

OPINION NO. 84-015**Syllabus:**

1. The Ohio Department of Mental Retardation and Developmental Disabilities may delegate to an agency providing protective services under contract with the Department the duty of obtaining the comprehensive evaluation required pursuant to R.C. 5123.57.
2. The Ohio Department of Mental Retardation and Developmental Disabilities may delegate to an agency providing protective services under contract with the Department the duty of filing, pursuant to R.C. 5123.58, applications in probate courts for appointment as a guardian or trustee.
3. The Director of the Ohio Department of Mental Retardation and Developmental Disabilities may make available to persons approved by the Director the medical, psychological, social and educational records of persons who have been nominated for protective services pursuant to R.C. 5123.58.

To: Minnie F. Johnson, Ph.D., Director, Department of Mental Retardation and Developmental Disabilities, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, March 26, 1984

In your request for my opinion you raise the following issues:

1. May the Department, in a contract with an agency pursuant to Section 5123.55 et seq. of the Revised Code (a) delegate the

duties of preparing a comprehensive evaluation; or (b) delegate the filing of applications in probate courts?

2. Does the release of the individual's medical, psychological, social and educational records to the contract agency constitute a violation of Ohio's Privacy Act?

In resolving the above stated issues, it is necessary to examine R.C. 5123.55 through 5123.59, which provide generally for a statewide system of protective services for certain mentally retarded or other developmentally disabled persons. Specifically, R.C. 5123.56 authorizes the Department of Mental Retardation and Developmental Disabilities to provide or contract for, and to adopt rules and regulations governing, the provision of protective services for mentally retarded or developmentally disabled persons.¹ The term "protective service" as used in R.C. 5123.56 "means performance of the duties of a guardian or trustee, or acting as a protector with respect to a mentally retarded or other developmentally disabled person."² R.C. 5123.55(C).

I note that nomination for protective service may be made by the mentally retarded or developmentally disabled individual or an interested person. R.C. 5123.58(A) and (B). In addition, a parent may nominate the Department or an agency providing protective services under contract with the Department as guardian or successor guardian in a will, or as guardian, trustee or protector during the parent's lifetime. R.C. 5123.58(C) and (D). Acceptance for protective service, however, is conditioned upon a finding, as a result of a comprehensive evaluation conducted by a clinic or facility approved by the Department, that the person named in the nomination is in need of protective services. R.C. 5123.57.

The Department's ability to delegate the duties of preparing a comprehensive evaluation or to delegate the filing of applications in probate courts must be determined under settled principles of administrative law. As a general rule, "[i]n the operation of any public administrative body, subdelegation of authority,

¹ A mentally retarded or other developmentally disabled person is defined by R.C. 5123.55(A) as:

any individual having a disability attributable to mental retardation, cerebral palsy, epilepsy, or another neurological condition closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals, which originated in the developmental period, has continued or can be expected to continue indefinitely, and constitutes a substantial handicap.

² The terms guardian, trustee and protector are defined in R.C. 5123.55 as follows:

(B) "Guardian" means guardian of the person pursuant to appointment by the probate court under Chapter 2111 of the Revised Code.

(C) "Trustee" means a trustee appointed by and accountable to the probate court, in lieu of a guardian and without a judicial determination of incompetency, with respect either to an estate of three thousand dollars or less or to periodic payments of not more than forty dollars per week, or both.

(D) "Protector" means the department of mental retardation and developmental disabilities or an agency under contract with or without court appointment to provide guidance, service and encouragement in the development of maximum self-reliance to a mentally retarded or other developmentally disabled person, independent of any determination of incompetency.

impliedly or expressly, exists—and must exist to some degree." Bell v. Bd. of Trustees, 34 Ohio St. 2d 70, 74, 296 N.E.2d 276, 278 (1973). The degree to which a public body may properly subdelegate authority depends in large part on the nature of that authority. If the execution of administrative authority requires the exercise of personal judgment and discretion, such authority may not be subdelegated absent express or necessarily implied authority. Kelley v. Cincinnati, 7 Ohio N.P. 360 (C.P. Hamilton County 1899). Ministerial duties, on the other hand, may be delegated to another, unless such delegation is expressly or impliedly prohibited. See 1973 Op. Att'y Gen. No. 73-126.

As to the requirement of a comprehensive evaluation, R.C. 5123.57 provides:

No guardianship or trusteeship appointment shall be made under sections 5123.55 to 5123.59 of the Revised Code and no person shall be accepted for service by a protector under such sections unless a comprehensive evaluation has been made in a clinic or other facility approved by the department of mental retardation and developmental disabilities. The evaluation shall include a medical, psychological, social, and educational evaluation, and a copy of such evaluation shall be filed with the department. (Emphasis added.)

This provision clearly requires that the evaluation be made in a clinic or other facility approved by the Department, and that a copy of such evaluation shall be filed with the Department. Thus, it presupposes that someone other than the Department will prepare the comprehensive evaluation. As neither the Department nor any contract agency performs the evaluation, the task of obtaining the report and filing it with the Department is, therefore, ministerial in nature. The statute does not expressly require the Department to procure the evaluation, it merely requires that an examination be made. Accordingly, the Department may delegate to a contract agency the duty of procuring the evaluation.

I note that pursuant to the authority granted by R.C. 5123.56 to adopt rules and regulations governing the provision of protective services, the Department has adopted several rules relating to the procurement of comprehensive evaluations. Ohio Admin. Code 5123-15-01(E)(1)(c) and (d) provide:

- (c) Upon receipt of the nomination, the department or a contract agency shall send written notice to the individual interested person, or parent that it holds a nomination.
- (d) The department or a contract agency shall then procure a comprehensive evaluation of the individual with mental retardation or other developmental disabilities. (Emphasis added.)

Rules and regulations promulgated pursuant to statutory authority have the force and effect of law unless they are unreasonable or in clear conflict with the statutory enactment governing the subject matter. Kroger Grocery and Baking Co. v. Glander, 149 Ohio St. 120, 77 N.E.2d 921 (1948). It is readily apparent that Rule 5123-15-01(E)(1)(d) does not exceed the Department's statutory grant of authority nor, for the reasons stated above, does it conflict with the provisions of R.C. 5123.57. Furthermore, I am not aware of any facts that would call into question the reasonableness of the rule. Although delegating the duty to procure an evaluation, the Department maintains the ability to insure that certain standards are met by the contracting agency. The evaluations must be made in a clinic or other facility approved by the Department (R.C. 5123.57), by persons with special training and certified by the Department (Ohio Admin. Code 5123-15-01(C)(3)), a copy of the evaluation must be filed with the Department (R.C. 5123.57), and lastly the agency must file with the Department annual reviews of clients, (R.C. 5123.57).

Under a similar analysis an equivalent conclusion can be reached as to the ability of the Department to delegate the filing of applications in probate courts. R.C. 5123.58 governs the time at which an application may be filed in a probate court. It provides:

If the results of the comprehensive evaluation required under Section 5123.57 of the Revised Code indicate that the person named in the nomination is in need of protective services, the department, agency, or service shall either reject or accept the nomination as guardian or trustee, subject to appointment by the probate court, or reject or accept the nomination as protector, or trustee and protector.

At the time the nomination is accepted or when an appointment is made by the court, the mentally retarded or other developmentally disabled person and any person who made application for service on his behalf under this section shall be informed by the department, agency, service or court of the procedure for terminating the appointment or service. The department, agency, or service shall cease to provide protective service as a protector pursuant to nomination under division (A), (B), or (D) of this section when a written request for termination is received by the department or agency from or on behalf of the mentally retarded or other developmentally disabled person. If the department, agency, or service believes the person to be in need of protective service, the department, agency, or service may file an application for guardianship, trusteeship or protectorship with the probate court. Termination of any court appointment as guardian, trustee, or protector must be by order of the probate court. (Emphasis added.)

The statute expressly provides that an agency as well as the Department may accept the initial nomination "subject to appointment by the probate court." The statute also expressly provides that an agency, after receipt of a written request for termination, "may file an application for guardianship, trusteeship or protectorship with the probate court" if it believes the person to be in need of protective services. Furthermore, in the specific instance of guardianships, R.C. 2111.02 allows for the filing of an application for guardianships in probate court by any interested party. Since R.C. 5123.58 allows an agency to serve as a guardian, trustee or protector, it is clear that a contracting agency would be an interested party and would be allowed to file an application for guardianships under R.C. 2111.02.³ In addition, R.C. 2109.01 provides:

"Fiduciary" as used in Chapters 2101. to 2131., inclusive, of the Revised Code, means any person, association, or corporation, other than an assignee or trustee for an insolvent debtor or a guardian under sections 5905.01 to 5905.19, inclusive, of the Revised Code, appointed by and accountable to the probate court and acting in a fiduciary capacity for any person, association or corporation or charged with duties in relation to any property, interest, trust or estate for the benefit of another; and includes the division of mental retardation or any agency under contract with the division for the provision of protective service under sections 5119.85 to 5119.89, inclusive, of the Revised Code, appointed by and accountable to the probate court as guardian or trustee with respect to mentally retarded and developmentally disabled persons. (Emphasis added.)

Finally, neither R.C. Chapter 2109 (fiduciaries) nor R.C. 2111.02 (guardian) contains any provisions which would operate to prevent a delegation of the task of filing an application in probate court.

I note that Ohio Admin. Code 5123-15-01(E)(2)(a) provides:

If the department or a contract agency concludes that the result of the comprehensive evaluation indicates the need for the provision of protective services for the individual named in the nomination, the

³ Furthermore, R.C. 2111.01(A) includes the Division of Mental Retardation and Developmental Disabilities, or an agency under contract with the Division within the definition of guardian.

department or a contract agency shall file an application in probate court for appointment as guardian, trustee, or protector along with a comprehensive evaluation. (Emphasis added.)

As indicated previously, this rule has the force and effect of law unless it is unreasonable or in clear conflict with R.C. 5123.58. Kroger Grocery and Baking Co. v. Glander. No such conflict between the statute and rule is apparent. Nor am I aware of any set of facts that suggest it would be unreasonable for the contract agency to file the application for appointment in the probate court.

Your second question asks whether the release of an individual's medical, psychological, social and educational records to a contract agency constitutes a violation of Ohio's Privacy Act. With respect to this issue, I note that R.C. 5123.57 expressly provides:

Any record of the department or agency pertaining to such a person shall not be a "public record" under section 149.43 of the Revised Code. Information contained therein shall not be disclosed publicly in such a manner as to identify individuals, but may be made available to persons approved by the director of mental retardation and developmental disabilities or the court. (Emphasis added.)

R.C. 5123.89 reads as follows:

(A) All certificates, applications, records, and reports made for the purpose of this chapter, other than court journal entries or court docket entries, which directly or indirectly identify a resident or former resident or an institution for the mentally retarded or person whose institutionalization has been sought under this chapter shall be kept confidential and shall not be disclosed by any person except insofar as:

(1) It is the judgment of the court for judicial records, and the managing officer for institution records, that disclosure is in the best interest of the person identified and such person or his guardian or, if he is a minor, his parent or guardian consents.

(2) Disclosure may be provided for in other sections of this chapter of the Revised Code.

(B) The department of mental retardation and developmental disabilities shall adopt and promulgate rules with respect to the systematic and periodic destruction of residents' records.

(C) No person shall reveal the contents of a record of a resident except as authorized by this chapter. (Emphasis added.)

These statutes operate to permit the director to make available comprehensive evaluations to persons approved by the director, while limiting the public accessibility of the records. The director's authority under R.C. 5123.57 is not constrained by the Ohio "Privacy Act." As my predecessor noted in 1980 Op. Att'y Gen. No. 80-036, note 2 at 2-375:

Although commonly known as the "Privacy Act," R.C. Chapter 1347 is, in actuality, a "personal information systems act." R.C. Chapter 1347 does not grant to the individual a right of privacy, as such, as is implied by the popular designation, but rather governs the maintenance of personal information systems by government agencies, and grants to the individual who is the subject of the information a right of inspection.

In fact, R.C. 1347.08 would operate to require the director to release an individual's medical, psychological, social and educational records to a contract agency in the event that the agency is serving as the individual's legal guardian. R.C. 1347.08(A) provides, in part:

Every state or local agency that maintains a personal information system, upon the request and the proper identification of any person who is the subject of personal information in the system, shall:

- (1) Inform the person of the existence of any personal information in the system in which he is the subject;
- (2) Except as provided in divisions (C) and (E)(2) of this section permit the person, his legal guardian, or an attorney who presents a signed written authorization made by the person, to inspect all personal information in the system of which he is the subject;

R.C. 1347.08 recognizes only three exceptions to the right of access of an individual who is the subject of the information or his legal guardian. R.C. 1347.08(E)(2) sets forth exceptions relating to confidential law enforcement investigatory records and trial preparation records. The third exception, which is set forth in R.C. 1347.08(F), pertains to adoption proceedings. In the instant matter none of the exceptions are relevant. The release of an individual's medical, psychological, social and educational records to the contract agency does not, therefore, constitute a violation of Ohio's Privacy Act.

Based on the foregoing analysis, it is my opinion, and you are advised, that:

1. The Ohio Department of Mental Retardation and Developmental Disabilities may delegate to an agency providing protective services under contract with the Department the duty of obtaining the comprehensive evaluation required pursuant to R.C. 5123.57.
2. The Ohio Department of Mental Retardation and Developmental Disabilities may delegate to an agency providing protective services under contract with the Department the duty of filing, pursuant to R.C. 5123.58, applications in probate courts for appointment as a guardian or trustee.
3. The Director of the Ohio Department of Mental Retardation and Developmental Disabilities may make available to persons approved by the Director the medical, psychological, social and educational records of persons who have been nominated for protective services pursuant to R.C. 5123.58.