

IN THE SUPREME COURT OF OHIO

IN RE: M.W.,
Adjudicated Delinquent Child

Case No. 2011-0215

On Appeal from the Cuyahoga
County Court of Appeals
Eighth Appellate District

C.A. Case No. 94737

REPLY BRIEF OF APPELLANT M.W.

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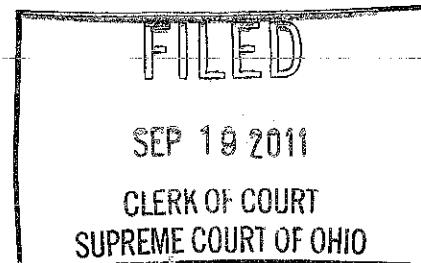


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STATEMENT OF THE CASE AND FACTS

M.W. rests on the statement of the case and facts set forth in his merit brief.

ARGUMENT

PROPOSITION OF LAW

A child has the right to counsel at all stages of the proceedings against him. Because Ohio's General Assembly has designated interrogation as a stage of the proceedings, a child must be represented by his parent, guardian, custodian, or an attorney before the child can waive his right to counsel pursuant to *Miranda*.

Introduction

The General Assembly expanded a child's right to counsel to "all stages of the proceedings" in 1969 when it enacted R.C. 2151.352. 133 v H 320, eff. 11-19-69. (Appellee's 2nd Appx. at 170). At that time, the rights of a child in custody and the rights of an adult in custody were the same. Since then, whether a child has a right to counsel during an interrogation or during a court proceeding has never been questioned.

In 2007, this Court addressed a child's waiver of his right to counsel in juvenile court. *In re C.S.*, 115 Ohio St. 3d 267, 2007-Ohio-4919. Recognizing that children need special protections that are not provided to adults, this Court interpreted R.C. 2151.352 as providing a non-waivable right to counsel for a child who is not represented by an interested adult regarding his decision to waive counsel. *C.S.* at ¶95 ("We believe that the fifth sentence of the statute reflects the General Assembly's understanding that *Gault* held that the juvenile may waive his rights, including his right to counsel, [* * *] and that it codifies that right of waiver but only if the juvenile is advised by a parent in considering waiver."). (Internal citation omitted.)

This case does not concern the validity of M.W.'s waiver of counsel at interrogation; it concerns whether a child can waive counsel at all when the child does have a parent or attorney

to consult with before waiving counsel. The specific question in this case is whether the same non-waivable right to counsel for a child not represented by an interested adult also applies at interrogation. M.W. asks this Court to hold that any time a child is provided the right to counsel, be it in court or at interrogation, his waiver of that right should be governed by the same terms—those set forth in R.C. 2151.352.

Plain language verses legislative intent.

Despite the State’s insistence, an analysis of the plain language, “proceedings” does not provide a clear answer as to what is meant by “all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code.” *Answer* at 14. The word “proceeding” when used in Chapter 2151 or 2152, is always placed in context by the surrounding words. See, e.g., R.C. 2151.35 (“proceedings of the court”); R.C. 2151.85(A) (“oral proceedings in the action”); R.C. 2152.12(J) (“all proceedings pertaining to the act shall be within the jurisdiction of the court...”); R.C. 2152.51 (eff. 9-30-2011) (“competency proceedings”); and, R.C. 2152.55 (eff. 9-30-2011) (“prior delinquent child proceedings”).

The only time “all stages of the proceedings” is used in the Code is in R.C. 2151.352. And in that context, “proceedings” is modified by “all stages” and “under this or Chapter 2152. of the Revised Code.” R.C. 2151.352. The usage of “proceedings” in R.C. 2151.352 is different than how “proceedings” is used in any other place in R.C. 2151 or 2152. It is more expansive, as it pertains to all stages of the proceedings set forth in Chapter 2151 or 2152 of the Revised Code. And this Court recognized in *C.S.* that the right to counsel in R.C. 2151.352 “goes beyond constitutional requirements.” *C.S.* at ¶83, citing *In re Williams*, 101 Ohio St. 3d 398, 2004-Ohio-1500, ¶15, and *State ex rel. Asberry v. Payne*, 82 Ohio St. 3d 44, 46, 1998-Ohio-596.

It is axiomatic that “when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply the rules of

statutory interpretation.” *State v. Muncie*, 91 Ohio St. 3d 440, 447, 2001-Ohio-93. In its brief, the State asks this Court to look to the legislative intent. *Answer* at 14-21. But a close examination of the history of juveniles’ rights to counsel and the enactment of R.C. 2151.352, provided in the State’s brief, supports M.W.’s reading of R.C. 2151.352, not the State’s.

As set forth in the State’s brief, the Juvenile Code “did not mention the right to legal counsel until September 14, 1957.” *Answer* at 15. The State notes that the right to appointed counsel was codified for the first time in former R.C. 2151.351, in 1967, following the United States Supreme Court’s decision in *In re Gault* (1967), 387 U.S. 1. *Answer* at 15-16; (Appellee’s 2nd Appx. at 165). At that time, the statute provided for counsel “[w]hen a child is brought before the juvenile court for hearing” and included the right to counsel in certain traffic “cases.” *Answer* at 15-16, citing former R.C. 2151.351, eff. 1967 (Appellee’s 2nd Appx. at 165). At that time, the right to counsel was provided in “hearings” and for “cases”, and the phrase “all stages of the proceedings” had not yet appeared.

As set forth in the State’s brief, the phrase “all stages of the proceedings” first appeared in the Juvenile Code when R.C. 2151.351 was replaced by R.C. 2151.352, in 1969. *Answer* at 17 (Appellee’s 2nd Appx. at 170). As explained in the committee notes, the first time the phrase “all stages of the proceedings” appeared was also the first time a child’s rights when taken into custody were addressed. *Answer* at 17, citing Ohio Legislative Service Commission, Summary of 1969 Enactments (Appellee’s 2nd Appx. at 179):

[Gives] a child taken into custody the same rights as an adult, including visits at any reasonable time with an attorney; gives ~~counsel access to any report prepared by the court as well as notice~~ of any hearing; provides that the child and his parents are entitled to representation by legal counsel at all stages of the proceedings, and if indigent, are entitled to have counsel provided.

Before the 1969 enactments, the right to counsel was provided only when the child was “brought before the juvenile court for hearing” and in certain traffic “cases.” See *Answer* at 15, referencing former R.C. 2151.35 (eff. 1957) (Appellee’s 2nd Appx. at 164). See, also, 127 Ohio Laws 547, eff. Aug. 27, 1957 (“The juvenile court shall permit a child to be represented by an attorney-at-law during any hearing before such court....”). (Appellee’s 2nd Appx. at 162).

The State references the history and the evolution of juveniles’ rights to counsel in an attempt to prove that the right to counsel has never been expressly provided for custodial interrogations. But, the State gives no explanation for the General Assembly’s change from requiring counsel in “juvenile court for hearing[s]” and in “cases” to “all stages of the proceedings” in 1969. Notably, *Miranda v. Arizona* (1966), 384 U.S. 436 was decided in 1966. And the enactment of R.C. 2151.352, with the term “all stages of the proceedings” came in 1969, three years after *Miranda* and two years after *Gault*. And while *Gault* provides for due process in juvenile court, including the right to counsel, it does not contain the phrase “all stages of the proceedings.” This confirms that in using the phrase “all stages of the proceedings,” the General Assembly intended the right to counsel to be expanded. See *Sosa v. Alvarez-Machain* (2004), 542 U.S. 692, 712, 124 S. Ct. 2739 (“when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.”). Then, as now, if the General Assembly had intended for a child’s right to counsel to be limited to “juvenile court proceedings” or “cases,” it would have used those words.

Children are different from adults and need special protections.

~~Without question, juveniles’ rights to counsel have expanded over time. And recently,~~ courts’ understanding of juvenile development and juvenile behavior has also expanded. With this understanding has come a trend toward affording children special considerations and special protections that are not afforded to adults. See *J.D.B. v. North Carolina*, __ U.S. __, __, 131 S.

Ct. 2394, 2403, 180 L. Ed. 2d 310 (“Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children “generally are less mature and responsible than adults,” [*Eddings v. Oklahoma* (1982), 455 U.S. 104, 115-16, 102 S. Ct. 869]; that they “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” [*Bellotti v. Baird* (1969), 443 U.S. 622, 635, 99 S. Ct. 3035 (plurality opinion)]; that they “are more vulnerable or susceptible to . . . outside pressures” than adults, [*Roper v. Simmons* (2005), 543 U.S. 551, 569]; and so on.”) And, the Court in *Graham* specifically warned that procedural laws that fail to take into account the defendant’s youthfulness would be “flawed.” *Graham v. Florida* (2009), __ U.S. __, __, 130 S. Ct. 2011, 2031, 176 L. Ed. 2d 825.

In its brief, the State repeatedly emphasizes that the rights for children and adults taken into custody are the same. *Answer* at 7, 10, 11, 15, 17, 19, and 28. But, the process for determining whether a child can waive his right to counsel is much different for children than it is for adults. R.C. 2151.352, C.S. at ¶95.

When a child is taken into custody upon suspicion that he has committed a delinquent act, the child’s journey through the juvenile justice process has begun. Because children are more susceptible to coercion, the guiding hand of counsel is even more important to them than it is to adults. See *Fare v. Michael C.* (1979), 442 U.S. 707, 719, 99 S. Ct. 2560 (“the lawyer is the person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts.”) M.W. asks this Court to recognize a uniform right to counsel at “all stages of the proceedings” under Chapter 2151 and 2152 of the Revised Code. That means, as in juvenile court, a child in an interrogation may only waive his right to counsel if he has consulted with a parent, guardian, custodian, or an attorney about his decision to waive counsel. Ohio’s children deserve nothing less.

Conclusion

For the reasons set forth in his merit brief and in this reply brief, M.W. asks this Court to adopt the proposition of law and reverse the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

The Office of the Ohio Public Defender



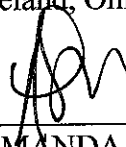
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply Brief of Appellant M.W. and the Appendix to the Reply Brief of Appellant M.W.**, was forwarded by regular U.S. Mail, postage prepaid, this 19th day of September, 2011 to Daniel T. Van, Assistant Prosecuting Attorney, Appeals Division, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113.



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APPENDIX TO REPLY BRIEF OF APPELLANT M.W.

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State through file 27

The provisions of 2011 SB 5 are subject to referendum and will not become effective unless ap-

proved at the November 2011 General Election

*** Annotations current through July 22, 2011 ***

TITLE 21. COURTS -- PROBATE -- JUVENILE

CHAPTER 2151. JUVENILE COURT

DISTRICT DETENTION HOMES

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ORC Ann. 2151.35 (2011)

§ 2151.35. Hearing procedure; recording of proceedings; dispositional hearing

(A) (1) Except as otherwise provided by division (A)(3) of this section or in *section 2152.13 of the Revised Code*, the juvenile court may conduct its hearings in an informal manner and may adjourn its hearings from time to time. The court may exclude the general public from its hearings in a particular case if the court holds a separate hearing to determine whether that exclusion is appropriate. If the court decides that exclusion of the general public is appropriate, the court still may admit to a particular hearing or all of the hearings relating to a particular case those persons who have a direct interest in the case and those who demonstrate that their need for access outweighs the interest in keeping the hearing closed.

Except cases involving children who are alleged to be unruly or delinquent children for being habitual or chronic truants and except as otherwise provided in *section 2152.13 of the Revised Code*, all cases involving children shall be heard separately and apart from the trial of cases against adults. The court may excuse the attendance of the child at the hearing in cases involving abused, neglected, or dependent children. The court shall hear and determine all cases of children without a jury, except cases involving serious youthful offenders under *section 2152.13 of the Revised Code*.

If a complaint alleges a child to be a delinquent child, unruly child, or juvenile traffic offender, the court shall require the parent, guardian, or custodian of the child to attend all proceedings of the court regarding the child. If a parent, guardian, or custodian fails to so attend, the court may find the parent, guardian, or custodian in contempt.

If the court finds from clear and convincing evidence that the child violated *section 2151.87 of the Revised Code*, the court shall proceed in accordance with divisions (F) and (G) of that section.

If the court at the adjudicatory hearing finds from clear and convincing evidence that the child is an abused, neglected, or dependent child, the court shall proceed, in accordance with divi-

sion (B) of this section, to hold a dispositional hearing and hear the evidence as to the proper disposition to be made under *section 2151.353 [2151.35.3] of the Revised Code*. If the court at the adjudicatory hearing finds beyond a reasonable doubt that the child is a delinquent or unruly child or a juvenile traffic offender, the court shall proceed immediately, or at a postponed hearing, to hear the evidence as to the proper disposition to be made under *section 2151.354 [2151.35.4] or Chapter 2152. of the Revised Code*. If the court at the adjudicatory hearing finds beyond a reasonable doubt that the child is an unruly child for being an habitual truant, or that the child is an unruly child for being an habitual truant and that the parent, guardian, or other person having care of the child has failed to cause the child's attendance at school in violation of *section 3321.38 of the Revised Code*, the court shall proceed to hold a hearing to hear the evidence as to the proper disposition to be made in regard to the child under division (C)(1) of *section 2151.354 [2151.35.4] of the Revised Code* and the proper action to take in regard to the parent, guardian, or other person having care of the child under division (C)(2) of *section 2151.354 [2151.35.4] of the Revised Code*. If the court at the adjudicatory hearing finds beyond a reasonable doubt that the child is a delinquent child for being a chronic truant or for being an habitual truant who previously has been adjudicated an unruly child for being an habitual truant, or that the child is a delinquent child for either of those reasons and the parent, guardian, or other person having care of the child has failed to cause the child's attendance at school in violation of *section 3321.38 of the Revised Code*, the court shall proceed to hold a hearing to hear the evidence as to the proper disposition to be made in regard to the child under division (A)(7)(a) of *section 2152.19 of the Revised Code* and the proper action to take in regard to the parent, guardian, or other person having care of the child under division (A)(7)(b) of *section 2152.19 of the Revised Code*.

If the court does not find the child to have violated *section 2151.87 of the Revised Code* or to be an abused, neglected, dependent, delinquent, or unruly child or a juvenile traffic offender, it shall order that the case be dismissed and that the child be discharged from any detention or restriction theretofore ordered.

(2) A record of all testimony and other oral proceedings in juvenile court shall be made in all proceedings that are held pursuant to *section 2151.414 [2151.41.4] of the Revised Code* or in which an order of disposition may be made pursuant to division (A)(4) of *section 2151.353 [2151.35.3] of the Revised Code*, and shall be made upon request in any other proceedings. The record shall be made as provided in *section 2301.20 of the Revised Code*.

(3) The authority of a juvenile court to exclude the general public from its hearings that is provided by division (A)(1) of this section does not limit or affect any right of a victim of a crime or delinquent act, or of a victim's representative, under Chapter 2930. of the Revised Code.

(B) (1) If the court at an adjudicatory hearing determines that a child is an abused, neglected, or dependent child, the court shall not issue a dispositional order until after the court holds a separate dispositional hearing. The court may hold the dispositional hearing for an adjudicated abused, neglected, or dependent child immediately after the adjudicatory hearing if all parties were served prior to the adjudicatory hearing with all documents required for the dispositional hearing. The dispositional hearing may not be held more than thirty days after the adjudicatory hearing is held. The court, upon the request of any party or the guardian ad litem of the child, may continue a dispositional hearing for a reasonable time not to exceed the time limits set forth in this division to enable a party to obtain or consult counsel. The dispositional hearing shall not be held more than ninety days after the date on which the complaint in the case was filed.

If the dispositional hearing is not held within the period of time required by this division, the court, on its own motion or the motion of any party or the guardian ad litem of the child, shall dismiss the complaint without prejudice.

(2) The dispositional hearing shall be conducted in accordance with all of the following:

(a) The judge or referee who presided at the adjudicatory hearing shall preside, if possible, at the dispositional hearing;

(b) The court may admit any evidence that is material and relevant, including, but not limited to, hearsay, opinion, and documentary evidence;

(c) Medical examiners and each investigator who prepared a social history shall not be cross-examined, except upon consent of the parties, for good cause shown, or as the court in its discretion may direct. Any party may offer evidence supplementing, explaining, or disputing any information contained in the social history or other reports that may be used by the court in determining disposition.

(3) After the conclusion of the dispositional hearing, the court shall enter an appropriate judgment within seven days and shall schedule the date for the hearing to be held pursuant to *section 2151.415 [2151.41.5] of the Revised Code*. The court may make any order of disposition that is set forth in *section 2151.353 [2151.35.3] of the Revised Code*. A copy of the judgment shall be given to each party and to the child's guardian ad litem. If the judgment is conditional, the order shall state the conditions of the judgment. If the child is not returned to the child's own home, the court shall determine which school district shall bear the cost of the child's education and shall comply with *section 2151.36 of the Revised Code*.

(4) As part of its dispositional order, the court may issue any order described in division (B) of *section 2151.33 of the Revised Code*.

(C) The court shall give all parties to the action and the child's guardian ad litem notice of the adjudicatory and dispositional hearings in accordance with the Juvenile Rules.

(D) If the court issues an order pursuant to division (A)(4) of *section 2151.353 [2151.35.3] of the Revised Code* committing a child to the permanent custody of a public children services agency or a private child placing agency, the parents of the child whose parental rights were terminated cease to be parties to the action upon the issuance of the order. This division is not intended to eliminate or restrict any right of the parents to appeal the permanent custody order issued pursuant to division (A)(4) of *section 2151.353 [2151.35.3] of the Revised Code*.

(E) Each juvenile court shall schedule its hearings in accordance with the time requirements of this chapter.

(F) In cases regarding abused, neglected, or dependent children, the court may admit any statement of a child that the court determines to be excluded by the hearsay rule if the proponent of the statement informs the adverse party of the proponent's intention to offer the statement and of the particulars of the statement, including the name of the declarant, sufficiently in advance of the hearing to provide the party with a fair opportunity to prepare to challenge, respond to, or defend against the statement, and the court determines all of the following:

- (1) The statement has circumstantial guarantees of trustworthiness;
- (2) The statement is offered as evidence of a material fact;
- (3) The statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts;
- (4) The general purposes of the evidence rules and the interests of justice will best be served by the admission of the statement into evidence.

(G) If a child is alleged to be an abused child, the court may order that the testimony of the child be taken by deposition. On motion of the prosecuting attorney, guardian ad litem, or any party, or in its own discretion, the court may order that the deposition be videotaped. Any deposition taken under this division shall be taken with a judge or referee present.

If a deposition taken under this division is intended to be offered as evidence at the hearing, it shall be filed with the court. Part or all of the deposition is admissible in evidence if counsel for all parties 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 the judge determines that there is reasonable cause to believe that if the child were to testify in person at the hearing, the child would experience emotional trauma as a result of participating at the hearing.

HISTORY:

133 v H 320 (Eff 11-19-69); 136 v H 85 (Eff 11-28-75); 138 v H 695 (Eff 10-24-80); 142 v S 89 (Eff 1-1-89); 146 v H 1 (Eff 1-1-96); 146 v H 274 (Eff 8-8-96); 146 v H 124 (Eff 3-31-97); 148 v S 181 (Eff 9-4-2000); 148 v S 218 (Eff 3-15-2001); 148 v S 179, § 1 (Eff 4-9-2001); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 400. Eff 4-3-2003.

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*** Annotations current through July 22, 2011 ***

TITLE 21. COURTS -- PROBATE -- JUVENILE

CHAPTER 2151. JUVENILE COURT

INDEPENDENT LIVING SERVICES

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ORC Ann. 2151.85 (2011)

§ 2151.85. Unmarried minor may seek abortion without notice to parent, guardian or custodian

(A) A woman who is pregnant, unmarried, under eighteen years of age, and unemancipated and who wishes to have an abortion without the notification of her parents, guardian, or custodian may file a complaint in the juvenile court of the county in which she has a residence or legal settlement, in the juvenile court of any county that borders to any extent the county in which she has a residence or legal settlement, or in the juvenile court of the county in which the hospital, clinic, or other facility in which the abortion would be performed or induced is located, requesting the issuance of an order authorizing her to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian.

The complaint shall be made under oath and shall include all of the following:

- (1) A statement that the complainant is pregnant;
- (2) A statement that the complainant is unmarried, under eighteen years of age, and unemancipated;
- (3) A statement that the complainant wishes to have an abortion without the notification of her parents, guardian, or custodian;
- (4) An allegation of either or both of the following:
 - (a) That the complainant is sufficiently mature and well enough informed to intelligently decide whether to have an abortion without the notification of her parents, guardian, or custodian;
 - (b) That one or both of her parents, her guardian, or her custodian was engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents, guardian, or custodian otherwise is not in her best interest.
- (5) A statement as to whether the complainant has retained an attorney and, if she has retained an attorney, the name, address, and telephone number of her attorney.

(B) (1) The court shall fix a time for a hearing on any complaint filed pursuant to division (A) of this section and shall keep a record of all testimony and other oral proceedings in the action. The court shall hear and determine the action and shall not refer any portion of it to a referee. The hearing shall be held at the earliest possible time, but not later than the fifth business day after the day that the complaint is filed. The court shall enter judgment on the complaint immediately after the hearing is concluded. If the hearing required by this division is not held by the fifth business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parent, guardian, or custodian, and the complainant and any other person may rely on the constructive order to the same extent as if the court actually had issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such notification.

(2) The court shall appoint a guardian ad litem to protect the interests of the complainant at the hearing that is held pursuant to this section. If the complainant has not retained an attorney, the court shall appoint an attorney to represent her. If the guardian ad litem is an attorney admitted to the practice of law in this state, the court also may appoint him to serve as the complainant's attorney.

(C) (1) If the complainant makes only the allegation set forth in division (A)(4)(a) of this section and if the court finds, by clear and convincing evidence, that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian. If the court does not make the finding specified in this division, it shall dismiss the complaint.

(2) If the complainant makes only the allegation set forth in division (A)(4)(b) of this section and if the court finds, by clear and convincing evidence, that there is evidence of a pattern of physical, sexual, or emotional abuse of the complainant by one or both of her parents, her guardian, or her custodian, or that the notification of the parents, guardian, or custodian of the complainant otherwise is not in the best interest of the complainant, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian. If the court does not make the finding specified in this division, it shall dismiss the complaint.

(3) If the complainant makes both of the allegations set forth in divisions (A)(4)(a) and (b) of this section, the court shall proceed as follows:

(a) The court first shall determine whether it can make the finding specified in division (C)(1) of this section and, if so, shall issue an order pursuant to that division. If the court issues such an order, it shall not proceed pursuant to division (C)(3)(b) of this section. If the court does not make the finding specified in division (C)(1) of this section, it shall proceed pursuant to division (C)(3)(b) of this section.

(b) If the court pursuant to division (C)(3)(a) of this section does not make the finding specified in division (C)(1) of this section, it shall proceed to determine whether it can make the finding specified in division (C)(2) of this section and, if so, shall issue an order pursuant to that division. If the court does not make the finding specified in division (C)(2) of this section, it shall dismiss the complaint.

(D) The court shall not notify the parents, guardian, or custodian of the complainant that she is pregnant or that she wants to have an abortion.

(E) If the court dismisses the complaint, it immediately shall notify the complainant that she has a right to appeal under *section 2505.073 [2505.07.3] of the Revised Code*.

(F) Each hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section shall be kept confidential and are not public records under *section 149.43 of the Revised Code*.

(G) The clerk of the supreme court shall prescribe complaint and notice of appeal forms that shall be used by a complainant filing a complaint under this section and by an appellant filing an appeal under *section 2505.073 [2505.07.3] of the Revised Code*. The clerk of each juvenile court shall furnish blank copies of the forms, without charge, to any person who requests them.

(H) No filing fee shall be required of, and no court costs shall be assessed against, a complainant filing a complaint under this section or an appellant filing an appeal under *section 2505.073 [2505.07.3] of the Revised Code*.

(I) As used in this section, "unemancipated" means that a woman who is unmarried and under eighteen years of age has not entered the armed services of the United States, has not become employed and self-subsisting, or has not otherwise become independent from the care and control of her parent, guardian, or custodian.

HISTORY:

141 v H 319. Eff 3-24-86.

PAGE'S OHIO REVISED CODE ANNOTATED

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Current through Legislation by the 129th Ohio General Assembly and filed with the Secretary of

State through file 27

The provisions of 2011 SB 5 are subject to referendum and will not become effective unless ap-

proved at the November 2011 General Election

*** Annotations current through July 22, 2011 ***

TITLE 21. COURTS -- PROBATE -- JUVENILE

CHAPTER 2152. DELINQUENT CHILDREN; JUVENILE TRAFFIC OFFENDERS

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ORC Ann. 2152.12 (2011)

Legislative Alert: LEXSEE 2011 Ohio HB 86 -- See sections 1 and 2.

§ 2152.12. Transfer of case; prosecution of child nullity in absence of transfer; juvenile court loses jurisdiction if child is not taken into custody or apprehended prior to attaining age twenty-one [Effective until September 30, 2011]

(A) (1) (a) After a complaint has been filed alleging that a child is a delinquent child for committing an act that would be aggravated murder, murder, attempted aggravated murder, or attempted murder if committed by an adult, the juvenile court at a hearing shall transfer the case if the child was sixteen or seventeen years of age at the time of the act charged and there is probable cause to believe that the child committed the act charged. The juvenile court also shall transfer the case at a hearing if the child was fourteen or fifteen years of age at the time of the act charged, if *section 2152.10 of the Revised Code* provides that the child is eligible for mandatory transfer, and if there is probable cause to believe that the child committed the act charged.

(b) After a complaint has been filed alleging that a child is a delinquent child by reason of committing a category two offense, the juvenile court at a hearing shall transfer the case if *section 2152.10 of the Revised Code* requires the mandatory transfer of the case and there is probable cause to believe that the child committed the act charged.

(2) The juvenile court also shall transfer a case in the circumstances described in division (C)(5) of *section 2152.02 of the Revised Code* or if either of the following applies:

(a) A complaint is filed against a child who is eligible for a discretionary transfer under *section 2152.10 of the Revised Code* and who previously was convicted of or pleaded guilty to a felony in a case that was transferred to a criminal court.

(b) A complaint is filed against a child who is domiciled in another state alleging that the child is a delinquent child for committing an act that would be a felony if committed by an adult, and, if the act charged had been committed in that other state, the child would be subject to criminal prosecution as an adult under the law of that other state without the need for a transfer of jurisdiction from a juvenile, family, or similar noncriminal court to a criminal court.

(B) Except as provided in division (A) of this section, after a complaint has been filed alleging that a child is a delinquent child for committing an act that would be a felony if committed by an adult, the juvenile court at a hearing may transfer the case if the court finds all of the following:

(1) The child was fourteen years of age or older at the time of the act charged.

(2) There is probable cause to believe that the child committed the act charged.

(3) The child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions. In making its decision under this division, the court shall consider whether the applicable factors under division (D) of this section indicating that the case should be transferred outweigh the applicable factors under division (E) of this section indicating that the case should not be transferred. The record shall indicate the specific factors that were applicable and that the court weighed.

(C) Before considering a transfer under division (B) of this section, the juvenile court shall order an investigation, including a mental examination of the child by a public or private agency or a person qualified to make the examination. The child may waive the examination required by this division if the court finds that the waiver is competently and intelligently made. Refusal to submit to a mental examination by the child constitutes a waiver of the examination.

(D) In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the following relevant factors, and any other relevant factors, in favor of a transfer under that division:

(1) The victim of the act charged suffered physical or psychological harm, or serious economic harm, as a result of the alleged act.

(2) The physical or psychological harm suffered by the victim due to the alleged act of the child was exacerbated because of the physical or psychological vulnerability or the age of the victim.

(3) The child's relationship with the victim facilitated the act charged.

(4) The child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity.

(5) The child had a firearm on or about the child's person or under the child's control at the time of the act charged, the act charged is not a violation of *section 2923.12 of the Revised Code*, and the child, during the commission of the act charged, allegedly used or displayed the firearm, brandished the firearm, or indicated that the child possessed a firearm.

(6) At the time of the act charged, the child was awaiting adjudication or disposition as a delinquent child, was under a community control sanction, or was on parole for a prior delinquent child adjudication or conviction.

(7) The results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system.

(8) The child is emotionally, physically, or psychologically mature enough for the transfer.

(9) There is not sufficient time to rehabilitate the child within the juvenile system.

(E) In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the following relevant factors, and any other relevant factors, against a transfer under that division:

- (1) The victim induced or facilitated the act charged.
- (2) The child acted under provocation in allegedly committing the act charged.
- (3) The child was not the principal actor in the act charged, or, at the time of the act charged, the child was under the negative influence or coercion of another person.
- (4) The child did not cause physical harm to any person or property, or have reasonable cause to believe that harm of that nature would occur, in allegedly committing the act charged.
- (5) The child previously has not been adjudicated a delinquent child.
- (6) The child is not emotionally, physically, or psychologically mature enough for the transfer.
- (7) The child has a mental illness or is a mentally retarded person.
- (8) There is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety.

(F) If one or more complaints are filed alleging that a child is a delinquent child for committing two or more acts that would be offenses if committed by an adult, if a motion is made alleging that division (A) of this section applies and requires that the case or cases involving one or more of the acts charged be transferred for *, and if a motion also is made requesting that the case or cases involving one or more of the acts charged be transferred pursuant to division (B) of this section, the juvenile court, in deciding the motions, shall proceed in the following manner:

- (1) Initially, the court shall decide the motion alleging that division (A) of this section applies and requires that the case or cases involving one or more of the acts charged be transferred.

(2) If the court determines that division (A) of this section applies and requires that the case or cases involving one or more of the acts charged be transferred, the court shall transfer the case or cases in accordance with the ** that division. After the transfer pursuant to division (A) of this section, the court shall decide, in accordance with division (B) of this section, whether to grant the motion requesting that the case or cases involving one or more of the acts charged be transferred pursuant to that division. Notwithstanding division (B) of this section, prior to transferring a case pursuant to division (A) of this section, the court is not required to consider any factor specified in division (D) or (E) of this section or to conduct an investigation under division (C) of this section.

(3) If the court determines that division (A) of this section does not require that the case or cases involving one or more of the acts charged be transferred, the court shall decide in accordance with division (B) of this section whether to grant the motion requesting that the case or cases involving one or more of the acts charged be transferred pursuant to that division.

(G) The court shall give notice in writing of the time, place, and purpose of any hearing held pursuant to division (A) or (B) of this section to the child's parents, guardian, or other custodian and to the child's counsel at least three days prior to the hearing.

(H) No person, either before or after reaching eighteen years of age, shall be prosecuted as an adult for an offense committed prior to becoming eighteen years of age, unless the person has been transferred as provided in division (A) or (B) of this section or unless division (J) of this section applies. Any prosecution that is had in a criminal court on the mistaken belief that the person who is the subject of the case was eighteen years of age or older at the time of the commission of the offense shall be deemed a nullity, and the person shall not be considered to have been in jeopardy on the offense.

(I) Upon the transfer of a case under division (A) or (B) of this section, the juvenile court shall state the reasons for the transfer on the record, and shall order the child to enter into a recognizance with good and sufficient surety for the child's appearance before the appropriate court for any disposition that the court is authorized to make for a similar act committed by an adult. The transfer abates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint, and, upon the transfer, all further proceedings pertaining to the act charged shall be discontinued in the juvenile court, and the case then shall be within the jurisdiction of the court to which it is transferred as described in division (H) of *section 2151.23 of the Revised Code*.

(J) If a person under eighteen years of age allegedly commits an act that would be a felony if committed by an adult and if the person is not taken into custody or apprehended for that act until after the person attains twenty-one years of age, the juvenile court does not have jurisdiction to hear or determine any portion of the case charging the person with committing that act. In those circumstances, divisions (A) and (B) of this section do not apply regarding the act, and the case charging the person with committing the act shall be a criminal prosecution commenced and heard in the appropriate court having jurisdiction of the offense as if the person had been eighteen years of age or older when the person committed the act. All proceedings pertaining to the act shall be within the jurisdiction of the court having jurisdiction of the offense, and that court has all the authority and duties in the case as it has in other criminal cases in that court.

HISTORY:

RC § 2151.26, 133 v H 320 (Eff 11-19-69); 134 v S 325 (Eff 1-14-72); 137 v S 119 (Eff 8-30-78); 139 v H 440 (Eff 11-23-81); 140 v S 210 (Eff 7-1-83); 141 v H 499 (Eff 3-11-87); 144 v

H 27 (Eff 10-10-91); 146 v H 1 (Eff 1-1-96); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 124 (Eff 3-31-97); *RC* § 2152.12, 148 v S 179, § 3. Eff 1-1-2002.

2152.51 [Effective 9/30/2011] Definitions regarding child competency proceedings.

(A) As used in sections 2152.51 to 2152.59 of the Revised Code:

(1) “Competent” and “competency” refer to a child’s ability to understand the nature and objectives of a proceeding against the child and to assist in the child’s defense. A child is incompetent if, due to mental illness, intellectual disability, or developmental disability, or otherwise due to a lack of mental capacity, the child is presently incapable of understanding the nature and objective of proceedings against the child or of assisting in the child’s defense.

(2) “Delinquent child proceeding” means any proceeding under this chapter.

(3) “A person who is at least moderately intellectually disabled” means “a person who is at least moderately mentally retarded,” as defined in section 5123.01 of the Revised Code.

(4) “Person with intellectual disability” has the same meaning as in section 2951.041 of the Revised Code.

(B) Each juvenile court shall adopt rules to expedite proceedings under sections 2152.51 to 2152.59 of the Revised Code. The rules shall include provisions for giving notice of any hearings held under those sections and for staying any proceedings on the underlying complaint pending the determinations under those sections.

(C) At a competency-related hearing held under section 2152.53 or 2152.58 of the Revised Code, the child shall be represented by an attorney. If the child is indigent and cannot obtain counsel, the court shall appoint an attorney under Chapter 120. of the Revised Code or the Rules of Juvenile Procedure.

Added by 129th General Assembly File No. 29, HB 86, § 1, eff. 9/30/2011.

2152.55 [Effective 9/30/2011] Evaluation process.

(A) If a court orders a child to receive an evaluation under section 2152.53 of the Revised Code, the child and the child's parents, guardians, or custodians shall be available at the times and places established by the evaluator who conducts the evaluation. The evaluation shall be performed in the least restrictive setting available that will both facilitate an evaluation and maintain the safety of the child and community. If the child has been released on temporary or interim orders and refuses or fails to submit to the evaluation, the court may amend the conditions of the orders in whatever manner necessary to facilitate an evaluation.

(B) The court shall provide in its evaluation order that the evaluator shall have access to all relevant private and public records related to the child, including competency evaluations and reports conducted in prior delinquent child proceedings. The court may include an order for all relevant private and public records related to the child in the journal entry ordering the evaluation.

(C) Within ten business days after the court appoints an evaluator, the prosecuting attorney shall deliver to the evaluator copies of relevant police reports and other background information that pertain to the child and that are in the prosecuting attorney's possession, except for any information that the prosecuting attorney determines would, if released, interfere with the effective prosecution of any person or create a substantial risk of harm to any person.

(D) Within ten business days after the court appoints an evaluator, the child's attorney shall deliver to the evaluator copies of relevant police reports and other background information that

pertain to the child and that are in the attorney's possession and that is not protected by attorney-client privilege.

Added by 129th General Assembly File No. 29, HB 86, § 1, eff. 9/30/2011