

**OPINION NO. 89-046**

**Syllabus:**

1. A minor youth who has been committed to the Department of Youth Services pursuant to R.C. 2151.355 and R.C. 5139.05 and who wishes to get married must first obtain consent, as required

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by the applicable provisions of R.C. 3101.01 and Juv. R. 42, from one or both parents, from one of the alternative authorities named in R.C. 3101.01, or from the juvenile court as provided in Juv. R. 42(A).

2. Pursuant to R.C. 3101.01 and Juv. R. 42(A), the Department of Youth Services has no authority to either consent or withhold consent to the marriage of a minor committed to the legal custody of the Department.

**To: Geno Natalucci-Persichetti, Director, Department of Youth Services, Columbus, Ohio**

**By: Anthony J. Celebrezze, Jr., Attorney General, July 20, 1989**

I have before me your request concerning the applicability of R.C. 3101.01 to minors within the care and custody of the Department of Youth Services (DYS). Specifically you ask whether a minor youth committed to DYS and who wishes to get married while serving his/her commitment is required to get parental consent for such a marriage or does DYS have the legal duty to provide consent for such a youth to marry.

The determination of who must give consent to the marriage of a minor is governed by R.C. 3101.01 and Juv. R. 42. R.C. 3101.01, to which you refer in your request, states:

Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. A minor must first obtain the consent of his parents, surviving parent, parent awarded custody by a court of competent jurisdiction, the guardian of his person, or any one of the following who has been awarded permanent custody of him by a court exercising juvenile jurisdiction:

(A) An adult person;

(B) The department of human services or any child welfare organization certified by such department;

(C) A county department of human services or a county children services board.

*A minor shall not be required to obtain the consent of a parent who resides in a foreign country, has neglected or abandoned such minor for a period of one year or longer immediately preceding his application for a marriage license, has been adjudged incompetent, is an inmate of a state mental or penal institution, has been permanently deprived of his custody by a court exercising juvenile jurisdiction, or has been deprived of his custody or control, or both, by the appointment of a guardian of the person of the minor by the probate court or by any other court of competent jurisdiction. (Emphasis added.)*

Pursuant to R.C. 3101.01, a minor must obtain the consent of each living parent except in the circumstances described in the last paragraph of R.C. 3101.01.<sup>1</sup> Dependent upon precisely which of those circumstances applies in a particular case, R.C. 3101.01 provides that the authority to provide consent will shift to one of the persons or organizations specified in the first paragraph. Thus, I must consider which, if any, of the circumstances described in R.C. 3101.01 applies when a child is committed to DYS.

Commitment of a child to DYS may be accomplished only by an order of the juvenile court pursuant to R.C. 2151.355. R.C. 2151.355(A)(4), (5) and (6) authorize the court to commit a child to DYS when the child has been adjudicated delinquent

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<sup>1</sup> I note that the consent provisions of R.C. 3101.01 directly pertain only to minors between the age of majority and the statutory minimum age

by virtue of a felony level offense. The juvenile court has exclusive original jurisdiction concerning the disposition of delinquent children. R.C. 2151.23(A)(1); *see also* R.C. 5139.05(A) ("juvenile court may commit any child to the department of youth services permanently as authorized in section 2151.355..."). Clearly, commitment to DYS involves, in the words of R.C. 3101.01, "a court exercising juvenile jurisdiction." Thus, the only circumstance of R.C. 3101.01 which could possibly shift consent authority to DYS is that the parent "has been permanently deprived of [the child's] custody by a court exercising juvenile jurisdiction."<sup>2</sup> Therefore, I must next determine whether, in the language of R.C. 3101.01, the parent of a minor committed to DYS "has been permanently deprived of his custody" by the juvenile court.

The term "permanent custody" is not defined in R.C. Chapter 3101. I note, however, that in R.C. 3101.01, the term is used only in connection with the exercise of juvenile jurisdiction. *See* R.C. 3101.01 ("any one of the following who has been awarded *permanent custody* of him by a court exercising *juvenile jurisdiction*"

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permissible for marriage. *See State v. Gans*, 168 Ohio St. 174, 178, 151 N.E.2d 709, 712 (1958) ("[s]ection 3101.01 provides that 'a minor must first obtain...consent' to marry....*That statute does not contemplate the joining in marriage either of any male person under 18 years of age or of any female person under 16 years of age*" (emphasis in original)); *see also Snafher v. State*, 20 Ohio 1 (1851); *Carlton v. Carlton*, 76 Ohio App. 338, 64 N.E.2d 428 (Wood County 1945).

The court in *Gans* also stated that "[t]he only exception to the public policy against the marriage of male and female persons under the ages of 18 and 16, respectively, as set out hereinbefore, is set forth in Section 3101.04, Revised Code...." *State v. Gans*, 168 Ohio St. at 178, 151 N.E.2d at 712. R.C. 3101.04 provides that: "When the juvenile court files a consent to marriage pursuant to the juvenile rules, the probate court may thereupon issue a license, notwithstanding either or both the contracting parties for the marital relation are under the minimum age prescribed in section 3101.01 of the Revised Code." Juv. R. 42(C) states:

Application where female pregnant or delivered of child born out of wedlock. Where a female is pregnant or delivered of a child born out of wedlock and the parents of such child seek to marry even though one or both of them is under the minimum age prescribed by law for persons who may contract marriage, such persons shall file an application under oath in the county where the female resides requesting that the judge of the juvenile court give consent in the probate court to such marriage.

Although the circumstances in which a minor below the statutory minimum age may marry are restricted by R.C. 3101.04 and Juv. R. 42(C), this does not obviate the need for parental consent. Juv. R. 42(D) further requires that "[t]he consent to the granting of the application [under Juv. R. 42(C)] by each parent whose consent is required by law shall be indorsed on the application." Since the only requirements for parental consent are found in R.C. 3101.01, a minor under the statutory minimum age for marriage must still meet the consent requirements of R.C. 3101.01, in addition to the requirements of Juv. R. 42(C).

<sup>2</sup> The final clause of R.C. 3101.01 refers to deprivation of custody or control "by any other court of competent jurisdiction." This phrase was added in 1951. 1951 Ohio Laws 178 (Am. S.B. 65, approved May 28, 1951). Prior to this amendment, a minor was not required to obtain consent of a parent "permanently deprived of custody...by a court exercising juvenile jurisdiction" or "deprived of custody or control, or both...by the appointment of a guardian of the person of the minor by the probate court." Thus, the language added by Am. S.B. 65 refers to custody actions by a third category of courts (for example, domestic relations), other than the specific juvenile and probate court actions which were already included in the statute.

and "has been *permanently* deprived of his *custody* by a court exercising *juvenile jurisdiction*" (emphasis added). Juvenile court jurisdiction is governed by R.C. Chapter 2151, which contains specific definitions of the various types of custody which the juvenile court may award. It is axiomatic that "[s]tatutes relating to the same subject matter should be construed *in pari materia*, although they were enacted at different sessions of the General Assembly." *Warner v. Ohio Edison Co.*, 152 Ohio St. 303, 89 N.E.2d 463 (1949) (syllabus, paragraph one); *Accord Bobb v. Marchant*, 14 Ohio St. 3d 1, 3, 469 N.E.2d 847, 849 (1984). I conclude, therefore, that the General Assembly intended that, for purposes of R.C. 3101.01, "permanent custody" should have the same meaning accorded that term with respect to the exercise of juvenile court jurisdiction in R.C. Chapter 2151.

R.C. 2151.011(B)(12) defines "permanent custody" as:

a legal status which vests in a public children services agency or a private child placing agency,<sup>3</sup> all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of any and all parental rights, privileges, and obligations, including all residual rights<sup>4</sup> and obligations. (Footnotes added.)

Review of R.C. Chapter 2151 reveals a number of express instances where the juvenile court may award permanent custody. See R.C. 2151.353(A)(4) (court may commit an abused, neglected, or dependent child "to the permanent custody of a public children services agency or private child placing agency"); R.C. 2151.355(A)(1) (court may make any order regarding a delinquent child that is "authorized by section 2151.353"); R.C. 2151.413-2151.415 (court may award permanent custody to public children services agency or private child placing agency, upon motion to convert temporary custody to permanent). See generally R.C. 2151.23(A)(1) (juvenile court has exclusive original jurisdiction "to determine the custody of any child not a ward of another court of this state); R.C. 2151.23(C), (D), (E) (juvenile court jurisdiction over cases involving children certified from court of common pleas or other court of competent jurisdiction). None of these statutes which use the term "permanent custody" address commitment to DYS.

In contrast, the provisions of R.C. Chapter 2151 providing for commitment of a child to DYS refer to "legal custody" rather than "permanent custody." R.C. 2151.355(A)(4), (5) and (6) each authorize a juvenile court to commit a child, who has been adjudicated delinquent for the reasons specified in those subdivisions, "to the *legal custody* of the department of youth services for institutionalization...." (Emphasis added.) "Legal custody," as defined at R.C. 2151.011(B)(10), means:

a legal status which vests in the custodian the right to have physical care and control of the child and to determine where and with whom he shall live,<sup>5</sup> and the right and duty to protect, train, and discipline

<sup>3</sup> "Public children services agency" is defined at R.C. 2151.011(B)(26) as "a children services board or a county department of human services." "Private child placing agency" is defined at R.C. 2151.011(B)(9). Such agencies must be certified by the Department of Human Services or by the Department of Youth Services, as provided in R.C. 5103.03. I note that DYS itself is not included as an agency under either definition.

<sup>4</sup> Pursuant to R.C. 2151.011(B)(11), "[r]esidual parental rights, privileges, and responsibilities" means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child.... The rights listed in R.C. 2151.011(B)(11) include, but are "not necessarily limited to," visitation, consent to adoption, choice of religion, and support obligations.

<sup>5</sup> I reject any suggestion that either the right to physical control or the right to determine where and with whom the child shall live encompasses the right to consent to marriage. As the U.S. Supreme Court has noted: "The right to marry, like many other rights, is subject to substantial restrictions

him and to provide him with food, shelter, education, and medical care, *all subject to any residual parental rights, privileges, and responsibilities.* (Emphasis and footnote added.)

The distinction between legal custody and permanent custody is also maintained in R.C. Chapter 5139, which governs DYS specifically. R.C. Chapter 5139 speaks of "permanent commitment" rather than "permanent custody." *See, e.g.,* R.C. 5139.05(A) ("juvenile court may commit any child to the department of youth services permanently"). Nor does R.C. Chapter 5139 include any definition of the term "permanent custody." The pertinent definitions are found at R.C. 5139.01(A), which states:

(2) "Permanent commitment" means a commitment which vests *legal custody* of a child in the department of youth services.

(3) "Legal custody", insofar as it pertains to the status which is created when a child is permanently committed to the department of youth services, means a legal status wherein the department has the following rights and responsibilities: the right to have physical possession of the child; the right and duty to train, protect, and control him; the responsibility to provide him with food, clothing, shelter, education, and medical care; and the right to determine where and with whom he shall live...provided that these rights and responsibilities are exercised *subject to the powers, rights, duties, and responsibilities of the guardian of the person of the child, and subject to any residual parental rights and responsibilities.* (Emphasis added.)

These definitions and the statutory scheme in which they appear, make it clear that, while the authority of DYS as legal custodian of a child is expansive, it is not equivalent to permanent custody.<sup>6</sup> Further, there are no provisions of the Revised Code which authorize a juvenile court to award permanent custody to DYS.<sup>7</sup> Thus, the parent of a child committed to DYS, pursuant to R.C. 2151.355, is not a

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as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life." *Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding that prison regulations restricting the right of adult prisoners to marry must be reasonably related to legitimate penological interests). Among attributes other than living together, the court listed emotional support, public commitment, spiritual significance with respect to many religions, expectation of full consummation upon release, and the effect of marriage with respect to children born out of wedlock, government benefits, and property rights. *Id.* at 95-96. The fact that DYS may physically control a minor and determine his or her dwelling place has as little to do with these aspects of marriage as did the physical confinement of the adults in *Turner*. Thus I cannot find that the right to consent to marriage is implied within these custodial rights.

<sup>6</sup> I note that it has been recognized in other contexts that the legal custody bestowed on DYS does not equate to full parental status. *See Hahn v. Brown*, 51 Ohio App. 2d 177, 367 N.E.2d 884 (Franklin County 1976) (Ohio Youth Commission [now DYS] is not a "parent" of an incarcerated child for purposes of liability for willful destruction of property under R.C. 3109.09); 1978 Op. Att'y Gen. No. 78-053 (legal custody under R.C. 5139.01 does not entitle Ohio Youth Commission to act either as parent or as parent surrogate of child for purposes of procedural safeguards in special education matters under R.C. 3323.05).

<sup>7</sup> The fact that DYS is not an authorized recipient of permanent custody is also reflected in the omission of DYS from the organizations authorized in the first paragraph of R.C. 3101.01 to give consent in lieu of parents. *See* R.C. 3101.01(B) ("department of human services or any child welfare organization certified by such department"); R.C. 3101.01(C) ("county department of human services or a county children services board").

parent who "has been permanently deprived of his custody by a court exercising juvenile jurisdiction" for purposes of R.C. 3101.01.

A minor youth who is committed to DYS must still, therefore, obtain consent from one or both parents or from one of the alternative authorities named in R.C. 3101.01, as required by the circumstances of his or her individual case. I note further, that DYS is not listed as an agency whose consent might be required on behalf of the minor, regardless of what circumstances in the last paragraph of R.C. 3101.01 may be applicable. When there is no parent, guardian, or custodian as specified in R.C. 3101.01 whose consent is required, Juv. R. 42(A) provides that the juvenile court shall fill the gap. Juv. R. 42(A) states:

Application where parental consent not required. When a minor desires to contract matrimony and has no parent, guardian, or custodian whose consent to the marriage is required by law, the minor shall file an application under oath in the county where the female resides requesting that the judge of the juvenile court give consent and approbation in the probate court for such marriage.

*See also* R.C. 3101.04 ("[w]hen the juvenile court files a consent to marriage pursuant to the juvenile rules, the probate court may thereupon issue a license..."). Given the express designation in R.C. 3101.01 and Juv. R. 42(A) of persons and institutions authorized to give consent in lieu of a parent or parents, I must presume that the General Assembly did not intend for DYS to have such authority, even by default. *See generally State ex rel. Alden E. Stilson & Assoc. v. Ferguson*, 154 Ohio St. 139, 145-46, 93 N.E.2d 688, 691 (1950) (citing the general rule of statutory construction that "the specification of one thing implies the exclusion of another"). As a result, the consent and marriage license application requirements found in R.C. Chapter 3101 and Juv. R. 42 which pertain to a minor who wishes to marry are not affected by commitment to DYS.

It is, therefore, my opinion, and you are hereby advised that:

1. A minor youth who has been committed to the Department of Youth Services pursuant to R.C. 2151.355 and R.C. 5139.05 and who wishes to get married must first obtain consent, as required by the applicable provisions of R.C. 3101.01 and Juv. R. 42, from one or both parents, from one of the alternative authorities named in R.C. 3101.01, or from the juvenile court as provided in Juv. R. 42(A).
2. Pursuant to R.C. 3101.01 and Juv. R. 42(A), the Department of Youth Services has no authority to either consent or withhold consent to the marriage of a minor committed to the legal custody of the Department.