining to the taking of depositions in general, to the videotaping of depositions, and to the use of the depositions are in addition to any other provisions of the Revised Code, the Rules of Juvenile Procedure, the Rules of Criminal Procedure, or the Rules of Evidence that pertain to the taking or admission of depositions in the proceeding, and do not limit the deposition's admissibility under any of those other provisions.

Closed circuit telecast of testimony and recording testimony

(R.C. 2152.821 and 2945.482)

Criteria for issuing orders. Under the bill, a judge may order the closed circuit telecast of testimony or the recording of testimony for showing in the courtroom if the judge determines that the mentally retarded or developmentally disabled victim is unavailable to testify in the physical presence of the person charged due to one or more of the following circumstances: (1) the persistent refusal of the victim to testify despite judicial requests to do so, (2) the inability of

---

Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio

Ohio Rules of Evidence 802.

[3] *Statements excluded from the definition of hearsay include prior inconsistent statements, prior consistent statements offered to rebut a charge of recent fabrication or improper influence or motive, and admissions by a party-opponent. Ohio R.Evid. 801(D).*

[4] *These exceptions are set forth in Ohio Evidence Rule 803.*

the victim to communicate about the alleged violation or offense because of extreme fear, failure of memory, or another similar reason, or (3) the substantial likelihood that the victim will suffer serious emotional trauma from testifying.

Motion and order for telecast. Under the bill, in any proceeding in a criminal prosecution (or in a juvenile court proceeding involving a complaint, indictment, or information) in which a person is charged with any violation listed above in "***Depositions in general***" as a violation to which that provision applies or an "offense of violence" (see **COMMENT** 2) and in which an alleged victim was a mentally retarded or developmentally disabled person, the prosecution may file a motion requesting the judge to order the testimony of the victim to be taken in a room other than the room in which the proceeding is being conducted and be televised by closed circuit equipment into the room in which the proceeding is being conducted to be viewed by the person charged, the jury, and any other persons who are not permitted in the room in which the testimony is to be taken but who would have been present during the testimony had it been given in the room in which the proceeding is being conducted. Except for good cause shown, the prosecution must file a motion under this provision at least seven days before the date of the proceeding. If the judge issues such an order, the judge must exclude from the room in which the testimony is to be taken every person except a person described above as a person who is permitted to be present during the videotaping of a deposition. The judge may preside during the giving of the testimony by electronic means from outside the room in which it is being given, subject to the limitations set forth above regarding the videotaping of a deposition. To the extent feasible, any person operating the televising equipment must be hidden from the sight and hearing of the victim giving the testimony, in a manner similar to that described above regarding the videotaping of a deposition. The person charged must be permitted to observe and hear the testimony of the victim giving the testimony on a monitor, provided with an electronic means of immediate communication with his or her attorney during the testimony, and restricted to a location from which he or she cannot be seen or heard by the victim giving the testimony, except on a monitor provided for that purpose. The victim giving the testimony must be provided with a monitor on which he or she can observe the person charged.

The order must specifically identify the victim to whose testimony it applies. The order applies only during the testimony of that victim, and that victim cannot be required to testify at the proceeding other than in accordance with the order. Regarding delinquent child proceedings, the authority of a juvenile judge to close a proceeding under this provision is in addition to the authority of a judge to close a hearing pursuant to existing law.

Motion and order for recording. Under the bill, in a criminal prosecution (or in a juvenile court proceeding involving a complaint, indictment, or information) in which a person is charged with any violation listed above in "***Depositions in general***" as a violation to which that provision applies or an "offense of violence" and in which an alleged victim of the violation or offense was a mentally retarded person or a developmentally disabled person, the prosecution may file a motion asking the judge to order the testimony of the victim to be taken outside of the room in which the proceeding is being conducted and be recorded for showing in the room in which the proceeding is being conducted before the judge, the person charged, the jury if applicable, and any other persons who would have been present during the testimony of the victim had it been given in the room in which the proceeding is being conducted. Except for good cause shown, the prosecution must file a motion under this provision at least seven days before the date of the proceeding.

If a judge issues such an order, the judge must exclude from the room in which the testimony is to be taken every person except a person described above as a person who is permitted to be present during the videotaping of a deposition. To the extent feasible, any person operating the recording equipment must be hidden from the sight and hearing of the victim giving the testimony, in a manner similar to that set forth regarding the videotaping of a deposition. The person charged must be permitted to observe and hear the testimony of the victim on a monitor, provided with an electronic means of immediate communication with his or her attorney, and restricted to a location from which he or she cannot be seen or heard by the victim, except on a monitor provided for that purpose. The victim testifying must be provided with a monitor on which to view the person charged. No order for the taking of testimony by recording may be issued under this provision unless the provisions described above in clauses (1) to (4) of the last paragraph under "***Videotaped depositions***" apply to the recording of the testimony.

If a judge issues an order pursuant to this provision that requires the testimony of a mentally retarded or developmentally disabled victim to be taken outside of the room in which the proceeding is being conducted, the order must specifically identify the victim to whose testimony it applies. The order applies only during the testimony of that victim, and that victim cannot be required to testify at the proceeding other than in accordance with the order. In delinquent child proceedings, the authority of a juvenile judge to close a proceeding under this provision is in addition to the authority of a judge to close a hearing under existing law.

Entry of determinations on the record

The bill specifies that a judge who makes any determination regarding the admissibility of a deposition, the videotaping of a deposition, or the taking of

testimony outside of the room in which a proceeding is being conducted under any of the provisions of the bill described above must enter the determination and findings on the record in the proceeding.

Use of videotaped preliminary hearing testimony

(R.C. 2945.491)

Under the bill, at a trial on a charge of any felony violation listed above in "***Depositions in general***" as a violation to which that provision applies regarding criminal defendants or delinquent children (*but not* the three additional violations that are specified regarding only criminal defendants) or an "offense of violence" and in which an alleged victim of the violation or offense was a mentally retarded or developmentally disabled person, the court, on motion of the prosecutor in the case, may admit videotaped preliminary hearing testimony of the victim as evidence at the trial, in lieu of the victim appearing as a witness and testifying at trial, if (1) the videotape of the testimony was made at the preliminary hearing at which probable cause of the violation charged was found, (2) the videotape of the testimony was made in accordance with existing law,[5] and (3) the testimony in the videotape is not excluded by the Hearsay Rule and otherwise is admissible under the Rules of Evidence.

For purposes of the Rules of Evidence, testimony is not excluded by the Hearsay Rule if the testimony is not hearsay under Evidence Rule 801, the testimony is within an exception to the Hearsay Rule set forth in Evidence Rule 803, the victim who gave the testimony is unavailable as a witness, as defined in Evidence Rule 804, and the testimony is admissible under that rule, or both of the following apply: (a) the accused had an opportunity and similar motive at the preliminary hearing to develop the testimony of the victim by direct, cross, or redirect examination, and (b) the court determines that there is reasonable cause to believe that if the victim were to testify in person at the trial, the victim would experience serious emotional trauma as a result of participation at the trial.

If a mentally retarded or developmentally disabled victim of an alleged felony violation or offense identified in the second preceding paragraph testifies at the preliminary hearing in the case, the testimony was videotaped pursuant to current law, and the defendant files a written objection to the use of the videotaped testimony at the trial, the court, immediately after the filing, must hold a hearing to determine whether the videotaped testimony should be admissible at trial and, if it is admissible, whether the victim should be required to provide limited additional testimony. At the hearing, the defendant and the prosecutor may present any

[5] *R.C. 2937.11(C), not in the bill.*

relevant evidence, but the victim cannot be required to testify. After the hearing, the court cannot require the victim to testify at the trial, unless it determines that both of the following apply: (1) the testimony of the victim at trial is necessary because evidence that was not available at the time of the victim's testimony at the preliminary hearing has been discovered, or the circumstances surrounding the case have changed sufficiently to necessitate that the victim testify at the trial, or both, and (2) the testimony of the victim at the trial is necessary to protect the right of the defendant to a fair trial.

The court must enter its finding and the reasons for it in the journal. If the court requires the victim to testify at the trial, the testimony of the victim must be limited to the new evidence and changed circumstances. The required testimony of the victim may be given in person or, on motion of the prosecution, may be taken by deposition in accordance with the bill's provisions described above.

If videotaped testimony of a mentally retarded or developmentally disabled victim is admitted at trial in accordance with the above-described provisions, the victim cannot be compelled to appear as a witness at the trial, except as provided in those provisions. An order issued pursuant to the above-described provisions must specifically identify the mentally retarded or developmentally disabled victim concerning whose testimony it pertains, and it applies only during the testimony of the victim it specifically identifies.

Offense of "patient endangerment"

(R.C. 2903.341)

The bill

The bill creates a new offense related to the endangerment of a mentally retarded or developmentally disabled person by a person involved with the care and protection of the mentally retarded or developmentally disabled person. Specifically, the bill:

(1) Prohibits an "MR/DD caretaker"[6] from creating a "substantial risk" (see **COMMENT** 3) to the health or safety of a mentally retarded or developmentally

[6] *"MR/DD caretaker" means any MR/DD employee or any person who assumes the duty to provide for the care and protection of a mentally retarded person or a developmentally disabled person on a voluntary basis, by contract, through receipt of payment for care and protection, as a result of a family relationship, or by order of a court of competent jurisdiction. "MR/DD caretaker" includes a person who is an employee of a care facility and a person who is an employee of an entity under contract with a provider. "MR/DD caretaker" does not include a person who owns, operates, administers, or is an agent of,*

disabled person. The bill clarifies that it is not a violation of this provision when the MR/DD caretaker treats a physical or mental illness or defect of the mentally retarded or developmentally disabled person by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body;

(2) Prohibits a person who owns, operates, administers, or is an agent of a care facility[7] from condoning or knowingly permitting any conduct by an MR/DD caretaker who is employed by or under the control of the owner, operator, administrator, or agent that is in violation of clause (1) above and involves a mentally retarded or developmentally disabled person who is under the care of the owner, operator, administrator, or agent. The bill states that a person who relies on treatment by spiritual means through prayer alone, in accordance with the tenets of a recognized religious denomination, cannot be considered "endangered" under this provision for that reason alone.

A violation of either prohibition is the offense of "patient endangerment." Patient endangerment generally is a misdemeanor of the first degree, but it is a felony of the fourth degree if the offender has previously been convicted of, or pleaded guilty to, patient endangerment. If the violation results in serious physical harm to the person with mental retardation or a developmental disability, patient endangerment is a felony of the third degree.

The bill provides that it is an affirmative defense to a charge of a violation of either prohibition described above that the actor's conduct was committed in good faith solely because the actor was ordered to commit the conduct by a person who has supervisory authority over the actor or has authority over the actor's conduct pursuant to a contract for the provision of services. The bill also provides three affirmative defenses to a charge of a violation of the prohibition described above in (2): (a) the owner, operator, administrator, or agent of a care facility charged with the violation is following the individual service plan for the involved mentally retarded or developmentally disabled person, (b) the admission,

---

a care facility unless the person also personally provides care to persons with mental retardation or a developmental disability (R.C. 2903.341(A)(1)).

[7] "Care facility" means any of the following: (a) a "home" as described in existing law governing nursing homes and similar residential facilities, (b) a residential facility for persons with mental retardation, (c) an institution or facility operated or provided by DMRDD, (d) a residential facility for persons with mental illness, (e) any unit of a hospital that provides the same services as a nursing home, (f) any institution, residence, or facility that provides, for a period of more than 24 hours, accommodations to one individual or two unrelated individuals who are dependent upon the services of others, (g) an adult care facility, (h) an adult foster home certified by the Department of Aging or its designee, or (i) a community alternative home for persons with AIDS.

discharge, and transfer rule set forth in the Administrative Code is being followed, and (c) a means to prevent the death or harm to the person with mental retardation or a developmental disability was not readily available to the actor and the actor took reasonable efforts to summon aid.

Related existing provisions

(R.C. 2903.16, 2903.34, and 5123.52)

Existing offenses. Continuing law prohibits a person who owns, operates, administers, or is an agent or employee of a care facility, from abusing, grossly neglecting, or neglecting a resident or patient of the facility. "Patient abuse" is generally a felony of the fourth degree, but is a felony of the third degree if the offender previously has been convicted of patient abuse, gross patient neglect, or patient neglect. "Gross patient neglect" is a misdemeanor of the first degree, but if the offender previously has been convicted of patient abuse, gross patient neglect, or patient neglect, it is a felony of the fifth degree. "Patient neglect" is generally a misdemeanor of the second degree, but is a felony of the fifth degree if the offender previously has been convicted of patient abuse, gross patient neglect, or patient neglect.

A person who relies on treatment by spiritual means through prayer alone, in accordance with the tenets of a recognized religious denomination, cannot be considered "neglected" under the prohibition described in the preceding paragraph for that reason alone. It is an affirmative defense to a charge of gross neglect or neglect under the prohibitions that the actor's conduct was committed in good faith solely because the actor was ordered to commit the conduct by a person with supervisory authority over the actor. The definition of "care facility" described above applies to these provisions.

Existing law also prohibits a caretaker from doing either of the following: (1) knowingly failing to provide a functionally impaired person under the caretaker's care with any treatment, care, goods, or service necessary to maintain the health or safety of the functionally impaired person when the failure results in physical harm or serious physical harm to the functionally impaired person, or (2) recklessly failing to provide a functionally impaired person under the caretaker's care with any treatment, care, goods, or service necessary to maintain the health or safety of the functionally impaired person when the failure results in serious physical harm to the functionally impaired person. A violation of the prohibition described in clause (1) is the offense of "knowingly failing to provide for a functionally impaired person." That offense generally is a misdemeanor of the first degree, but it is a felony of the fourth degree if the functionally impaired person suffers serious physical harm as a result of the violation. A violation of the prohibition described in clause (2) is the offense of "recklessly failing to provide

for a functionally impaired person." That offense generally is a misdemeanor of the second degree, but it is a felony of the fourth degree if the functionally impaired person under the offender's care suffers serious physical harm as a result of the violation. The definitions of "caretaker" and "functionally impaired person" described above apply to these provisions.

MR/DD Registry. Existing law requires the Department of Mental Retardation and Developmental Disabilities (DMRDD) to establish a registry regarding misappropriation, abuse, neglect, or other misconduct by MR/DD employees. Before a person or government entity hires, contracts with, or employs an individual as an MR/DD employee, the person or government entity must inquire whether the individual is included in the registry. When it receives such an inquiry, DMRDD must tell the person making the inquiry whether the individual is included in the registry. Information contained in the registry is a public record under the Public Records Law. Except as otherwise provided in a public employee collective bargaining agreement that was in effect on November 22, 2000, a person or government entity is prohibited from hiring, contracting with, or employing as an MR/DD employee an individual who is included in the registry.

As used in these provisions, "MR/DD employee" means all of the following: (1) an employee of DMRDD, (2) an employee of a county board of mental retardation and developmental disabilities, (3) a worker in an intermediate care facility for the mentally retarded, and (4) an individual who is employed in a position that includes providing specialized services to an individual with mental retardation or a developmental disability.

Sexual activity

(R.C. 5123.541)

The bill enacts a provision specifying that an MR/DD employee cannot engage in any sexual conduct or have any sexual contact with an individual with mental retardation or another developmental disability for whom the employee is employed or under a contract to provide care and who is not the employee's spouse.[8] Any MR/DD employee who violates this restriction is eligible to be

[8] *As used in this provision:*

"MR/DD employee" means all of the following: (a) an employee of DMRDD, (b) an employee of a county board of mental retardation and developmental disabilities, (c) a worker in an intermediate care facility for the mentally retarded, and (d) an individual who is employed in a position that includes providing specialized services to an individual with mental retardation or a developmental disability. (R.C. 5123.50.)

included in the registry regarding misappropriation, abuse, neglect, or other specified misconduct by MR/DD employees, in addition to any other sanction or penalty authorized or required by law.

The bill requires any person who is a mandatory reporter of abuse or neglect[9] with reason to believe that an MR/DD employee has violated this prohibition to immediately report that belief to the DMRDD. The bill also permits any other person with such a belief to report it to DMRDD.

Reports of abuse or neglect

(R.C. 5120.173, 5123.61, and 5123.99; Section 3)

Existing law

Mandatory reports. Existing law lists certain categories of professions and prohibits any person in any of the categories, having reason to believe that a person with mental retardation or a developmental disability has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of that person, from failing to immediately report or cause reports to be made to a law enforcement agency or the county board of mental retardation

---

"Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse. (R.C. 2907.01, not in the bill.)

"Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person. (R.C. 2907.01, not in the bill.)

"Spouse" means a person married to an offender at the time of an alleged offense, except that such person cannot be considered the spouse when any of the following applies: (a) when the parties have entered into a written separation agreement authorized by the Domestic Relations Law, (b) during the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or legal separation, or (c) in the case of an action for legal separation, after the effective date of the judgment for legal separation. (R.C. 2907.01, not in the bill.)

[9] *Mandatory reporters include physicians, teachers, and others who may come in contact with a person who is mentally retarded or developmentally disabled. The complete list is in R.C. 5123.61(C)(2).*

and developmental disabilities, except that if the report concerns a resident of a facility operated by DMRDD the report must be made either to a law enforcement agency or to DMRDD.[10] The specified professions to which the mandatory reporting provision applies are physicians; dentists; podiatrists; chiropractors; practitioners of a limited branch of medicine; hospital administrators and employees; nurses; employees of an ambulatory health facility, home health agency, adult care facility, or community mental health facility; school teachers or school authorities; social workers; psychologists; attorneys; peace officers; coroners; clergymen; residents' rights advocates; superintendents, board members, and employees of a county board of mental retardation and developmental disabilities; administrators, board members, and employees of a residential facility or of any other public or private provider of services to a person with mental retardation or a developmental disability; MR/DD employees; members of a citizen's advisory council established at an institution or branch institution of DMRDD; and persons who, while acting in an official or professional capacity, render spiritual treatment through prayer in accordance with the tenets of an organized religion. The reporting requirements do not apply to members of the Legal Rights Service Commission or to employees of the Legal Rights Service.

The reports must be made promptly by telephone or in person, must be followed by a written report, and must contain names and addresses of the person with mental retardation or a developmental disability and the person's custodian, if known, the age of the person with mental retardation or a developmental disability, and any other information that would assist in the investigation. Existing law also requires a physician performing services as a member of the staff of a hospital or similar institution who has reason to believe that a person with mental retardation or a developmental disability has suffered injury, abuse, or physical neglect, to notify the person in charge of the institution or that person's designated delegate, who must make the necessary reports.

Discretionary reports. Existing law permits any person having reasonable cause to believe that a person with mental retardation or a developmental disability has suffered abuse or neglect to report the belief, or cause a report to be made, to a law enforcement agency, the county board of mental retardation and developmental disabilities, or, if the person is a resident of a facility operated by DMRDD, to a law enforcement agency or to DMRDD.

---

[10] Under existing law, as used in the reporting provisions: (1) "law enforcement agency" means the State Highway Patrol, a municipal police department, or a county sheriff, (2) "abuse" has the same meaning as in current DMRDD law, except that it includes a misappropriation, as defined in that section, and (3) "neglect" has the same meaning as in current law governing DMRDD.

Procedures regarding reports. On receipt of a report concerning possible abuse or neglect of a person with mental retardation or a developmental disability, the law enforcement agency must inform the county board of mental retardation and developmental disabilities or, if the person is a resident of a facility operated by DMRDD, the Department's Director. On receipt of a report that includes an allegation of action or inaction that may constitute a crime under federal law or Ohio law, DMRDD must notify the law enforcement agency. When a county board receives a report that includes an allegation of action or inaction that may constitute any such crime, the board's superintendent or the superintendent's designee must notify the law enforcement agency. The superintendent or designee must notify DMRDD when it receives any report.

A law enforcement agency must investigate each report it receives. DMRDD, in cooperation with law enforcement officials, must investigate each report regarding a resident of a facility operated by DMRDD to determine the circumstances surrounding the injury, the cause of the injury, and the person responsible. DMRDD must determine, with the registry office maintained by DMRDD, whether prior reports have been made concerning an adult with mental retardation or a developmental disability or other principals in the case. If DMRDD finds that the report involves action or inaction that may constitute a crime under federal law or Ohio law, it must submit a written report of its investigation to the law enforcement agency. If the person with mental retardation or a developmental disability is an adult, with his or her consent, DMRDD must provide such protective services as are necessary. The law enforcement agency must make a written report of its findings to DMRDD. If the person is an adult and is not a resident of a facility operated by DMRDD, the county board must review the report of abuse or neglect, and the law enforcement agency must make the written report of its findings to the county board.

Existing law provides a qualified immunity from liability for persons, hospitals, institutions, schools, health departments, agencies, and other specified entities relative to the making of reports, and to involvement in related proceedings or conduct. It also provides a qualified protection from the taking of detrimental action or retaliation against any employee related to the making of a report.

Reports made under these provisions are not public records under the Public Records Law, but information they contain, on request, must be made available to the person who is the subject of the report, the person's legal counsel, and agencies authorized to receive information in the report by DMRDD or by a county board. The law specifies that the physician-patient privilege is not a ground for excluding evidence regarding the injuries or physical neglect of a person with mental retardation or a developmental disability or the cause thereof

in any judicial proceeding resulting from a report submitted pursuant to this section.

Finally, existing law requires DMRDD to establish a registry office for the purpose of maintaining reports of abuse, neglect, and other major unusual incidents made to DMRDD under the above-described provisions and reports received from county boards of mental retardation and developmental disabilities. DMRDD must establish committees to review reports of abuse, neglect, and other major unusual incidents.

Penalties. Existing law provides that a person who violates the existing prohibition against failing to file a mandatory report, the existing provision requiring physicians who are staff at a hospital or similar institution to provide notice to the head of the institution and requiring the head of the institution to file a report, or the existing provision requiring a county board that receives a report alleging specified criminal conduct to notify a law enforcement agency and requiring a county board that receives any report to notify DMRDD, may be fined not more than $500.

The bill

The bill modifies some of the existing provisions regarding mandatory reports of abuse or neglect of a person with mental retardation or a developmental disability, and some of the procedures related to mandatory reports and discretionary reports. A summary of the modifications follows.

(1) Expands the mandatory reporting requirement to require a person in any of the existing categories to make a report when the person has reason to believe that a person with mental retardation or a developmental disability *faces a substantial risk* (see **COMMENT** 3) *of suffering* any wound, injury, disability, or condition of such nature as to reasonably indicate abuse or neglect. The bill similarly expands the existing provisions regarding discretionary reports of abuse or neglect.

(2) Modifies the provisions describing the entities to which the mandatory reports must be made, and the discretionary reports may be made. Under the bill: (a) in general, as under existing law, the reports are to be made to a law enforcement agency or to the county board of mental retardation and developmental disabilities, (b) if the reports concern a resident of a facility operated by DMRDD, as under existing law, the reports are to be made either to a law enforcement agency or to DMRDD, (c) if the reports concern any act or omission of an employee of a county board of mental retardation and developmental disabilities, as added by the bill, the reports immediately must be made to DMRDD and to the county board, and (d) if the reports concern a person

with mental retardation or a developmental disability who is an inmate in a state correctional institution, as added by the bill, the reports are to be made to the State Highway Patrol. If the Patrol determines there is probable cause that the abuse or neglect occurred, it must report its findings to the Department of Rehabilitation and Correction, the sentencing court, and the Correctional Institution Inspection Committee Chairman and Vice-chairman.

(3) Modifies the portions of the specified categories of professions that are subject to the mandatory reporting requirement that include clergymen and, in specified circumstances, persons who render spiritual treatment through prayer. Under the bill (a) a clergyman is included in the specified categories of professions only if the clergyman is employed in a position that includes providing specialized services to an individual with mental retardation or another developmental disability and is acting in an official or professional capacity in that position, and (b) a person who renders spiritual treatment through prayer is included in the specified categories of professions only if the person is employed in a position that includes providing specialized services to an individual with mental retardation or another developmental disability and the person, while acting in an official or professional capacity, renders spiritual treatment through prayer in accordance with the tenets of an organized religion.

(4) Adds a limited exemption from the mandatory reporting requirement for attorneys and physicians. Under the bill, an attorney or physician is not required to make a report concerning any communication the attorney or physician receives from a client or patient in an attorney-client or physician-patient relationship, if the attorney or physician could not testify with respect to that communication in a civil or criminal proceeding. The client or patient is deemed to have waived any testimonial privilege and the attorney or physician must make a report under the requirement if both of the following apply: (a) the client or patient, at the time of the communication, is a person with mental retardation or a developmental disability, and (b) the attorney or physician knows or suspects, as a result of the communication or any observations made during that communication, that the client or patient has suffered or faces a substantial risk of suffering any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of the client or patient.

(5) Specifies that any MR/DD employee who unreasonably fails to make a report required under the mandatory reporting provisions when the employee knew or should have known that the failure would result in a substantial risk of harm to a person with mental retardation or a developmental disability is eligible to be included in the registry regarding misappropriation, abuse, neglect, or other misconduct by MR/DD employees established under existing law, as described above in "***MR/DD registry***."

(6) Requires investigations of a mandatory or discretionary report by a law enforcement agency or DMRDD to be in accordance with the memorandum of understanding prepared under the bill's provisions, as described below.

(7) Revises the existing penalties provided for specified violations of the reporting law. Under the bill, a person who violates the existing prohibition against failing to file a mandatory report, the existing provision requiring physicians who are staff at a hospital or similar institution to provide a notice to the head of the institution and requiring the head of the institution to file a report, or the existing provision requiring a county board that receives a report alleging specified criminal conduct to notify a law enforcement agency and requiring a county board that receives any report to notify DMRDD is guilty of a misdemeanor of the fourth degree or, if the abuse or neglect constitutes a felony, a misdemeanor of the second degree. In addition, if the offender is an MR/DD employee, the offender is eligible to be included in the MR/DD registry.

(8) Enacts a provision specifying that, when a county board receives a report under the reporting provisions and believes that the degree of risk to the person is such that the report is an emergency, the superintendent of the board or an employee of the board the superintendent designates must attempt a face-to-face contact with the alleged victim within one hour of the board's receipt of the report.

(9) Requires DMRDD to adopt rules that provide standards for the substantiation of reports of abuse or neglect filed under the mandatory and discretionary reporting provisions of current law.

Memorandum of understanding

(R.C. 5126.058)

The bill requires each county board of mental retardation and developmental disabilities to prepare a memorandum of understanding concerning reports of abuse, neglect, or exploitation. The memorandum of understanding must be developed by all of the following and be signed by all of those persons except the judges: (1) if there is only one probate judge in the county, the probate judge of the county or the probate judge's representative, (2) if there is more than one probate judge in the county, a probate judge or the probate judge's representative selected by the probate judges or, if they are unable to do so for any reason, the probate judge who is senior in point of service or the senior probate judge's representative, (3) the county peace officer, all chief municipal peace officers within the county, and other law enforcement officers handling abuse, neglect, and exploitation of mentally retarded and developmentally disabled

persons in the county, (4) the prosecuting attorney of the county, (5) the public children services agency, and (6) the coroner of the county.

The bill provides that the memorandum of understanding must set forth the normal operating procedure to be employed by officials in the execution of their respective responsibilities regarding reports of abuse, neglect, or exploitation of a person with mental retardation or another developmental disability. The memorandum's primary goal must be the elimination of unnecessary interviews of persons who are the subject of reports. Failure of an official to follow the procedure is not grounds for, and cannot result in, the dismissal of a charge or complaint arising from a reported case of abuse, neglect, or exploitation or the suppression of evidence obtained as a result of reported abuse, neglect, or exploitation. In addition, such a failure does not give any rights or grounds for appeal or post-conviction relief to any person.

Under the bill, the memorandum of understanding must specify roles and responsibilities for all of the following: (1) handling emergency and nonemergency cases of abuse, neglect, or exploitation, (2) handling and coordinating investigations of reported cases of abuse, neglect, or exploitation, as well as methods to be used in interviewing the person who is the subject of the report, (3) addressing the categories of persons who may interview the person who is the subject of the report, (4) providing victim services to mentally retarded and developmentally disabled persons pursuant to the existing crime victims rights law, and (5) filing criminal charges against persons alleged to have abused, neglected, or exploited mentally retarded or developmentally disabled persons.

The bill provides that the memorandum of understanding may be signed by victim advocates, municipal court judges, municipal prosecutors, and any other person whose participation furthers the goals of a memorandum of understanding.

Abuse, neglect, or misappropriation of property by an MR/DD employee

(R.C. 5123.51)

Existing law

Existing law provides that, in addition to any other required action, DMRDD must review each report it receives of abuse or neglect of an individual with mental retardation or a developmental disability or misappropriation of an individual's property that includes an allegation that an MR/DD employee committed or was responsible for the abuse, neglect, or misappropriation. DMRDD must review a report it receives from a public children services agency only after the agency completes its investigation, as discussed below. DMRDD must do both of the following: (1) investigate the allegation or adopt the findings

of an investigation or review conducted by another person or government entity and determine whether there is a reasonable basis for the allegation, and (2) if it determines there is a reasonable basis for the allegation, conduct an adjudication pursuant to the Administrative Procedure Act.

DMRDD, or DMRDD and a union representative in certain circumstances, must appoint an independent hearing officer to conduct any hearing pursuant to the provisions described in the preceding paragraph. No hearing may be conducted until any criminal proceeding or collective bargaining arbitration concerning the same allegation has concluded. In conducting a hearing, the hearing officer must do both of the following: (1) determine whether there is clear and convincing evidence that the MR/DD employee has misappropriated the property of an individual with mental retardation or a developmental disability, knowingly abused or neglected such an individual, recklessly abused or neglected such an individual with resulting physical harm, or negligently abused or neglected such an individual with resulting serious physical harm (hereafter, these are collectively referred to as "specified prohibited acts"), and (2) give weight to the decision in any collective bargaining arbitration regarding the same allegation.[11] Unless DMRDD's Director determines there are extenuating circumstances (including an employee's use of physical force that was necessary as self-defense) and subject to the exceptions described below, the Director must include the name of an MR/DD employee in the MR/DD registry if the Director finds that there is clear and convincing evidence the employee has committed one or more of the specified prohibited acts. If the Director includes an MR/DD employee in the registry, the Director must notify the employee, the individual who was the subject of the report, and certain other specified persons and entities.

Under current law, DMRDD's Director cannot include in the registry an individual who has been found not guilty by a court or jury of an offense arising from the same facts. If an allegation concerns an employee of the Department, the Director of Health or that Director's designee must review the hearing officer's decision to determine whether "the standard described in R.C. 5123.51(C)(2) has been met." If the Director or designee determines that the standard has been met and that no extenuating circumstances exist, the Director or designee must notify DMRDD's Director that the MR/DD employee is to be included in the registry. If DMRDD's Director receives such notification, the Director must include the MR/DD employee in the registry, unless the individual has been found not guilty by a court or jury of an offense arising from the same facts, and must provide the

---

[11] *"Clear and convincing evidence [is e]vidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than beyond a reasonable doubt, the norm for criminal trials." BLACK'S LAW DICTIONARY 577 (7th ed. 1999).*

related notification. Files and records of investigations conducted pursuant to these provisions are not public records under the Public Records Law, but, on request, DMRDD must provide copies to the Attorney General, a prosecuting attorney, or a law enforcement agency.

The bill

The bill revises the existing provisions regarding reports of abuse, neglect, or misappropriation of property by an MR/DD employee in the following ways:

(1) Requires DMRDD to review the notice it receives from a prosecutor concerning the filing of charges in a case involving an alleged victim with mental retardation or a developmental disability when DMRDD receives it;

(2) Expands the duties of DMRDD, in certain circumstances, following its investigation of an allegation of abuse, neglect, or misappropriation of property by an MR/DD employee and enacts related provisions. Under the bill, if DMRDD determines that there is a reasonable basis for the allegation and there is no criminal proceeding pending regarding the allegation, DMRDD must conduct an adjudication pursuant to the Administrative Procedure Act. If a criminal proceeding regarding the allegation is pending, DMRDD may proceed with the adjudication only if the prosecutor responsible for the criminal proceeding, after receiving notice of DMRDD's intention to proceed, consents.

(3) Modifies the matters that a hearing officer must determine at a hearing conducted under the provisions. First, it revises the existing "misappropriation of property," requiring the hearing officer to determine whether there is clear and convincing evidence that the MR/DD employee has misappropriated property of one or more individuals with mental retardation or a developmental disability with an aggregate value of $100 or more. Second, it creates another category of misappropriation that must be considered involving property that is designed to be used as a check, draft, negotiable instrument, credit card, charge card, or device for implementing an electronic fund transfer at a point of sale terminal, automated teller machine, or cash dispensing machine. Third, the bill eliminates the requirement in existing law that the hearing officer determine whether there is clear and convincing evidence that the employee knowingly neglected a person with mental retardation or a developmental disability. In addition, it expands the matters the hearing officer must determine to include, in addition to the acts specified under existing law, determinations of whether the MR/DD employee has done any of the following: (a) recklessly neglected such an individual, creating a "substantial risk" (see **COMMENT** 3) of "serious physical harm" (see **COMMENT** 4), (b) engaged in sexual conduct or had sexual contact with such an individual for whom the employee is employed or under a contract to provide care and who was not the employee's spouse, or (c) unreasonably failed to make a

report pursuant to the provisions described above under "***Reports of abuse or neglect***" when the employee knew or should have known that the failure would result in a substantial risk of harm to an individual with mental retardation or a developmental disability;

(4) Repeals the prohibition against DMRDD's Director including in the MR/DD registry an individual who has been found not guilty by a court or jury of an offense arising from the same facts as the allegation in question, and the related application to findings made by the Director of Health;

(5) Requires that the disposition of a court proceeding or arbitration arising out of the same facts as the allegation that resulted in an individual's placement on the registry be noted in the registry next to the individual's name;

(6) Clarifies that, when determining whether to place an individual on the registry, the Director of DMRDD must consider the same things that a hearing officer conducting an adjudication would consider;

(7) Specifies that, if DMRDD is required by the Administrative Procedure Act to give notice of an opportunity for a hearing and the MR/DD employee subject to the notice does not timely request a hearing in accordance with a specified provision of that Act, DMRDD is not required to hold a hearing;

(8) Requires the hearing officer to give weight to any relevant facts presented at the hearing.

Notice to MR/DD employees

(R.C. 5123.542)

The bill requires that each MR/DD employee be provided an annual written notice describing the conduct for which an employee may be included in the registry regarding misappropriation, abuse, neglect, or other misconduct by an MR/DD employee. This notice must be provided by the following, to its own employees: (1) DMRDD, (2) each county board of mental retardation and developmental disabilities, (3) each contracting entity of a county board, (4) each owner, operator, or administrator of a residential facility, and (5) each owner, operator, or administrator of a program certified by the department to provide supported living. The notice must be provided in a form and manner proscribed by DMRDD, and the form must be the same for all persons and entities required to provide the notice.

The bill provides that the fact that an MR/DD employee does not receive the notice required by this division does not exempt the employee from being included in the registry.

Review of major unusual incidents

(R.C. 5123.614)

The bill authorizes DMRDD to conduct, or request that certain entities conduct, an independent investigation or review of major unusual incidents reported to DMRDD. DMRDD may request that any of the following conduct the investigation or review: a county board of mental retardation and developmental disabilities that is not implicated in the report, a regional council of government, or any other entity authorized to conduct such an investigation.

The bill requires that an independent investigation or review occur if the report concerns the health or safety of a person with mental retardation or a developmental disability and involves an allegation that an employee of a county board of mental retardation and developmental disabilities created a substantial risk of serious physical harm to a person with MR/DD.

Prosecutor's report of filing of charges

(R.C. 2930.03 and 2930.061)

The bill enacts a provision specifying that, if a person is charged in a complaint, indictment, or information with any violation of law involving a victim that the prosecutor knows is a mentally retarded or developmentally disabled person, in addition to any other required notices, the prosecutor in the case must send written notice of the charges to DMRDD. The notice must specifically identify the person charged. The bill specifies that the provisions of the existing crime victims rights law that govern the giving of notices to crime victims under that law do not apply regarding a notice given under this provision of the bill.

Protective service order and plans

Complaint for protective services

(R.C. 5126.30, 5126.33, and 5126.50; Section 4)

Existing law. Under existing law, a county board of mental retardation and developmental disabilities may file a complaint with the probate court of the county in which an adult with mental retardation or a developmental disability resides for an order authorizing the board to arrange services for that adult if the board has been unable to secure consent. The complaint must include the adult's name, age, and address, facts describing the nature of the abuse or neglect and supporting the board's belief that services are needed, the types of services proposed by the board, as set forth in the individualized service plan prepared for the person and filed with the complaint, and facts showing the board's attempts to

obtain the required consent to the services. The law specifies notice procedures that must be followed when a board files such a complaint, and procedures that must be followed at the hearing on the complaint.

The court must issue an order authorizing the board to arrange the services if it finds, by clear and convincing evidence, that the adult has been abused or neglected, is incapacitated, is facing a substantial risk of immediate physical harm or death, is in need of the services, and that no person authorized by law or court order to give consent for the adult is available or willing to consent to the services.[12] In formulating the order, the court must consider the individual service plan and specifically designate the services that are necessary to deal with the abuse, neglect, or condition resulting from abuse or neglect and that are available locally, and authorize the board to arrange for these services only. The court must limit the provision of these services to a period not exceeding 14 days, renewable for an additional 14-day period on a showing by the board that continuation of the order is necessary. The law sets forth certain limitations on the court, in issuing the order. The adult, the board, or any other person who received notice of the petition may file a motion for modification of the court order at any time.

Operation of the bill. The bill modifies these provisions in the following ways:

(1) Clarifies that a county board can seek an order under this section for an adult who is eligible to receive services or support;

(2) Requires that, unless the court has waived notice, notice of the filing of the complaint be personally served on all parties;

(3) Specifies that all parties may attend the hearing, present evidence, and examine and cross-examine witnesses;

(4) Provides that the Ohio Rules of Evidence apply in hearings conducted under this provision;

(5) Revises the existing provisions that refer to the board's arrangement of services for the adult and to the individualized service plan for the adult so that they instead refer to the arrangement of protective services for the adult and to the individualized protective service plan for the adult, and it adds references to "exploitation" in those provisions to conform to the changes described below.

---

[12] *"Substantial risk" has the same meaning as in existing criminal law (see* **COMMENT** *3).*

(6) Requires the board to develop a detailed protective service plan describing the services that the board will provide, or arrange for the provision of, to the adult to prevent further abuse, neglect, or exploitation, requires the board to submit the plan to the court for approval, and specifies that the plan may be changed only by court order.[13]

(7) Extends the limit for the provision of the services to a period not exceeding six months, renewable for an additional six-month period on a showing by the board that continuation of the order is necessary.

(8) Enacts provisions regarding temporary orders related to protective services.[14] Under the bill, after the filing of a complaint for a protective services order, the court, prior to the final disposition, may enter any temporary order that it finds necessary to protect the adult from abuse, neglect, or exploitation including the following: (a) a temporary protection order, (b) an order requiring the evaluation of the adult, (c) an order requiring a party[15] to vacate the adult's place of residence or legal settlement, provided that, subject to clause (d) of this sentence, no operator of a residential facility licensed by DMRDD may be removed under

---

[13] *"Adult" means a person 18 years of age or older with mental retardation or a developmental disability.*

"Abuse" and "neglect" have the same meanings as in existing law governing DMR/DD, except that "abuse" includes a misappropriation.

*"Exploitation" means the unlawful or improper act of a caretaker using an adult or an adult's resources for monetary or personal benefit, profit, or gain, including misappropriation (see "**Abuse, neglect, or misappropriation of property by an MR/DD employee**,") of an adult's resources.*

"Protective service plan" means an individualized plan developed by the county board of mental retardation and developmental disabilities to prevent the further abuse, neglect, or exploitation of an adult with mental retardation or a developmental disability. (R.C. 5126.30.)

[14] *"Protective services" means services provided by the county board of mental retardation and developmental disabilities to an adult with mental retardation or a developmental disability for the prevention, correction, or discontinuance of an act of as well as conditions resulting from abuse, neglect, or exploitation. (R.C. 5126.30(I).)*

[15] *"Party" means all of the following: (a) an adult who is the subject of a probate proceeding concerning protective services, (b) a caretaker, unless otherwise ordered by, the probate court, and (c) any other person designated as a party by the probate court, including, but not limited to, the adult's spouse, custodian, guardian, or parent. (R.C. 5126.30(L).)*

this provision, or (d) an order pursuant to existing law that appoints a receiver to take possession of and operate a residential facility licensed by DMRDD. The court may grant an *ex parte*[16] order pursuant to this provision on its own motion or, if a party files a written motion or makes an oral motion requesting the issuance of the order and stating the reasons for it, if it appears to the court that the best interest and the welfare of the adult require that the court issue the order immediately. The court, if acting on its own motion, or the person requesting the granting of an *ex parte* order, to the extent possible, must give notice of its intent or of the request to all parties, the adult's legal counsel, if any, and the Legal Rights Service. If it issues an *ex parte* order, the court must hold a hearing to review the order within 72 hours after it is issued or before the end of the day after the day on which it is issued, whichever occurs first. The court must give written notice of the hearing to all parties to the action.

Emergency ex parte orders by telephone

(R.C. 5126.331, 5126.332, and 5126.333)

Issuance. The bill permits a probate court, through a probate judge or magistrate, to issue an *ex parte* emergency order by telephone if (1) the court receives notice from the county board of mental retardation and developmental disabilities, or an authorized employee of the board, that the board or employee believes such an order is needed, (2) the adult who is the subject of the notice is eligible to receive services or support from the board, (3) there is reasonable cause to believe that the adult who is the subject of the notice is incapacitated,[17] and (4) there is a substantial risk to the adult of immediate physical harm or death.

The bill provides that a court cannot issue an order to remove an adult under this section until it is satisfied that reasonable efforts have been made to notify the adult and any person with whom the adult resides of the proposed removal and any reasons for it. The court may, however, issue such an order despite the fact that reasonable efforts to give notice were not made if notification could (1) jeopardize the physical or emotional safety of the adult or (2) result in the adult being removed from the court's jurisdiction.

---

[16] *An* ex parte *order is "[a]n order made by the court upon the application of one party to an action without notice to the other." BLACK'S LAW DICTIONARY 1123 (7th ed. 1999).*

[17] *"Incapacitated" means lacking understanding or capacity, with or without the assistance of a caretaker, to make and carry out decisions regarding food, clothing, shelter, health care, or other necessities, but does not include mere refusal to consent to the provision of services. (R.C. 5126.30(G).)*

Duration of order. An order issued pursuant to this provision can be effective for up to 24 hours, unless the day following the day on which the order was issued is a weekend-day or holiday, in which case the order may remain in effect until the next business day.

Effect of order. The bill provides that an *ex parte* order issued pursuant to this section may authorize the county board to provide for, or arrange for the provision of, emergency protective services for the adult; remove the adult from the adult's place of legal residence or legal settlement; or remove the adult from the place where the abuse, neglect, or exploitation occurred.

Under the bill, if an emergency *ex parte* order is issued under this provision, the county board or employee that provided notice to the court must file a complaint for protective services as described above within 24 hours. If the day after the day the order was issued is a weekend-day or holiday, the complaint must be filed on the next business day.

Probable cause hearing. The bill provides that if an emergency *ex parte* order is issued pursuant to this section, the court must hold a hearing within 24 hours of issuance to determine if there is probable cause for the order. If, however, the day after the order was issued is a weekend-day or holiday, the hearing must be held on the next business day. At the hearing, the court is required to consider the adult's choice of residence and determine whether protective services are the least restrictive alternative to meet the adult's needs. The court is permitted to issue temporary orders to protect the adult from immediate physical harm; such an order is effective for 30 days, and may be renewed for an additional 30-day period. The bill's provisions also permit the court to order emergency protective services.[18]

Notice to the Department. The bill permits any person with reason to believe that an adult with mental retardation or a developmental disability faces a substantial risk of immediate physical harm or death and that the responsible county board has neither filed a complaint for protective services nor sought an emergency *ex parte* order for such services to notify the Department of Mental Retardation and Developmental Disabilities. Within 24 hours of receipt of the notice, the Department must cause an investigation to be conducted regarding the notice. The bill requires the Department to provide assistance to the county board to provide for the health and safety of the adult.

---

[18] *"Emergency protective services" means protective services furnished to a person with mental retardation or a developmental disability to prevent immediate physical harm. (R.C. 5126.30(H).)*

Criminal record checks

(R.C. 109.572, 5123.081, and 5126.28)

Existing law

Existing law requires (1) DMRDD's Director to request that the Superintendent of the Bureau of Criminal Identification and Investigation (BCII) conduct a criminal records check with respect to (a) each person who is under final consideration for appointment to or employment with DMRDD (an applicant), (b) a person who is being transferred to DMRDD, and (c) an employee who is being recalled or reemployed after a layoff, (2) the superintendent of a county board of mental retardation and developmental disabilities to request that BCII's Superintendent conduct a criminal records check with respect to any applicant who has applied to the board for employment in any position, and (3) the entity under contract with a county board for the provision of specialized services to individuals with mental retardation or a developmental disability request that BCII's Superintendent conduct a criminal records check with respect to all persons under final consideration for employment in a direct services position with an entity contracting with a county board for employment. The criminal records checks are not required with respect to employees who are being considered for a different position or are returning after a leave of absence or seasonal break in employment, as long as the Director or county board superintendent has no reason to believe that the employee has committed any "disqualifying offense," and are not required in other specified circumstances. Existing law contains procedures regarding the manner of requesting BCII to conduct a criminal records check, and the manner in which BCII is to conduct a check.

BCII's Superintendent must conduct a criminal records check on receipt of a request regarding an applicant for employment in any position with DMRDD, in any position with a county board of mental retardation and developmental disabilities, or in a direct services position with an entity contracting with a county board, a completed form prescribed pursuant to the request procedures, and a set of fingerprint impressions obtained in the manner described in the request procedures. The Superintendent must conduct the criminal records check in accordance with the specified procedures to determine whether any information exists that indicates that the person who is the subject of the request has been convicted of or pleaded guilty to any of a number of crimes specified in statute, including murder, rape, and assault.

In general, the entity or person required to request a criminal records check regarding an applicant cannot employ or place the applicant in a direct services position if the applicant has been convicted of or pleaded guilty to a "disqualifying offense." The law specifies circumstances, pertaining to provisional employment

pending receipt of the report of the criminal records check and to employment of an applicant who satisfies specified "rehabilitation standards," to whom the ban does not apply.

Operation of the bill

The bill expands the list of convictions for which BCII's Superintendent must check in conducting a criminal records check and the list of "disqualifying offenses" to include the offense of patient endangerment established by the bill.

Notice to coroner regarding certain deaths

(R.C. 313.12)

Existing law

Existing law provides that, when a person dies as a result of criminal or other violent means, by casualty, by suicide, or in any suspicious or unusual manner, or when any person dies suddenly when in apparent good health, the physician called in attendance, or any member of an ambulance service, emergency squad, or law enforcement agency who obtains knowledge thereof arising from the person's duties, must immediately notify the office of the coroner of the known facts concerning the time, place, manner, and circumstances of the death, and any other information required pursuant to the coroner law. In such cases, if a request is made for cremation, the funeral director called in attendance immediately must notify the coroner.

The bill

The bill expands the coroner notification provision to also require the specified health care, emergency, and law enforcement personnel to immediately notify the office of the coroner when any mentally retarded person or developmentally disabled person dies regardless of the circumstances.

Consent for autopsy or post-mortem examination

(R.C. 2108.50 and 2108.521)

Existing law

Existing law provides that a licensed physician or surgeon may perform an autopsy or post-mortem examination if consent has been given in the order named by one of the following persons of sound mind and 18 years of age or older in a written instrument executed by the person or on the person's behalf at the person's express direction: (1) the deceased person during the deceased person's lifetime,

(2) the deceased person's spouse, (3) if there is no surviving spouse, if the surviving spouse's address is unknown or outside the United States, if the surviving spouse is physically or mentally unable or incapable of giving consent, or if the deceased person was separated and living apart from the surviving spouse, then a person having the first named degree of relationship in the following list in which a relative of the deceased person survives and is physically and mentally able and capable of giving consent may execute consent: children; parents; or brothers or sisters, (4) if there are no surviving persons of any degree of relationship listed in clause (3) of this paragraph, any other relative or person who assumes custody of the body for burial, (5) a person authorized by written instrument executed by the deceased person to make arrangements for burial, or (6) a person who, at the time of the deceased person's death, was serving as guardian of the person for the deceased person. Consent to an autopsy or post-mortem examination may be revoked only by the person executing the consent and in the same manner as required for execution of consent.

The bill

The bill enacts a new provision that pertains to an autopsy for a mentally retarded or developmentally disabled person. Under the bill, when a mentally retarded person or a developmentally disabled person dies, if (1) DMRDD or a county board of mental retardation and developmental disabilities has a good faith reason to believe that the death occurred under suspicious circumstances, and (2) the coroner was apprised of the circumstances of the death, and declines to conduct an autopsy, DMRDD or the board may file a petition in a court of common pleas seeking an order authorizing an autopsy or post-mortem examination.

On the filing of a petition under this provision, the court may conduct a hearing on the petition. The court may determine whether to grant the petition without a hearing. DMRDD or the board, and all other interested parties, may submit information and statements to that court that are relevant to the petition, and, if the court conducts a hearing, may present evidence and testimony at the hearing. The court must order the requested autopsy or post-mortem examination if it finds that DMRDD or the board has demonstrated a need for the autopsy or post-mortem examination regardless of whether any consent has been given, has been given and withdrawn, or whether any information was presented to the coroner or to the court regarding an autopsy being contrary to the deceased person's religious beliefs.

An autopsy or post-mortem examination ordered under this provision may be performed by a licensed physician or surgeon. The court may identify in the order the person who is to perform the autopsy or post-mortem examination. If an autopsy or post-mortem examination is ordered under this provision, DMRDD or

the board that requested the autopsy or examination must pay the physician or surgeon who performs the autopsy or examination for costs and expenses incurred in performing the autopsy or examination.

Appointment of an interpreter in a legal proceeding

(R.C. 2311.14)

Existing law

Existing law provides that, whenever because of a hearing, speech, or other impairment a party to or witness in a legal proceeding cannot readily understand or communicate, the court must appoint a qualified interpreter to assist such person. Before entering upon his or her duties, the interpreter must take an oath that he or she will make a true interpretation of the proceedings to the party or witness, and that he or she will truly repeat the statements made by such party or witness to the court, to the best of his or her ability. The court is required to determine a reasonable fee for all such interpreter service which must be paid out of the same funds as witness fees.

The bill

The bill specifies that: (1) the existing interpreter-appointment provision described above is not limited to a person who speaks a language other than English, (2) the provision also applies to the language and descriptions of any mentally retarded person or developmentally disabled person who cannot be reasonably understood, or who cannot understand questioning, without the aid of an interpreter, and (3) the interpreter may aid the parties in formulating methods of questioning the person with mental retardation or a developmental disability and in interpreting the answers of the person. The bill provides that, before appointing any interpreter under this provision, the court must evaluate the qualifications of the interpreter and make a determination as to the ability of the interpreter to effectively interpret on behalf of the party or witness. The court may appoint the interpreter only if it is satisfied that the interpreter is able to effectively interpret on behalf of that party or witness. The bill specifies that the existing "oath" requirement must be satisfied before the interpreter enters upon his or her "official duties," as opposed to his or her "duties" as under existing law. It also specifies that, if the interpreter is appointed to assist a mentally retarded or developmentally disabled person, the oath also shall include a statement that the interpreter will not prompt, lead, suggest, or otherwise improperly influence the testimony of the witness or party.

Mandatory reporters of abuse or neglect

(R.C. 2151.421 and 2151.99, not in the bill)

Existing law

Existing law lists certain categories of professions, and prohibits a person in any of the specified professions who is acting in an official or professional capacity and knows or suspects that a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, from failing to immediately report that knowledge or suspicion to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. The specified professions to which the mandatory reporting provision applies are attorneys; physicians; dentists; podiatrists; practitioners of a limited branch of medicine; registered, licensed practical, and visiting nurses; other health care professionals; licensed psychologists; licensed school psychologists; speech pathologists and audiologists; coroners; administrators and employees of a child day-care center, residential camp, child day camp, certified child care agency, or other public or private children services agency; school teachers, employees, and authorities; persons engaged in social work or the practice of professional counseling; and persons rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion. Attorneys and physicians are provided an exception from the mandatory reporting provision, in specified circumstances, concerning communications received from a client or patient in an attorney-client or physician-patient relationship.

A violation of the prohibition is a misdemeanor of the fourth degree. Existing law provides procedures for making the report, rules and procedures regarding follow-ups and investigations regarding the report, a qualified civil immunity regarding the making of the report, rules regarding the use or confidentiality of the report, and rules and procedures regarding protective services based on the report.

The bill

The bill expands the list of specified professions that are subject to the existing mandatory abuse and neglect reporting provision. Under the bill, the provision also applies to superintendents, board members, and employees of a county board of mental retardation, investigative agents contracted with by a county board of mental retardation, and employees of DMRDD.

COMMENT

1. Current law, unchanged by the bill, provides that the personal liability of any distributee cannot exceed the lesser of (a) the amount the distributee has received reduced by the amount, if any, previously returned or otherwise used for the payment of the spouse's share or claims finally allowed or (b) the distributee's proportionate share of the spouse's share or of claims finally allowed. Any distributee's proportionate share of the spouse's share or of claims finally allowed are determined by the following fraction: (i) the numerator is the total amount received by the distributee, reduced by all amounts, if any, previously returned or otherwise used for the payment of the spouse's share or claims finally allowed and (ii) the denominator is the total amount received by all distributees reduced by all amounts, if any, previously returned or otherwise used for the payment of the spouse's share or claims finally allowed. (R.C. 2113.53(B).)

2. The provisions of R.C. 2101.163 in the bill are similar to the provisions of former R.C. 2101.163, which was enacted by Am. Sub. H.B. 350 of the 121st General Assembly (Tort Reform Act). In conformity with the Supreme Court of Ohio's decision in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, which held Am. Sub. H.B. 350 unconstitutional *in toto* for violating the one-subject rule, Sub. S.B. 108 of the 124th General Assembly outright repealed former R.C. 2101.163. It appears from the *Sheward* decision that former R.C. 2101.163 did not violate any substantive constitutional provision.

3. Existing law (not in the bill) contains provisions that, in cases in a juvenile court or criminal court in which a person is charged with a violation of R.C. 2905.03, 2905.05, 2907.02, 2907.03, 2907.05, 2907.06, 2907.07, 2907.09, 2907.21, 2907.23, 2907.24, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, or 2919.22 or an act that would be an "offense of violence" if committed by an adult *and in which an alleged victim of the violation was a child who was less than 13 years of age* when the document charging the violation was filed, provide mechanisms for the taking and use in the proceedings of depositions and videotaped depositions of the child victim, the closed circuit telecast into the courtroom of testimony of the child victim that is taken outside the courtroom, the recording, for showing in the courtroom, of the testimony of the child victim, and the videotaping and use of preliminary hearing testimony of the child victim. The existing mechanisms are similar to those contained in the bill regarding cases in a juvenile court or criminal court in which a person is charged with one of the violations specified in the bill or an offense of violence and in which an alleged victim of the violation was a functionally impaired person. Existing law (not in the bill) also contains a provision that provides for the use of preliminary hearing, prior trial, or deposition testimony of a person, if the person giving the testimony has died, cannot be produced at trial, or has become incapacitated to testify; the

existing provision appears to be identical to the provision contained in the bill at R.C. 2945.491(A)(3). (R.C. 2152.81, 2945.481, and 2945.49.)

4. Existing R.C. 2901.01 (not in the bill) provides that, as used in the Revised Code, "offense of violence" means any of the following: (a) a violation of R.C. 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.15, 2903.21, 2903.211, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.05, 2909.02, 2909.03, 2909.24, 2911.01, 2911.02, 2911.11, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.04, 2921.34, 2923.161, 2911.12(A)(1), (2), or (3), or 2919.22(B)(1), (2), (3), or (4) or felonious sexual penetration in violation of former R.C. 2907.12, (b) a violation of an existing or former municipal ordinance or law of Ohio or any other state or the United States, substantially equivalent to any section, division, or offense listed in clause (a) of this paragraph, (c) an offense, other than a traffic offense, under an existing or former municipal ordinance or law of Ohio or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons, or (d) a conspiracy or attempt to commit, or complicity in committing, any offense under clause (a), (b), or (c) of this paragraph.

5. Existing R.C. 2901.01 (not in the bill) provides that, as used in the Revised Code, "substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.

6. Existing R.C. 2901.01 (not in the bill) provides that, as used in the Revised Code, "serious physical harm to persons" means any of the following: (a) any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment, (b) any physical harm that carries a substantial risk of death, (c) any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity, (d) any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement, or (e) any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain. "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	02-11-03	p. 140
Reported, H. Judiciary	04-01-03	p. 309
Passed House (98-0)	04-08-03	pp. 334-335
Reported, S. Judiciary on Civil Justice	---	---

H0051-RS-125.doc/jc