Ohio Legislative Service Commission

Bill Analysis

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(As Introduced)

Sens. Cafaro and Wagoner, Manning, Jones, Sawyer, Turner, Lehner

BILL SUMMARY

- Requires that if, under Ohio's usual procedures for the appointment of a guardian, the person for whom the guardian is to be appointed is an adult, that adult must be a "qualified respondent" (a respondent subject to the jurisdiction of the Ohio probate court under the bill).

- In a case involving an out-of-state respondent, requires an applicant for the appointment of a guardian or for the issuance of a protective order for an adult to give notice of the application to persons who would be entitled to notice if a proceeding were brought in the respondent's home state.

- Establishes rules for deciding whether an Ohio probate court should proceed with, stay, or dismiss a proceeding for the appointment of a guardian or issuance of a protective order when a proceeding is also filed in another state.

- Authorizes an Ohio probate court to communicate with, request information or action from, and provide information to or take action at the request of a court of another state regarding adult guardianship and protective proceedings.

- Provides for the taking of testimony in another state and the use of that testimony in adult guardianship and protective proceedings in Ohio.

- Delineates the jurisdiction of an Ohio probate court in adult guardianship and protective proceedings when Ohio is not the respondent's home state.

- Establishes procedures for the transfer of guardianship of an adult from Ohio to another state and from another state to Ohio.

- Authorizes the registration of an out-of-state guardianship or protective order in Ohio so that the order may be enforced in Ohio.

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CONTENT AND OPERATION

Introduction

The bill adopts the Transfer of Adult Guardianship and Protective Proceedings Jurisdiction Act and provides that new R.C. Chapter 2112. may be cited by that name, although some portions of that chapter apply to proceedings other than transfers. As used in the bill, a guardian, generally speaking, is a person, association, or corporation, or an agency under contract with the Department of Developmental Disabilities, appointed by a guardianship order of a probate court to have the care and management of the person, the estate, or both of an incompetent or minor. An incompetent is a person who is so mentally impaired as a result of a mental or physical illness, disability, mental retardation, or chronic substance abuse that the person cannot take proper care of the person's self or property or fails to provide for the person's family or others for

whom the person is charged by law to provide, or any person confined to a correctional institution within this state.[1]

The person for whom a guardian is appointed is a ward. For purposes of the new chapter, a ward is any adult (person who is 18 or older) who has been adjudicated incompetent and for whom a guardian or the probate court, as superior guardian, is acting. A guardian of the person of a ward is someone appointed by the court to make decisions regarding the support, care, education, health, and welfare of the ward but does not include a guardian ad litem appointed to represent a minor or incompetent in court. A guardian of the ward's estate is someone appointed to administer the estate of a ward.[2]

The bill establishes procedures for the transfer of guardianship between Ohio and other states and addresses related issues concerning guardianship and protective proceedings. A "protected person" is an adult for whom a protective order has been issued. "Guardianship proceedings" are judicial proceedings in which a person seeks "an order for the appointment of a guardian" (guardianship order) or such an order has been issued. "Protective proceedings" are judicial proceedings in which a person seeks a protective order related to the management of an adult's (protected person) person, property or both" (protective order), or in which such an order has been issued. "State" means a U.S. state, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, any territory or insular possession subject to the jurisdiction of the United States, and any Indian tribe or band that is recognized by federal law or formally acknowledged by a state. For purposes of the new chapter, an Ohio probate court may treat a foreign country as if it were a state.[3]

Appointment for adult ward

The bill provides that if, under Ohio's usual procedures for the appointment of a guardian, the person for whom the guardian is to be appointed is an adult, that adult must be a "qualified respondent" as described in R.C. 2112.21, new in the bill (see "**Definitions**" in the **COMMENT**). A respondent is an adult for whom a protective order or the appointment of a guardian is sought. R.C. 2112.21 does not define "qualified respondent," but it does establish the jurisdiction of an Ohio probate court when Ohio is not the respondent's home state (see "**Jurisdiction: In general**," below). The respondent's home state is the state in which the respondent was physically present,

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[1] R.C. 2112.011, 2112.01(B) (incorporating by reference R.C. 2111.01(A)) and (S) (incorporating by reference R.C. 2111.01(D)).

[2] R.C. 2112.01(F), (A), (C), and (D).

[3] R.C. 2112.01(H) ,(I), (M), (N), (O), and (T) and 2112.02.

including any period of temporary absence, for at least six consecutive months immediately before the filing of an application for appointment of a guardian or the issuance of a protective order or, if there is no such state, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the application.[4]

Notice to respondent's home state

Under the bill, if an application for the appointment of a guardian or issuance of a protective order (as used in the new chapter, an order appointing a guardian or other order related to the management of an adult's person, property, or both) is brought in Ohio and Ohio was not the respondent's home state on the date that the application was filed, the applicant must give notice of the application to those persons who would be entitled to notice if a proceeding were brought in the home state. This notice is in addition to, and must be given in the same manner as, any notice that the applicant must otherwise give under Ohio law. This requirement applies generally to applications for the appointment of a guardian or issuance of a protective order. It is not limited to the new proceedings established by the bill.[5]

Applications in multiple states

The bill sets up rules that apply when an application for the appointment of a guardian or issuance of a protective order is filed in both Ohio and another state and neither application has been dismissed or withdrawn. If the Ohio probate court has jurisdiction under the bill (see "**Jurisdiction: In general**," below), it may proceed with the case unless a court in another state acquires jurisdiction under similar jurisdiction provisions before the Ohio court makes an appointment or issues an order. If the Ohio court does not have such jurisdiction, whether at the time the application is filed or at any time before the appointment or issuance of the order, it must stay the proceeding and communicate with the court in the other state. If the court in the other state has jurisdiction, the Ohio court must dismiss the application unless the court in the other state determines that the Ohio court is a more appropriate forum. These rules do not apply in emergency situations[6] (see "**Jurisdiction: Special jurisdiction in emergencies**," below, and **COMMENT**).

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[4] R.C. 2111.02(A) and 2112.01(Q) and (J).

[5] R.C. 2112.02(N) and 2112.26.

[6] R.C. 2112.27.

Communications with courts in other states

The bill authorizes an Ohio probate court to communicate with a court in another state concerning any proceeding under the new chapter, with or without the participation of the parties (respondent, applicant, guardian, and other persons whom the court allows to participate in a guardianship or protective proceeding). The court must make a record of any communication unless the communication involves schedules, calendars, court records, or other administrative matters. A record is information inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form.[7]

The bill authorizes an Ohio probate court, in a guardianship or protective proceeding, to request the appropriate court of another state to do any of the following:[8]

(1) Hold an evidentiary hearing;

(2) Order a person in that state to produce evidence or give testimony pursuant to the procedures of that state;

(3) Order that an evaluation or assessment be made of the respondent;

(4) Order any appropriate investigation of a person involved in the proceeding;

(5) Forward to the Ohio probate court a certified copy of the record of an evidentiary hearing or other proceeding and any evidence, evaluation, or assessment otherwise produced or prepared under (1), (2), (3), or (4), above;

(6) Issue any order necessary to assure the appearance in the proceeding of a respondent, ward, protected person (an adult for whom a protective order has been issued),[9] or other person whose presence is necessary for the probate court to make a determination;

(7) Issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state, including protected health information as authorized in federal regulations (45 C.F.R. 164.504).

The bill gives Ohio probate courts jurisdiction for the limited purpose of granting a request for, or making reasonable efforts to comply with, any similar request from a

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[7] R.C. 2112.03 and 2112.01(K) and (P).

[8] R.C. 2112.04(A).

[9] R.C. 2112.01(M).

court of another state. It also permits the Ohio probate court to require an advance deposit for costs in an amount sufficient to obtain or provide the requested assistance.[10]

Evidence in guardianship and protective proceedings

The bill allows the use, in a guardianship or protective proceeding, of any procedures that may otherwise be available in this state to obtain the testimony of a witness in another state. The probate court, on its own motion, may order that the testimony of a witness be taken in another state and may prescribe the manner in which and the terms upon which the testimony is to be taken. In addition, the bill permits the testimony of an out-of-state witness by deposition or by telephone, audiovisual, or other electronic means. The court must cooperate with the court of the other state in designating an appropriate location for the deposition or testimony. The bill prohibits the use of the best-evidence rule, which generally requires the introduction of original writings into evidence, to exclude documentary evidence sent by "technological means" from another state to an Ohio probate court. Finally, the bill authorizes Ohio probate courts to adopt local rules of practice that promote the use of any device or procedure to facilitate the expeditious disposition of guardianship and protective cases.[11]

Jurisdiction

In general

Under the bill, an Ohio probate court has jurisdiction to appoint a guardian or issue a protective order for a respondent if any of the following applies:

Home state: Ohio is the respondent's home state (see "**Definitions**" in the **COMMENT**).[12]

Significant-connection state: On the date that the application is filed, Ohio is a significant-connection state (a non-home state with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available) and either of the following applies:[13]

(1) The respondent does not have a home state, or a court of the respondent's home state has declined to exercise jurisdiction because Ohio is a more appropriate forum.

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[10] R.C. 2112.04(B).

[11] R.C. 2112.05.

[12] R.C. 2112.21(A)(1).

[13] R.C. 2112.21(A)(2) and 2112.01(R).

(2) The respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and before the probate court makes the appointment or issues the order all of the following apply:

(a) An application for an appointment or order is not filed in the respondent's home state.

(b) An objection to the probate court's jurisdiction is not filed by a person required to be notified of the proceeding.

(c) The Ohio probate court concludes that the probate court is an appropriate forum (see "**Jurisdiction: In general**," below).

In determining whether a respondent has a significant connection with a particular state, the probate court may consider any of the following:[14]

(1) The location of the respondent's family and other persons required to be notified of the guardianship or protective proceeding;

(2) The length of time the respondent at any time was physically present in the state and the duration of any absence;

(3) The location of the respondent's property;

(4) The extent to which the respondent has ties to the state, including, but not limited to, voting registration, state or local tax return filing, vehicle registration, driver's license, social relationships, and receipt of services.

Appropriate forum: Ohio does not have jurisdiction as the applicant's home state or as a significant-connection state, the respondent's home state and all significant-connection states have declined to exercise jurisdiction because Ohio is the more appropriate forum, and jurisdiction in Ohio is consistent with the Ohio and U.S. Constitutions.[15]

Special jurisdiction: The requirements for special jurisdiction (see "**Jurisdiction: Special jurisdiction in emergencies**," below) are met.[16]

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[14] R.C. 2112.21(B).

[15] R.C. 2112.21(A)(3).

[16] R.C. 2112.21(A)(4).

Special jurisdiction in emergencies

The bill defines "emergency" as a circumstance that likely will result in substantial harm to a respondent's health, safety, welfare, or property and for which the appointment of a guardian or issuance of a protective order is necessary because no other person has authority and is willing to act on the respondent's behalf.[17]

Under the bill, an Ohio probate court that lacks jurisdiction as described above nevertheless has special jurisdiction to do any of the following:[18]

(1) Appoint a guardian in an emergency for a respondent who is physically present in Ohio;

(2) Issue a protective order with respect to the adult or the real or tangible personal property located in Ohio;

(3) Appoint a guardian for a ward or protected person for whom a provisional order to transfer the proceeding from another state has been issued under procedures similar to those described under "**Transfer of guardianship to another state**," below.

If an application for the appointment of a guardian in an emergency is brought in Ohio and Ohio was not the respondent's home state on the date the application was filed, the probate court must dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment.[19]

Continuing jurisdiction

Except as otherwise provided in the emergency situations described above, the bill gives to a probate court that has appointed a guardian or issued a protective order under the Act exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.[20]

Declination of jurisdiction

An Ohio probate court that has jurisdiction to appoint a guardian or issue a protective order (see "**Jurisdiction: In general**," above) may decline to exercise

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[17] R.C. 2112.01(G).

[18] R.C. 2112.22(A).

[19] R.C. 2112.22(B).

[20] R.C. 2112.23.

jurisdiction if the court determines at any time that a court of another state is a more appropriate forum. A court that declines to exercise jurisdiction must either dismiss or stay the proceeding. The court may impose any condition that it considers just and proper, including the condition that an application for the appointment of a guardian or issuance of a protective order be filed promptly in another state.[21]

In determining whether it is an appropriate forum, the probate court must consider all relevant factors, including, but not limited to, the following:[22]

(1) Any expressed preference of the respondent;

(2) Whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent;

(3) The length of time the respondent was physically present in or was a legal resident of Ohio or another state;

(4) The distance of the respondent from the court in each state;

(5) The financial circumstances of the respondent's estate;

(6) The nature and location of the evidence;

(7) The ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;

(8) The familiarity of the court of each state with the facts and issues in the proceeding;

(9) The probate court's ability, if an appointment were made, to monitor the conduct of the guardian;

(10) Any other factors that the probate court considers relevant.

Jurisdiction acquired through unjustifiable conduct

The bill spells out the probate court's options in cases in which it has acquired jurisdiction to appoint a guardian or issue a protective order because of unjustifiable conduct. Unjustifiable conduct includes, but is not limited to, conduct by a person that attempts to create jurisdiction in Ohio by removing the adult from the adult's home

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[21] R.C. 2112.24(A) and (B).

[22] R.C. 2112.24(C).

state, secreting the adult, retaining the adult, or restraining or otherwise preventing the adult from returning to the adult's home state in order to prevent or deprive a court of the adult's home state from taking jurisdiction.[23]

If at any time an Ohio probate court determines that it has acquired jurisdiction because of unjustifiable conduct, it may do any of the following:[24]

(1) Decline to exercise jurisdiction;

(2) Exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the respondent or the protection of the respondent's property or to prevent a repetition of the unjustifiable conduct, including staying the proceeding until an application for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction;

(3) Continue to exercise jurisdiction after considering all of the following:

(a) The extent to which the respondent and all persons required to be notified of the proceedings have acquiesced in the exercise of the probate court's jurisdiction;

(b) Whether the probate court is a more appropriate forum than the court of any other state under the factors set forth under "**Jurisdiction: Declination of jurisdiction**," above;

(c) Whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the normal jurisdictional standards (see "**Jurisdiction: In general**," above).

If the court determines that it has acquired jurisdiction because a party seeking to invoke the court's jurisdiction engaged in unjustifiable conduct, the court may assess against that party necessary and reasonable expenses, including, but not limited to, attorney's fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. Except as otherwise provided by statute, the court may not assess fees, costs, or expenses of any kind against the state or a governmental subdivision, agency, or instrumentality of the state.[25]

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[23] R.C. 2112.25(C).

[24] R.C. 2112.25(A).

[25] R.C. 2112.25(B).

Transfer of guardianship to another state

Petition for transfer

The bill creates a procedure for the transfer of a guardianship from Ohio to another state. A guardian appointed in Ohio may petition the probate court for a transfer. The guardian must give notice of the petition to the persons who would be entitled to notice of an application for the appointment of a guardian in Ohio. On its own motion or on request of the guardian, ward, protected person, or other person required to be notified of the petition, the court must hold a hearing on the petition.[26]

Provisional order of transfer

The probate court must issue a provisional order transferring guardianship of the *person* and direct the guardian to petition for guardianship of the person in the other state if the court is satisfied that the guardianship will be accepted by the court in the other state and if it finds all of the following:[27]

(1) The ward is physically present in or is reasonably expected to move permanently to the other state.

(2) An objection to the transfer has not been made, or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the ward.

(3) Plans for care and services for the ward in the other state are reasonable and sufficient.

The probate court must issue a provisional order transferring guardianship of the *estate* and direct the guardian to petition for a guardianship of the estate in the other state if it is satisfied that the guardianship will be accepted by the court of the other state, and the probate court finds all of the following:[28]

(1) The ward is physically present in or is reasonably expected to move permanently to the other state, or the ward has a significant connection to the other state (see "**Significant connection**," above). The bill repeats the factors that a court

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[26] R.C. 2112.31(A), (B), and (C).

[27] R.C. 2112.31(D).

[28] R.C. 2112.31(E).

may consider in determining whether the respondent has a significant connection with a state.[29]

(2) An objection to the transfer has not been made, or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person.

(3) Adequate arrangements will be made for management of the ward's property.

Final order of transfer

The Ohio court must issue a final order confirming the transfer and terminating the guardianship when it receives a provisional order from the court in the other state accepting the proceeding and the documents required to terminate a guardianship. The other state's provisional order must have been issued in a proceeding similar to that by which an Ohio court accepts a transfer of guardianship from another state (see "**Transfer of guardianship to Ohio**," below).[30]

Transfer of guardianship to Ohio

The bill authorizes an Ohio probate court to confirm the transfer of a guardianship from another state to Ohio if the other state's proceedings are similar to those described above for the transfer of a guardianship from Ohio to another state. The guardian must petition the Ohio court to accept the guardianship of the person, the estate, or both. The petition must include a certified copy of the other state's provisional order of transfer. The guardian must give notice of the petition, in the same manner in which notice must be given in Ohio, to those persons who would be entitled to notice if the petition were an application for the appointment of a guardian or issuance of a protective order in both the transferring state and Ohio. On its own motion or on the request of the guardian, ward, protected person, or other person to whom the guardian must give notice of the petition, the court must hold a hearing on a petition.[31]

The probate court must issue a provisional order granting the transfer unless the guardian is ineligible for appointment in Ohio or someone objects and establishes that transfer of the proceeding would be contrary to the interests of the ward or protected person. The court must issue a final order accepting the proceeding and appointing the guardian as a guardian in Ohio when it receives from the court in the other state a final

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[29] R.C. 2112.31(G).

[30] R.C. 2112.31(F).

[31] R.C. 2112.32(A), (B), and (C).

order transferring the proceedings issued under provisions similar to those in the bill for a transfer of guardianship from Ohio.[32]

When an Ohio probate court grants a petition to transfer a guardianship to this state, it must recognize a guardianship order from the other state, including the determination of the incompetence of the ward and the appointment of the guardian. However, the Revised Code section providing for the transfer does not limit the probate court's authority under R.C. Chapter 2111., which governs guardianship and conservatorship in Ohio. If the Ohio court denies a petition to accept the transfer of a guardianship from another state, the guardian may still seek appointment as a guardian in Ohio under Chapter 2111. if the probate court has jurisdiction under that chapter.[33]

Registration of guardianship order

The bill authorizes a guardian appointed in another state to register the guardianship or protective order in Ohio. Once the order is registered, the guardian may exercise in Ohio all powers authorized in the order of appointment except those prohibited by Ohio law, including maintaining actions and proceedings in Ohio. A guardian who is not an Ohio resident is subject to any conditions imposed upon nonresident parties. An Ohio probate court may grant any relief available under Ohio statutes to enforce a registered order.[34]

For a guardian to register an out-of-state order in Ohio, there must not be an application for the appointment of a guardian of the same type (person or estate) pending in Ohio, and the guardian must first give notice to the appointing court of an intent to register. To register a guardianship of the person, the guardian must file as a foreign judgment certified copies of the guardianship order and letters of office in the probate court of any appropriate county. To register a guardianship of the estate, the guardian must file as a foreign judgment certified copies of the guardianship or protective order, letters of office, and any bond in the probate court of any county in which property belonging to the ward or protected person is located.[35]

Applicability of bill

The bill provides that R.C. 2112.01, 2112.011, 2112.02, 2112.03, 2112.04, 2112.05, 2112.31, 2112.32, 2112.41, 2112.42, and 2112.43 apply to guardianship and protective

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[32] R.C. 2112.32(D) and (E).

[33] R.C. 2112.32(F) and (G).

[34] R.C. 2112.43.

[35] R.C. 2112.41 and 2112.42.

orders begun before the effective date of the bill regardless of whether an order has been issued.[36]

COMMENT

Definitions

R.C. 2112.21(A)(1) refers to the "applicant's" home state, but this appears to be an error. "Home state" is defined in R.C. 2112.02(J) in terms of the respondent, and all other parts of R.C. 2112.21 refer to the "respondent's" home state. Therefore, R.C. 2112.21(A)(1) probably needs to be amended to replace "applicant's" with "respondent's."

R.C. 2112.01(L) defines "person," except in the term "protected person," as "an individual, parent, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental agency or instrumentality, public corporation, or other legal or commercial entity." The exception probably should be expanded to include the term "guardian of the person."

R.C. 2112.01(E) defines "conservator" for purposes of R.C. Chapter 2112., but that term is not used anywhere else in the chapter.

Cross-reference

R.C. 2112.22(A)(1) refers to the appointment of guardians in emergency situations "pursuant to section 2112.02 of the Revised Code." R.C. 2112.02 authorizes the probate court to treat a foreign country as if it were a state. The incorrect citation probably should be deleted.

Ambiguities

R.C. 2112.27 begins as follows: "Except for an application for the appointment of a guardian in an emergency or issuance of a protective order, if an application for the appointment of a guardian or issuance of a protective order is filed in this state and in another state . . . ." With regard to protective orders, this language seems to say, "(e)xcept for an application for the issuance of a protective order, if an application for the issuance of a protective order is filed . . ." the sentence probably should be reworded so that the exception includes both the emergency appointment of a guardian and the emergency issuance of a protective order. If the sentence is so reworded, then R.C. 2112.22(A)(2) also should probably refer to emergency protective orders.

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[36] Section 3.

HISTORY

ACTION	DATE
Introduced	06-07-12

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