

Conclusion**OPINION NO. 93-079****Syllabus:**

1. A juvenile court has no authority pursuant to R.C. 2151.38(B) or (C) to release a child committed to the Department of Youth Services under R.C. 2151.355(A)(4)-(6) for institutional care after expiration of the applicable minimum period of institutionalization. The effect of R.C. 2151.38(A), therefore, is that the juvenile court's jurisdiction to release a child terminates when the child has completed the minimum period of institutionalization.
2. If a request for early release is made pursuant to one of the procedures specified in R.C. 2151.38(B) prior to expiration of the minimum period of institutionalization imposed under R.C. 2151.355(A)(4)-(6), and the hearing is rescheduled or continued beyond the expiration of the minimum period of institutionalization, the juvenile court does not acquire or retain jurisdiction to grant an early release after that date. The court's jurisdiction over releases after the minimum period of confinement is limited to that set out in R.C. 2151.38(C).
3. If a juvenile court schedules an early release hearing pursuant to R.C. 2151.38(B) after expiration of the applicable minimum period of institutionalization imposed under R.C. 2151.355(A)(4)-(6) and orders the Department of Youth Services (DYS) to deliver the child for the hearing and to present a treatment plan for post-institutional care as described in R.C. 2151.38(B)(2)(c), DYS should raise the issue of lack of jurisdiction by motion in that proceeding.

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

By: Lee Fisher, Attorney General, December 30, 1993

You have requested an opinion regarding the provisions of R.C. 2151.38 governing the early release of children who have been committed to the Department of Youth Services (DYS) for institutionalization pursuant to an adjudication of delinquency. Specifically, you ask:

1. After the minimum period of a committed child's confinement, as set forth in divisions (A)(4), (A)(5), or (A)(6) of R.C. 2151.355, does a juvenile court have jurisdiction to release the child pursuant to R.C. 2151.38(B)?

2. If it is your opinion in response to the first question that the court has jurisdiction, and if the court orders the release of a child committed to DYS after the minimum period of confinement, is DYS prevented from doing so if it does not believe that law-abiding conduct can be achieved with parole supervision and conditions pursuant to division (C)(1) of section 5139.06, Revised Code? In other words, does DYS have the duty, independent of the juvenile court, to continue to confine a child after the minimum period of confinement if it believes that the child would be a threat to community safety if released?
3. If it is your opinion that after the minimum period of confinement, a juvenile court does not have jurisdiction to grant an early release, is the DYS nevertheless required to comply with an order from the juvenile court to deliver a child to the court for scheduled early release hearings and to present a treatment plan for post-institutional care as described in division (B)(2)(c) of section 2151.38, Revised Code?
4. If a request for early release is made pursuant to one of the procedures specified in R.C. 2151.38(B) prior to the prescribed minimum period of confinement, and if a hearing is rescheduled or continued beyond the minimum period of confinement date, does the court retain jurisdiction to grant release at any time after that date?

I. Statutory Scheme

A. R.C. 2151.355(A)(4)-(6): Minimum Periods of Institutionalization

Pursuant to R.C. 2151.355(A)(4)-(6), a juvenile court may commit a child to the legal custody of DYS for institutionalization when the child has been adjudicated delinquent for committing an act that would be a felony if committed by an adult. Specifically, these divisions of R.C. 2151.355 state:

(A) If a child is found by the court to be a delinquent child, the court may make any of the following orders of disposition:

....

(4) If the child was adjudicated delinquent by reason of having committed an act that would be an aggravated felony of the third degree or a felony of the third or fourth degree if committed by an adult, commit the child to the legal custody of the department of youth services for institutionalization for an indefinite term consisting of a *minimum period of six months* and a maximum period not to exceed the child's attainment of the age of twenty-one years;

(5) If the child was adjudicated delinquent by reason of having committed an act that would be an aggravated felony of the first or second degree or a felony of the first or second degree if committed by an adult, commit the child to the legal custody of the department of youth services for institutionalization in a secure facility for an indefinite term consisting of a *minimum period of one year* and a maximum period not to exceed the child's attainment of the age of twenty-one years;

(6) If the child was adjudicated delinquent by reason of having committed an act that would be the offense of murder or aggravated murder if committed by an adult, commit the child to the legal custody of the department of youth services for institutionalization in a secure facility *until the child's attainment of the age of twenty-one years....* (Emphasis added.)

Thus, R.C. 2151.355 requires that a child committed to DYS for institutional care must be institutionalized for a minimum of six months, one year, or until age twenty-one depending on which division of R.C. 2151.355 is applicable. *See also* R.C. 5139.05(A); R.C. 5139.06(A) (requiring DYS to place and maintain children in a manner consistent with R.C. 2151.355).

B. R.C. 2151.38(A): Limitation on Juvenile Court Jurisdiction

Once a child has been committed to DYS, the juvenile court's jurisdiction is limited as provided in R.C. 2151.38(A), which states in pertinent part:

When a child is committed to the legal custody of the department of youth services, *the jurisdiction of the juvenile court with respect to the child so committed shall cease and terminate at the time of commitment, except as provided in divisions (B) and (C) of this section and in section 5139.38 of the Revised Code and except that, if the department of youth services makes a motion to the court for the termination of permanent custody, the court upon the motion, after notice and hearing and for good cause shown, may terminate permanent custody at any time prior to the child's attainment of age eighteen.* (Emphasis added.)

See also R.C. 5139.05(B) (stating that the court's jurisdiction terminates at commitment and describing the exceptions thereto).

R.C. 2151.38(A) thus provides that the jurisdiction of the juvenile court with respect to a child committed to DYS terminates at the time of commitment with only four exceptions. Any action by the juvenile court subsequent to the commitment of a child to DYS must be taken in accordance with one of these exceptions. *See Clark v. Hamilton County Dept. of Human Services*, No. C-850187, slip op. at 4 (Ct. App. Hamilton County, March 12, 1986) (unreported) (holding that R.C. 2151.38(A) does not grant the juvenile court jurisdiction to consider a motion for termination of permanent custody filed by a parent rather than the custodial agency).¹ Two of the exceptions to termination of the juvenile court's jurisdiction are not relevant to your questions. R.C. 5139.38 is a recently enacted statute that gives DYS authority to transfer a

¹ At the time *Clark* was decided, R.C. 2151.38(A) provided that the juvenile court's jurisdiction terminated when a child was committed to the custody of DYS or to the custody of a county department of child welfare, county children services board or certain other certified organizations. References to agencies other than DYS were removed from R.C. 2151.38 in 1989 as part of a comprehensive revision of Ohio juvenile law governing abused, neglected and dependent children. 1987-1988 Ohio Laws Part I, 198, 229 (Am. Sub. S.B. 89, eff. Jan. 1, 1989).

It should be further noted that R.C. 2151.38(A) does not affect the juvenile court's jurisdiction to consider new charges against a juvenile that arise after commitment. *In re McNaughten*, No. 79AP-676 (Ct. App. Franklin County Dec. 28, 1979) (unreported).

felony delinquent from an institution to a community facility within the ninety days prior to the expiration of the prescribed minimum period of institutionalization. DYS must notify the committing court of the transfer, but R.C. 5139.38 does not provide that the court must approve the transfer. See 1993 Ohio Legis. Bull. 202, 584 (Anderson) (Am. Sub. H.B. 152, eff. July 1, 1993). The exception with respect to termination of permanent custody involves complete termination of DYS' custody of a child rather than release from institutional care.² The jurisdiction of the juvenile court with respect to the release of a child from institutional care, therefore, is limited to that provided in R.C. 2151.38(B) and (C), which are the statutory provisions dealing with such a release.

C. R.C. 2151.38(B): Early Release before Expiration of Minimum Period

R.C. 2151.38(B)(1) provides that DYS shall not release a child committed pursuant to R.C. 2151.355(A)(4)-(5) "prior to the expiration of the prescribed minimum periods of institutionalization," or a child committed under R.C. 2151.355(A)(6) prior to age twenty-one, except as provided in R.C. 5139.38 or unless DYS, the child, or the child's parent "requests an *early release* ... from the court that committed the child and the court approves ... or unless the court on its own motion grants an *early release*." (Emphasis added.) The procedural requirements for filing requests for early release, set out in (B)(2)(a) and (b), also expressly refer to release prior to expiration of the prescribed minimum period of institutionalization or prior to age twenty-one, depending on the applicable commitment provision of R.C. 2151.355(A). DYS may request an early release at any time. The court, on its own motion, may also consider an early release at any time. R.C. 2151.38(B)(2)(a). The child or a parent may submit a request for an early release after the child has served thirty days. R.C. 2151.38(B)(2)(b). Any subsequent requests must be at least ninety days apart. *Id.*

The juvenile court that committed the child may rule on R.C. 2151.38(B)(2)(a) or (b) requests without a hearing or may schedule a hearing within thirty days. If the committing court schedules a hearing, the court must order DYS to present a treatment plan for post-institutional care at the hearing. R.C. 2151.38(B)(2)(c). Division (B)(2)(c) further provides that the court may order DYS to bring the child to the hearing. If the committing court approves the early release, DYS must prepare a treatment plan that contains the terms and conditions of release. The court in the county of placement may adopt these terms as a court order and add other consistent terms, conduct hearings to determine if the child has violated the terms of release, and, if so, order the child returned to a DYS institution. Time served before the early release must be counted toward fulfilling the minimum sentence under the original commitment, but a child who is returned must serve a minimum of three months or complete a specialized parole revocation program. See also R.C. 5139.05(B); R.C. 5139.06(B) (requiring DYS to comply with provisions of R.C. 2151.38(B) with respect to children who have not been institutionalized for the prescribed minimum periods of time).

² R.C. 5139.01(A)(9) states: "'Release' means the termination of a child's stay in an institution. A child released pursuant to division (B) of section 2151.38 ... shall be on parole until discharged...." The word "discharge," defined at R.C. 5139.01(A)(8), refers to termination of DYS custody of a child. The introductory language of R.C. 5139.01 limits the definitions therein to use in R.C. Chapter 5139. The reference to R.C. 2151.38, however, which was added to the above definition of release by the same legislation that enacted the release provisions of R.C. 2151.38(B), clearly indicates that the legislature intended the definition to apply for purposes of releases pursuant to R.C. 2151.38. See 1981-1982 Ohio Laws, Part II, 2791 (Am. Sub. H.B. 440, eff. Nov. 23, 1981).

D. R.C. 2151.38(C): Release after Minimum Period

R.C. 2151.38(C) provides that when a child has been committed to DYS pursuant to R.C. 2151.355(A)(4) or (5) "*and the child has been institutionalized ... for the prescribed minimum periods of time under those divisions, the department [of youth services], without approval of the court that committed the child, may release the child or discharge the child.*" (Emphasis added.) DYS, however, must notify the committing court of the release. If DYS releases the child on parole or assigns the child to a non-institutional placement for additional treatment and rehabilitation, DYS must provide both the committing court and the court in the county of placement with a copy of the child's treatment and rehabilitation plan. The juvenile court in the county of placement may adopt the terms and conditions of that plan as a court order, adopt additional consistent terms and conditions, conduct hearings to determine if the child has violated the terms of release, and, if so, order the child returned to a DYS institution. As is true under R.C. 2151.38(B), a child who is returned must serve a minimum of three months or complete a specialized parole revocation program. *See also* R.C. 5139.06(C) (setting out DYS' responsibility with respect to a child who has been institutionalized for the prescribed minimum period of time).

II. Juvenile Court Has No Jurisdiction to Grant Release after Minimum Period of Institutionalization

A. Plain Language of the Statute

The juvenile court is a court of limited jurisdiction. Consequently, in construing its powers, "nothing is to be held as granted by implication which is not necessary to full exercise of powers expressly granted, and such courts are confined strictly within the limits of powers granted." *In re Wolfe*, 26 Ohio Op. 2d 274, 276, 187 N.E.2d 658, 661 (Juv. Ct. 1962). It is apparent from the preceding discussion of the statutes that the authority of a juvenile court acting under R.C. 2151.38(B) differs from the authority of a juvenile court acting under R.C. 2151.38(C). Only R.C. 2151.38(C) contains any provisions dealing with the release of a child who has completed the applicable minimum period of institutionalization. Division (C), however, provides no authority for the court to approve or disapprove the release of such child. Such authority over release does appear in division (B). By its terms, however, R.C. 2151.38(B) is limited to release of a child "prior to the expiration of the prescribed minimum periods of institutionalization." Additionally, the phrase "early release" appears only in division (B). Thus, neither R.C. 2151.38(B) or (C) confer any authority on the juvenile court to release a child *after* the minimum period of institutionalization. The effect of R.C. 2151.38(A), therefore, is that the juvenile court's jurisdiction to release a child committed to DYS for institutional care terminates when the child has completed the minimum period of institutionalization.

B. Legislative History

Although the plain language of R.C. 2151.38 requires no further construction, *see generally State ex rel. Stanton v. Zangerle*, 117 Ohio St. 436, 159 N.E. 823 (1927), legislative history also indicates that the General Assembly did not intend, by enactment of the release provisions of R.C. 2151.38(B) and (C), to give the juvenile court authority to release a child after the minimum period of institutionalization. The release provisions of R.C. 2151.38 were enacted in 1981. *See* 1981-1982 Ohio Laws, Part II, 2791 (Am. Sub. H.B. 440, eff. Nov. 23, 1981). Prior to the enactment of House Bill 440, once a child was committed to the Ohio Youth Commission (now DYS), the Youth Commission had complete discretion over the determination of how long to institutionalize a child. *See generally* Keith R. Kearney & Steven R. Smith, Note, *H.B. 440: Ohio Restructures Its Juvenile Justice System*, 8 U. Dayton L. Rev.

237, 237-238, 242 (1983). The juvenile court had no authority to set the length of institutionalization. See *In re Tsesmilles*, 24 Ohio App. 2d 153, 157, 265 N.E.2d 308, 311 (Columbiana County 1970) (commitment of a child to the Department of Mental Hygiene and Corrections). Nor were there any provisions involving the court in the release of a child. R.C. 2151.38(A) provided for termination of jurisdiction after commitment with only one statutory exception: The court could determine motions for termination of custody made by the Ohio Youth Commission or a county child welfare agency. This exception was interpreted strictly -- motions for change of custody submitted by a parent did not qualify for the exception. *State v. Clevenger*, 19 Ohio App. 2d 306, 251 N.E.2d 159 (Clinton County 1969) (holding that R.C. 2151.38 is constitutional and affirming lower court dismissal of motion for lack of jurisdiction). Once a child was committed to a public agency, discretion to determine the child's rehabilitation needs vested in the custodial agency and not the court. See *Tsesmilles*, 24 Ohio App. 2d at 157, 265 N.E.2d at 311; *Clevenger*, 19 Ohio App. 2d at 307-08, 251 N.E.2d at 161.

The enactment of the minimum sentence provisions of R.C. 2151.355(A)(4)-(6) and the release provisions of R.C. 2151.38(B)-(C) was the result of public and judicial perception that delinquent children were being released too soon into community placements. Kearney & Smith, 8 U. Dayton L. Rev at 238-39. The purpose of these provisions was "to prohibit the Department of Youth Services from placing children committed to it who have not served the prescribed minimum periods of institutionalization in a less restrictive setting ... without the prior approval of the committing court" 1981-1982 Ohio Laws at 2793 (Am. Sub. H.B. 440, preamble). Viewed in this context, the clear legislative intent behind the release provisions of R.C. 2151.38(B)-(C) was to postpone, until after a child had completed the minimum period of institutionalization, the time when DYS would acquire exclusive discretion over a child's release. Neither R.C. 2151.38(B) or (C) was intended to grant the court jurisdiction to release a child after the minimum period of institutionalization. With respect to that time after the minimum period of institutionalization, DYS retained the same exclusive authority it had prior to H.B. 440, subject only to the notice requirements of R.C. 2151.38(C).

C. Corresponding Provisions of R.C. Chapter 5139

The conclusion that DYS has exclusive discretion to release a child after the minimum period of institutionalization is further supported by the provisions of R.C. Chapter 5139 (youth services). When the release provisions of R.C. Chapter 2151 (juvenile court) were enacted in H.B. 440, corresponding provisions were enacted in R.C. Chapter 5139 with respect to the authority and responsibilities of DYS. See 1981-1982 Ohio Laws at 2837-72. Of particular note is the following emphasized language of R.C. 5139.05(B):

The department of youth services may grant the release from institutionalization of any child committed to it pursuant to division (A)(4), (5), or (6) of section 2151.355 of the Revised Code in a manner consistent with section 5139.38 of the Revised Code, *in a manner consistent with division (B) of section 2151.38 of the Revised Code* [release prior to expiration of minimum period of institutionalization] *if that division is applicable to the child, or in a manner consistent with division (C) of section 5139.06 of the Revised Code if division (B) of section 2151.38 of the Revised Code is no longer applicable to the child.* (Emphasis added.)

The language of R.C. 5139.05(B) indicates that, when R.C. 2151.38(B) is no longer applicable, *i.e.*, after a child has served the minimum period of institutionalization, it is R.C.

5139.06(C) that provides the authority for the actual release of a child.³ R.C. 5139.06(C)(1) provides that DYS may release a child committed pursuant to R.C. 2151.355(A)(4) or (5) who has been institutionalized for the prescribed minimum period, "under the supervision and conditions that it believes conducive to law-abiding conduct ... provided that the department shall notify the committing court, in writing, of the terms of supervision and the conditions of the release at least fifteen days prior to the scheduled date of release...." Thus, R.C. 5139.06(C) vests authority to release a child after the minimum period of institutionalization in DYS, while R.C. 2151.38(B) vests authority for an "early release," before the minimum period has expired, in the juvenile court. R.C. 2151.38(C) limits the juvenile court's jurisdiction after the minimum period to adding consistent terms and conditions of release and conducting hearings regarding post-release violations. *See also* R.C. 5139.05(B). The juvenile court has no jurisdiction to release a child committed to DYS after the expiration of the minimum period of institutionalization, as set forth in R.C. 2151.355(A)(4), (A)(5), or (A)(6).⁴

III. Continuation of Hearing on Request for Early Release Does Not Extend Juvenile Court's Jurisdiction Beyond Minimum Period of Institutionalization

It follows from the above discussion that if the court has not ruled on a request for early release before expiration of the minimum period of institutionalization, the request becomes moot. The term "early release" appears only in R.C. 2151.38(B) and refers to releases made before expiration of the minimum period of institutionalization. Once that date has passed, the relief requested -- an early release -- is no longer possible. The juvenile court has no statutory jurisdiction to grant or deny any other kind of release. Releases subsequent to the expiration of the minimum period of institutionalization are made when DYS, in the exercise of its discretion, determines that the standards set in R.C. 5139.06(C) have been met. The juvenile court's jurisdiction over such releases is limited to that set out in R.C. 2151.38(C).

It is true that R.C. 2151.38(B)(2) provides that when a request for an early release is received, the juvenile court may rule on it without a hearing or "schedule a time within thirty days for a hearing on whether the child is to be released." This provision for a hearing within thirty days, however, does not compel the conclusion that the court has authority to order DYS to hold the child for a hearing beyond the minimum period of institutionalization. The hearing provision must be construed in the context of R.C. 2151.38 as a whole. It is clear from the statutory scheme that after the minimum period of institutionalization, if DYS considers the child appropriate for release pursuant to R.C. 5139.06(C), DYS has authority to release the child without the court's approval.⁵ Conversely, if at that point in time DYS finds that the standards

³ A similar juxtaposition of R.C. 2151.38(B) and R.C. 5139.06(C) appears in the definition of release at R.C. 5139.01(A)(9).

⁴ It may be noted that the minimum commitment pursuant to R.C. 2151.355(A)(6) is until age twenty-one, which is also the maximum possible commitment. As a practical matter, therefore, DYS never acquires exclusive jurisdiction over the release of a child committed pursuant to division (A)(6).

⁵ An early criticism of the release statutes was that "the administrative handling of early releases generally takes so long that often the offender's minimum sentence has expired before the release can be granted." Kearney & Smith, 8 U. Dayton Law Rev. at 248 (citing a 1982 interview with George Sheehan, Chief of Legal Affairs of DYS).

for release set in R.C. 5139.06(C) have not been met, DYS also has the authority to keep the child without the court's approval. The legislature has not chosen to extend the court's jurisdiction to approve or disapprove the release of a child beyond the minimum period of institutionalization. The purpose of the thirty-day hearing provision is not to extend the court's jurisdiction, but to insure that the court rules quickly on such requests, given the limited time period during which early releases can be obtained. The court may retain jurisdiction for the full thirty days available for scheduling a hearing only when the minimum period of institutionalization does not expire within thirty days of the request for an early release.

IV. Issue of Lack of Jurisdiction Should Be Raised By Motion in the Context of the Early Release Hearing

When a juvenile court schedules an early release hearing after a child has completed the applicable minimum period of institutionalization and orders DYS to deliver the child for the hearing and to present a treatment plan for post-institutional care, DYS may obey the order, seek to have the court change the order, or disobey the order at its own peril. See 1992 Op. Att'y Gen. No. 92-072 at 2-306. Disobedience to a court order would potentially subject DYS to a contempt proceeding. See generally R.C. 2705.02 (acts punishable by contempt); *Zakany v. Zakany*, 9 Ohio St. 3d 192, 459 N.E.2d 870 (1984) (syllabus). DYS may raise lack of jurisdiction as a defense in such a contempt proceeding and present this opinion as authority in support of that defense.

An opinion of the Attorney General regarding a court's authority does not in and of itself, however, authorize a public official to disregard an order of that court. 1990 Op. Att'y Gen. No. 90-009 at 2-39. While the language of R.C. 2151.38 seems clear with respect to the juvenile court's limited jurisdiction over early releases, there is as yet no controlling Ohio case law interpreting this jurisdictional issue. Every court has the inherent authority to determine, in the first instance, its jurisdiction over a matter brought before that court. *Sturgill v. Sturgill*, 61 Ohio App. 3d 94, 101, 572 N.E.2d 178, 182 (Montgomery County 1989). The issue of jurisdiction, therefore, must ultimately be determined by the courts. Further, even though it may ultimately be determined that the court lacked jurisdiction in the underlying action and order, this does not necessarily invalidate a finding of contempt of court. See generally *United States v. United Mine Workers*, 330 U.S. 258, 290 (1947) (criminal contempt); *Walker v. City of Birmingham*, 388 U.S. 307, 315-21 (1967) (same).

It seems clear, therefore, that if DYS wishes to raise the issue of the court's lack of jurisdiction to make early releases after the expiration of the minimum period of institutionalization, both respect for the court and prudence dictate that DYS should do so by motion in the context of the early release hearing itself. If DYS is dissatisfied with the determination of the jurisdictional issue by the juvenile court, the matter can be pursued further by direct appeal. See, e.g., *Wandling v. Ohio Dept. of Transp.*, 78 Ohio App. 3d 368, 604 N.E.2d 838 (Gallia County 1992) (motion to vacate order of trial court for lack of subject matter jurisdiction overruled by trial court but reversed on appeal).

V. Conclusion

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

1. A juvenile court has no authority pursuant to R.C. 2151.38(B) or (C) to release a child committed to the Department of Youth Services under R.C. 2151.355(A)(4)-(6) for institutional care after expiration of the applicable

minimum period of institutionalization. The effect of R.C. 2151.38(A), therefore, is that the juvenile court's jurisdiction to release a child terminates when the child has completed the minimum period of institutionalization.

2. If a request for early release is made pursuant to one of the procedures specified in R.C. 2151.38(B) prior to expiration of the minimum period of institutionalization imposed under R.C. 2151.355(A)(4)-(6), and the hearing is rescheduled or continued beyond the expiration of the minimum period of institutionalization, the juvenile court does not acquire or retain jurisdiction to grant an early release after that date. The court's jurisdiction over releases after the minimum period of confinement is limited to that set out in R.C. 2151.38(C).
3. If a juvenile court schedules an early release hearing pursuant to R.C. 2151.38(B) after expiration of the applicable minimum period of institutionalization imposed under R.C. 2151.355(A)(4)-(6) and orders the Department of Youth Services [DYS] to deliver the child for the hearing and to present a treatment plan for post-institutional care as described in R.C. 2151.38(B)(2)(c), DYS should raise the issue of lack of jurisdiction by motion in that proceeding.