

OPINION NO. 80-027**Syllabus:**

1. The word "relative," for the purposes of R.C. 5123.18, means a person related to another by blood or affinity.
2. R.C. 5123.18 grants no power to the Division of Mental Retardation and Developmental Disabilities of the Department of Mental Health and Mental Retardation to license and inspect the home of a relative in which a person with a developmental disability resides.
3. The Division of Mental Retardation and Developmental Disabilities may not enter into a contract for services with a relative of a mentally retarded person pursuant to R.C. 5123.121.
4. Pursuant to R.C. 5123.12, the Department of Mental Health and Mental Retardation or the Division of Mental Retardation and Developmental Disabilities may contract with a relative or other person with whom a mentally ill or mentally retarded person resides, for the provision of care, custody, supervision, control, treatment, and training of such mentally ill or mentally retarded person, only if the Department or Division is able to insure adequate oversight and supervision of such person. If the relative is a liable relative as defined in R.C. 5121.06(A), the relative shall be liable for the support of such mentally ill or mentally retarded person to the extent provided by R.C. Chapter 5121.

To: Timothy B. Moritz, M.D., Director, Department of Mental Health and Mental Retardation, Columbus, Ohio

By: William J. Brown, Attorney General, May 13, 1980

I have before me your request for my opinion regarding the power of the Division of Mental Retardation and Developmental Disabilities ("Division") of the Department of Mental Health and Mental Retardation ("Department") to license, or contract with, a relative of a person with a developmental disability. Your questions may be stated as follows:

1. May the Division, pursuant to R.C. 5123.18, license and inspect the home of a relative in which a person with a developmental disability resides?
2. May "relative" in R.C. 5123.18 be defined as a liable relative only, as per R.C. 5121.06(A)?
3. If the Division may license a relative's home pursuant to R.C. 5123.18, then may the Division contract with such licensed relative under R.C. 5123.121, if the licensed relative is not a liable relative?
4. If the Division may not license the home of a relative, may the Division contract with an unlicensed relative pursuant to R.C. 5123.121?

R.C. 5123.18 requires the Chief of the Division of Mental Retardation and Developmental Disabilities to license and inspect the operation of residential facilities for the developmentally disabled. No person may "operate a residential facility or receive a person with a developmental disability as a resident of a residential facility unless such facility is licensed under section 5123.18 of the

Revised Code." R.C. 5123.19. "Residential facility" is defined in R.C. 5123.18(A)(1) as "a home or facility in which a person with a developmental disability resides, except. . . the home of a relative or legal guardian in which a person with a developmental disability resides." (Emphasis added.) Clearly, then, the General Assembly did not intend to subject relatives caring for a person with a developmental disability to the licensing requirements of R.C. 5123.18. You inquire whether, despite the exclusion of relatives from the purview of R.C. 5123.18, the Division has the discretion to so license at the request of a relative.

The General Assembly, by excluding homes of relatives from the definition of residential facilities, has effectively precluded the Division from licensing the home of a relative in which a person with a developmental disability resides. R.C. 5123.18(C) states that the Chief of the Division "shall license and inspect the operation of residential facilities." The Chief's authority is thus confined to the licensing of "residential facilities." Since the home of a relative cannot be considered a residential facility within the meaning of R.C. 5123.18, the Chief has no power or authority to license the same.

Furthermore, the word "relative" for the purposes of R.C. 5123.18 should not be equated with the definition of "liable relative" in R.C. 5121.06(A). R.C. Chapter 5121 sets out the procedure for the collection of reimbursement for the expense of care given individuals by the Department of Mental Health and Mental Retardation. The power of the Department to seek reimbursement is, however, restricted to reimbursement from liable relatives, who are defined as the patient's husband or wife, or the parents of a minor child. R.C. 5121.06(A).

Words in a statute are to be construed according to their common usage unless they have acquired a technical or particular meaning by legislative definition or otherwise. See R.C. 1.42. Although the words "liable relatives" have a special meaning by reason of legislative definition for the purposes of R.C. Chapter 5121, the word "relative" in R.C. 5123.18 is not used in conjunction with "liable," nor is it particularly defined for the purposes of that statute. "[W]hen the General Assembly has desired to give a particular construction to a word, it has done so by definition." 1979 Op. Att'y Gen. No. 79-084 at 2-269. See also Larkins v. Routson, 115 Ohio St. 639, 155 N.E. 227 (1927). Hence, the term "relative" in R.C. 5123.18 should be given its common and ordinary meaning, i.e., person related by blood or affinity. Schuck v. Schuck, 80 Ohio L. Abs. 394, 398, 156 N.E. 2d 351, 354 (Prob. Ct. Hamilton County 1958); Webster's New World Dictionary 1199 (2d college ed. 1978).

You also inquire whether the Division may contract with an unlicensed relative for the provision of services under R.C. 5123.121. That section provides that the Chief of the Division may enter into "a written contract with a private organization, a non-profit corporation, or a local public agency for the provision of services. . . including residence, supervision, and habilitation services, for any mentally retarded person."

R.C. 5123.121 lists three entities with which the Division may contract—private organizations, non-profit corporations, and local public agencies. Hence, under the rule of expressio unius est exclusio alterius, the Chief of the Division has no power to contract with individuals. Any facility with which the Division contracts must, moreover, "meet licensing regulations and certification by the appropriate state agency." R.C. 5123.121(D). As noted earlier herein, a relative of a developmentally disabled person may not be licensed for the provision of residential services. Pursuant to R.C. 5123.18(A)(2), the term "developmental disability" includes a disability attributable to mental retardation. I conclude, accordingly, that R.C. 5123.121 grants the Chief of the Division no power to contract with a relative of a mentally retarded person for the provision of services.

Although the Division may not contract with a relative to provide services pursuant to R.C. 5123.121 or R.C. 5123.18, the Division does have the discretion to provide for the support and maintenance of the mentally ill and the mentally

retarded in the home of an individual, including a relative, pursuant to R.C. 5123.12. That section states:

The department of mental health and mental retardation¹ may provide for the custody, supervision, control, treatment, and training of mentally ill, and mentally retarded persons hospitalized elsewhere than within the enclosure of a hospital, if the department so determines with respect to any individual or group of individuals. In all such cases the department shall insure adequate and proper overseeing and supervision for the due protection of such persons and of the public.

R.C. 5123.12 formerly provided that the Department of Mental Hygiene and Correction (now the Department of Mental Health and Mental Retardation) "may provide for the custody, supervision, control, treatment, and training of feeble-minded, epileptic, mentally ill, and mentally deficient persons committed to its custody and care elsewhere than within the enclosure of an institution." 1953-1954 Ohio Laws 823, 864 (Am. S.B. 155, eff. July 1, 1954). Under this language, one of my predecessors opined that the Department of Mental Hygiene would have the power to place a child committed to its custody in a foster home. 1960 Op. Att'y Gen. No. 1581, p. 539.

R.C. 5123.12 now states that the Department of Mental Health and Mental Retardation may provide for the supervision, custody, training, and treatment of mentally ill or retarded persons "hospitalized elsewhere than within the enclosure of a hospital." That the General Assembly did not intend the word "hospitalized" be confined in meaning to an institutional setting is made apparent by the fact that R.C. 5122.15, enacted at the same time as R.C. 5123.12 was amended, provided that a court could order "indeterminate hospitalization. . . [w]ith a relative. . . [or] [w]ith a friend." 1961 Ohio Laws 1448, 1465, 1473 (Am. Sub H. B. 529, eff. Oct. 25, 1961) (emphasis added). Furthermore, R.C. 5119.01 provides that the Director of the Department "may contract. . . with persons, organizations, or agencies for the custody, supervision, care, or treatment of mentally ill persons receiving services elsewhere than within the enclosure of a hospital under section 5123.12 of the Revised Code." (Emphasis added.) Thus, it was apparently contemplated that the care to which R.C. 5123.12 pertains could be provided in the home of an individual.

The power of the Department to "provide" for the custody, treatment, and training of persons elsewhere than within a hospital, of necessity includes the power to contract for the provision of these services. In C.B. Transportation, Inc. v. Butler County Board of Mental Retardation, 60 Ohio Misc. 71, 13 Ohio Op. 3d 382 (C.P. Butler County 1979), for example, the court was faced with the question of whether the power of a county board of mental retardation to "provide" necessary transportation, pursuant to R.C. 5126.03(C), would give the board the concomitant power to enter into contracts for transportation of mentally retarded persons. Concluding that it would be incongruous to find that the board has a duty to "provide" transportation, "while withholding the authority to obtain the means of transportation," the court held that transportation could be supplied by various means, including contracts with third persons. 60 Ohio Misc. at 79, 13 Ohio Op. 3d at 387. Accord, 1978 Op. Att'y Gen. No. 78-027 (authority of board of mental retardation to purchase or lease motor vehicles is so integrally related to the duty to "provide" transportation found in R.C. 5126.03(C) that it is a necessarily implied power). I conclude, accordingly, that the Department, or the Division, has the

¹Pursuant to R.C. 5122.04, the Division of Mental Retardation and Developmental Disabilities may perform all powers and duties which the Department has with respect to services for the mentally ill and mentally retarded. Hence, the Division may exercise those powers granted to the Department pursuant to R.C. 5123.12.

power to contract with third persons in order to "provide" care and treatment for the mentally ill and retarded pursuant to R.C. 5123.12.²

Whether the Division may contract with a relative for the provision of such services is within the Division's discretion, subject to the requirement of R.C. 5123.12 that the Department "shall insure adequate and proper overseeing and supervision." The use of the word "shall" indicates that the insurance of adequate and proper oversight and supervision is mandatory. Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E. 834 (1971). The Department or Division has no option of entering into an agreement for the provision of services that is not accompanied by appropriate measures for the exercise of supervisory powers by the Department or Division. Thus, the Division has discretion to contract with a relative for the provision of services under R.C. 5123.12, but may do so only if the Division is able to insure the required oversight and supervision.

In 1975 Op. Att'y Gen. No. 75-072, I found that the Youth Commission had insured that a youth was being provided with adequate care, protection, and support from the following facts: The child was required to report to a counselor and was subject to certain rules and restrictions; the child visited the youth group home three times a week; and a youth counselor called the child daily, and visited the child's residence once a week. Equally efficacious measures would be required of the Department of Mental Health and Mental Retardation, or the Division, to insure adequate oversight and supervision of a mentally ill or retarded person under R.C. 5123.12. I conclude, accordingly, that the Department of Mental Health and Mental Retardation or the Division of Mental Retardation and Developmental Disabilities may enter into an agreement with a relative of a mentally ill or retarded person for the care, control, treatment, and training of such person within the relative's home, if the Department or Division takes steps to insure adequate oversight and supervision.

Pursuant to R.C. 5121.04(A), the Department "shall investigate the financial condition of the patients or clients. . . being paid for in a private facility or home under its control and of the relatives named in section 5121.06 of the Revised Code liable for the support of such patients, in order to determine the ability of any patient or such relatives for the support of the patient. . . ." Thus, if the Department or Division contemplates entering into a contract with a person qualifying as a "liable" relative under R.C. 5121.06, it must first determine whether such person would be subject to the payment of reimbursement to the Department. Of course, if the amount of reimbursement due would equal contract payments, it would be ridiculously circuitous to go through the procedure of contract, payment, and restitution. It may, however, be the case that the amount of reimbursement due would be less than the contract amount, or that the relative would not be able to pay any reimbursement. I can see no reason why the Department may not set-off from the contract payments the amount, if any, which would be due from the liable relative, paying the relative only that amount over and above reimbursement liability.

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

1. The word "relative," for purposes of R.C. 5123.18, means a person related to another by blood or affinity.
2. R.C. 5123.18 grants no power to the Division of Mental Retardation and Developmental Disabilities of the Department of Mental Health and Mental Retardation to license and inspect the home of a relative in which a person with a developmental disability resides.

²Of course, the home of an individual with whom a mentally retarded person resides which meets the definition of "residential facility," as used in R.C. 5123.18, must be inspected and licensed by the Division. R.C. 5123.19.

3. The Division of Mental Retardation and Developmental Disabilities may not enter into a contract for services with a relative of a mentally retarded person pursuant to R.C. 5123.121.
4. Pursuant to R.C. 5123.12, the Department of Mental Health and Mental Retardation or the Division of Mental Retardation and Developmental Disabilities may contract with a relative or other person with whom a mentally ill or mentally retarded person resides, for the provision of care, custody, supervision, control, treatment, and training of such mentally ill or mentally retarded person, only if the Department or Division is able to insure adequate oversight and supervision of such person. If the relative is a liable relative as defined in R.C. 5121.06(A), the relative shall be liable for the support of such mentally ill or mentally retarded person to the extent provided by R.C. Chapter 5121.