



**H.B. 144\***

126th General Assembly

(As Reported by S. Judiciary on Civil Justice)

**Reps. Buehrer, Aslanides, Barrett, Daniels, Domenick, C. Evans, D. Evans, Faber, Flowers, Gilb, Harwood, Hughes, Latta, McGregor, Miller, Oelslager, Reidelbach, Schneider, Seaver, Seitz, G. Smith**

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**BILL SUMMARY**

- Prohibits a person who has not received, and has not waived the right to receive, notice of the admission of a will to probate to commence a will contest action more than three months after the filing of the certificate.
- Provides that the savings statute does not apply to a will contest action.
- Provides that the testimonial privilege of an attorney concerning communications made to the attorney by a client or the attorney's advice to a client does not apply concerning a communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client and the dispute addresses the competency of the deceased client when executing a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when executing a document that is the basis of the dispute.
- Provides in a new exception that the testimonial privilege of a physician or dentist concerning a communication made to either of them by a patient in that relation or the physician's or dentist's advice to a patient does not apply and either may testify or be compelled to testify if the communication was between a patient who has since died and the deceased patient's physician or dentist, the communication is relevant to a

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*\* This analysis was prepared before the report of the Senate Judiciary on Civil Justice Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

dispute between parties who claim through that deceased patient, and the dispute addresses the competency of the deceased patient when executing a document that is the basis of the dispute or whether the deceased patient was a victim of fraud, undue influence, or duress when executing a document that is the basis of the dispute.

- Provides that if neither the spouse of a patient nor the executor or administrator of that patient's estate gives express consent to a physician's or dentist's testimony, testimony or the disclosure of the patient's medical records under the new exception by a physician, dentist, or other health care provider is a permitted use or disclosure of protected health information and an authorization or opportunity to be heard is not required.
- Permits an interested party who objects to testimony or the disclosure of a communication between a patient who has since died and the deceased patient's physician or dentist under the new exception to seek a protective order pursuant to Civil Rule 26.
- Prohibits a person to whom protected health information is disclosed under the new exception from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which the information was requested and requires the person to return the protected health information to the covered entity or destroy the protected health information, including all copies made, at the conclusion of the litigation or proceeding.
- Removes a provision that specifies that the testimonial privilege of a physician or dentist concerning a communication made to either of them by a patient in that relation or the physician's or dentist's advice to a patient does not apply and that a physician or dentist may testify or be compelled to testify if the patient is deceased and a party to a will contest action requests the testimony and demonstrates that it is necessary to establish the party's rights and a provision that specifies that a physician or dentist may be compelled to testify or to submit to discovery in such a will contest action only as to the patient in question on issues relevant to the competency of the patient at the time of the execution of the will.

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## CONTENT AND OPERATION

### *Will contest action*

Current law prohibits a person who has received or waived the right to receive notice of the admission of a will to probate to commence an action to contest the validity of the will more than three months after the filing of the certificate that evidences the giving of that notice or the waiver of the right to receive that notice. The bill prohibits any other person from commencing an action to contest the validity of the will more than three months after the initial filing of that certificate as a result of the bill's change to existing law, all persons are prohibited from commencing an action to contest the validity of the will more than three months after the filing of the certificate regardless of whether they receive or waive the right to receive the notice. (R.C. 2107.76(A).) (See **COMMENT 1.**)

### *Savings statute*

Current law provides that in any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This provision applies to any claim asserted in any pleading by a defendant. (R.C. 2305.19(A)--not in the bill.) The bill provides that the above-described provision does not apply to a will contest action (R.C. 2107.76(B)). (See **COMMENT 2.**)

### *Privileged communications*

The Privileged Communications Law precludes specified persons from testifying in certain respects. The bill eliminates the physician-patient and attorney-client privilege in probate cases under certain circumstances.

### *Attorney-client privilege*

#### *Current law*

Current law provides that an attorney cannot testify concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client, or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client and except that

if the client voluntarily testifies or is deemed to have waived any testimonial privilege, the attorney may be compelled to testify on the same subject (R.C. 2317.02(A)).

### **Operation of the bill**

The bill expands the circumstances in which the testimonial privilege of an attorney does not apply. The bill provides that the attorney-client privilege does not apply concerning a communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when executing a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when executing a document that is the basis of the dispute. (R.C. 2317.02(A).)

### **Physician-patient privilege**

#### **Current law**

With certain exceptions specified in the Privileged Communications Law, a physician or a dentist cannot testify concerning a communication made to the physician or dentist by a patient in that relation or the physician's or dentist's advice to a patient. This testimonial privilege does not apply, and a physician or dentist may testify or may be compelled to testify, in any of the following circumstances (R.C. 2317.02(B)(1)(a) to (e)):

(1) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under the Worker's Compensation Law, under any of the following circumstances: (a) if the patient or the patient's guardian or other legal representative gives express consent, (b) if the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent, or (c) if a medical claim, dental claim, chiropractic claim, or optometric claim, an action for wrongful death, any other type of civil action, or a claim under the Worker's Compensation Law is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative;

(2) In any civil action concerning court-ordered treatment or services received by a patient, if the court-ordered treatment or services were ordered as part of a case plan journalized under the Juvenile Court Law or the court-ordered

treatment or services are necessary or relevant to dependency, neglect, or abuse or temporary or permanent custody proceedings under that law;

(3) In any criminal action concerning any test or the results of any test that determines the presence or concentration of alcohol, a drug of abuse, or alcohol and a drug of abuse in the patient's blood, breath, urine, or other bodily substance at any time relevant to the criminal offense in question;

(4) In any criminal action against a physician or dentist, subject to the requirement that the court require that appropriate measures be taken to ensure that the confidentiality of any patient named or otherwise identified in the patient's medical or dental records that are introduced into evidence is maintained;

(5) In any will contest action under the Probate Law if both of the following apply: (a) the patient is deceased, and (b) a party to the will contest action requests the testimony, demonstrates to the court that that party would be an heir of the patient if the patient died without a will, is a beneficiary under the will that is the subject of the will contest action, or is a beneficiary under another testamentary document allegedly executed by the patient, and demonstrates to the court that the testimony is necessary to establish the party's rights.

If the testimonial privilege does not apply as described in paragraph (5) above, a physician or dentist may be compelled to testify or to submit to discovery in the will contest action only as to the patient in question on issues relevant to the competency of the patient at the time of the execution of the will. Testimony or discovery conducted pursuant to this provision must be conducted in accordance with the Civil Rules. (R.C. 2317.02(B)(3)(c).)

### **Operation of the bill**

The bill deletes the provision in paragraph (5) above and the following related paragraph under "**Current law**." It replaces them with a provision that states that the testimonial privilege of a physician or dentist does not apply, and a physician or dentist may testify or may be compelled to testify, if the communication was between a patient who has since died and the deceased patient's physician or dentist and the communication is relevant to a dispute between parties who claim through that deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased patient when executing a document that is the basis of the dispute or whether the deceased patient was a victim of fraud, undue influence, or duress when executing a document that is the basis of the dispute.

The bill states that this exemption from the testimonial privilege does not require a mental health professional to disclose psychotherapy notes, as defined in 45 C.F.R. 164.501.<sup>1</sup> (R.C. 2317.02(B)(1)(e)(i) and (iii) and (B)(3)(c).)

The bill further provides that if neither the spouse of a patient nor the executor or administrator of that patient's estate gives express consent under the provision described above in (1)(b) under "Current law," testimony or the disclosure of the patient's medical records by a physician, dentist, or other health care provider under the new exception to the testimonial privilege discussed in the prior paragraph is a permitted use or disclosure of protected health information, as defined in 45 C.F.R. 160.103,<sup>2</sup> and an authorization or opportunity to be heard is not required. However, an interested party who objects to testimony or the disclosure of a communication between a patient who has since died and the deceased patient's physician or dentist pursuant to that new exemption may seek a protective order pursuant to Civil Rule 26. A person to whom protected health information is disclosed pursuant to that new exception may not use or disclose the protected health information for any purpose other than the litigation or proceeding for which the information was requested and must return the protected health information to the covered entity or destroy the protected health information, including all copies made, at the conclusion of the litigation or proceeding. (R.C. 2317.02(B)(1)(e), (ii), (iv), and (v).)

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## COMMENT

1. In *Tomasik v. Tomasik* (2004), 2004 WL 2348170, former devisees and legatees, who had been named in the decedent's prior will, but were not named in the decedent's last will and testament that was admitted to probate, filed an action

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<sup>1</sup> 45 C.F.R. 164.501 states that "psychotherapy notes" means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.

<sup>2</sup> 45 C.F.R. 160.103 provides that "health information" means any information, whether oral or recorded in any form or medium, that: (1) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse, and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

to contest the will. The Ninth District Court of Appeals held that the former devisees and legatees were not subject to the three-month statute of limitations applicable to will contests. R.C. 2107.19 provides that the persons who must receive notice of the admission of a will to probate are (1) the surviving spouse, (2) those who would inherit intestate, and (3) those named in the will. The former devisees and legatees did not fit into any of these three categories, therefore they argued that their claim is not barred by the statute of limitations. The Court of Appeals agreed with their argument based on the plain language of the statute.

2. In *Allen v. McBride* (2004), 105 Ohio St.3d 121, the Ohio Supreme Court found that the savings statute under R.C. 2305.19 applied to a will contest action under R.C. 2107.71.

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## HISTORY

| ACTION                                  | DATE     |
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| Introduced                              | 03-22-05 |
| Reported, H. Judiciary                  | 05-03-05 |
| Passed House (96-0)                     | 05-11-05 |
| Reported, S. Judiciary on Civil Justice | ---      |

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