MAY 27 1993
Nebraska State Library

STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#93039
NO.
STATE OF NEBRASKA
OFFICIAL
MAY 18 1993
DEPT. OF JUSTICE

DATE: May 17, 1993

SUBJECT: Validity of Op. Att'y Gen. No. 206 (Mar. 28, 1984) in View of *State v. Gourley*; Practice of Lay Midwifery as the Unauthorized Practice of Medicine and Surgery

REQUESTED BY: Senator Don Wesely
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Jan E. Rempe, Assistant Attorney General

You have submitted two opinion requests to this office regarding the practice of lay midwifery in Nebraska. We note that your questions concern lay midwifery, as opposed to nurse midwifery, which is a practice governed by the Nebraska Certified Nurse Midwifery Practice Act, Neb. Rev. Stat. §§ 71-1738 to 71-1765 (1990). For purposes of this opinion, "lay midwifery" refers to midwives not certified under sections 71-1738 to 71-1765; not licensed to practice medicine in Nebraska; and not falling within the exceptions in Neb. Rev. Stat. § 71-1,103 (Cum. Supp. 1992), described in further detail below.

In your first opinion request, you have asked whether Opinion of the Attorney General No. 206, dated March 28, 1984, is still the view of this office. That opinion concluded that Neb. Rev. Stat. § 71-1,103 (1981) and a provision in LB 761, which later became the Nebraska Certified Nurse Midwifery Practice Act, would permit a father who was neither licensed to practice medicine and surgery, nor a certified nurse midwife, to deliver his own child at home in an emergency situation; however, he could not practice obstetrics

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Elaine A. Chapman
Delores N. Coe-Barbee
Dale A. Comer
James A. Elworth
Lynne R. Fritz
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Joseph P. Loudon
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Marie C. Pawol
Kenneth W. Payne
Paul N. Potadle
Jan E. Rempe
James H. Spears
Mark D. Starr
John R. Thompson
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

printed on recycled paper

in this manner in a nonemergency situation. After a review of the current statutes governing this matter, we believe the above-referenced opinion is still valid. *See* Neb. Rev. Stat. §§ 71-1738 to 71-1765 (1990), 71-1,102 (1990), 71-1,103 (Cum. Supp. 1992), 71-102(1) (1990).

In a postscript to your first opinion request, you ask that we review a Lancaster County Court case dealing with certified nurse midwives. We presume you are referring to *State v. Gourley*, Docket 93F01, Page 8326, in the Lancaster County Court. In that case, the State charged Karen Gourley under Neb. Rev. Stat. § 71-1764(1) (1990) with practicing as a certified nurse midwife without a current certificate as such under the Nebraska Certified Nurse Midwifery Practice Act. The State argued that Gourley was not certified, but performed the functions of a certified nurse midwife in delivering a child in a nonemergency situation in a private home. Brief for State at 3.

The court's order, entered on April 26, 1993, stated that the language of the statute under which Gourley was charged "only prohibits a person from holding themselves out as a certified nurse midwife when they were not so certified. The complaint is dismissed, the State failing to meet their burden of proof for a bindover." The court's order is limited to interpretation of section 71-1764(1) and a determination of whether the State met its burden of proof under that statute. The order does not interpret other sections of the Nebraska Certified Nurse Midwifery Practice Act, nor does it determine whether actions similar to those taken by Gourley would constitute the unauthorized practice of medicine under sections 71-1,102 and 71-1,103.

Therefore, the disposition of the *Gourley* case does not affect our answer to your first inquiry. Opinion of the Attorney General No. 206, dated March 28, 1984, is still the opinion of this office.

Your second opinion request asks whether the practice of lay midwifery constitutes the unauthorized practice of medicine under Nebraska law.

Neb. Rev. Stat. § 71-1,102 (1990) provides in relevant part:

> For the purpose of the Uniform Licensing Law and except as otherwise provided by law, the following classes of persons shall be deemed to be engaged in the practice of medicine and surgery: (1) Persons who . . . publicly profess to assume the duties incident to the practice of . . . obstetrics . . .; (2) persons who

> prescribe and furnish medicine for . . . any physical . . . condition . . .; (3) persons holding themselves out to the public as being qualified in the diagnosis or treatment of . . . any physical . . . condition . . . of human beings . . . .

Neb. Rev. Stat. § 71-1,103 (Cum. Supp. 1992) creates exceptions to the above definition of the practice of medicine and surgery by listing numerous classes of people who shall not be considered to be engaging in the unauthorized practice of medicine. Section 71-1,103 also states that every act or practice of medicine and surgery, as defined in section 71-1,102, not excepted in section 71-1,103 "shall constitute the practice of medicine and surgery and may be performed in this state only by those licensed by law to practice medicine in Nebraska." *See also* Neb. Rev. Stat. § 71-102(1) (1990) ("No person shall engage in the practice of medicine and surgery . . . unless such person has obtained a license from the Department of Health for that purpose.") Neb. Rev. Stat. § 71-167 (1990) provides criminal penalties for violations of the Uniform Licensing Law, of which the above statutes are a part.

Due process of law requires criminal statutes to be clear and definite to allow those subject to such statutes to know what conduct will make them liable to punishment and to intelligently choose in advance a lawful course of conduct. ***State v. Pierson***, 239 Neb. 350, 476 N.W.2d 544 (1991). *See also* Neb. Rev. Stat. § 29-106 (1989) (criminal statutes to be construed according to the plain import of the language used; "no person shall be punished for an offense which is not made penal by the plain import of the words"). Although penal statutes must be strictly construed, they should be given a sensible construction in the context of the object to be accomplished, the evils to be remedied, and the purpose to be served. ***State v. Kincaid***, 235 Neb. 89, 453 N.W.2d 738 (1990). In construing a penal statute, a court will avoid a construction which leads to unjust, unconscionable, or absurd results, and will place a sensible construction upon the statute to effectuate the object of the legislation. *Id.* "The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." *Pierson*, at 353, 476 N.W.2d at 547.

"Midwifery" is the "art or practice of assisting women in childbirth; obstetrics." Webster's Unabridged Dictionary 1140 (2d ed. 1979). A "midwife" is one who "assists at childbirth." Black's Law Dictionary 895 (5th ed. 1979). ***See also Smith v. State ex rel. Medical Licensing Bd.***, 459 N.E.2d 401 (Ind. Ct. App. 1984).

The "practice of midwifery" is commonly understood to mean "the exercise of, as a profession or occupation, the art or act of assisting at childbirth." *State ex rel. Missouri State Bd. of Registration for the Healing Arts v. Southworth*, 704 S.W.2d 219, 224 (Mo. 1986). "Practice of midwifery" are "words of common usage, understandable by persons of normal intelligence." *Id.* at 223.

"'[M]idwife' is a term of common usage and people of common intelligence need not guess at its meaning. . . . Constructions of the terms 'midwife' and 'midwifery' from common usage, legal and non-legal dictionaries, and case law are nearly unanimous in defining midwifery as assisting at childbirth." *People v. Rosburg*, 805 P.2d 432, 439-40 (Colo. 1991). *But see People v. Jihan*, 127 Ill. 2d 379, 537 N.E.2d 751 (1989) ("midwifery" could mean assisting at childbirth or actually delivering the child).

"Midwifery" has also been defined as the practice of obstetrics. Webster's Unabridged Dictionary 1140 (2d ed. 1979) (midwifery is obstetrics); Webster's Unabridged Dictionary 1235 (2d ed. 1979) (obstetrics is the branch of medicine dealing with the care and treatment of women during pregnancy, childbirth, and the period immediately following); *Southworth*, 704 S.W.2d 219 (adopts Webster's definition of midwifery which includes obstetrics); *Banti v. State*, 163 Tex. Crim. 89, 289 S.W.2d 244 (1956); *People v. Arendt*, 60 Ill. App. 89 (1894). The practice of assisting pregnant women in giving birth through "natural childbirth," or without the use of drugs, was deemed to be the practice of obstetrics in the context of a naturopathic physician, or drugless healer, in *Griffith v. Department of Motor Vehicles*, 23 Wash. App. 722, 598 P.2d 1377 (1979).

Construing section 71-1,102 according to the plain import of its language, the practice of lay midwifery--defined as assisting at childbirth and not falling within one of the exceptions listed in section 71-1,103--would constitute the unauthorized practice of medicine and surgery under section 71-1,102(1) because that section defines the practice of medicine and surgery to include "[p]ersons who . . . publicly profess to assume the duties incident to the practice of . . . obstetrics."[1]

---

[1]*But see Leigh v. Board of Registration in Nursing*, 395 Mass. 670, 481 N.E.2d 1347 (1985), *appeal after remand*, 399 Mass. 558, 506 N.E.2d 91 (1987) (in dicta, court said ordinary assistance in normal cases of childbirth is not the practice of medicine; however, one who practices midwifery, uses obstetrical instruments

The practice of lay midwifery when not excepted under section 71-1,103 would also appear to constitute the unauthorized practice of medicine under sections 71-1,102(2) and (3) if lay midwives "prescribe and furnish medicine for . . . any physical . . . condition" or hold "themselves out to the public as being qualified in the diagnosis or treatment of . . . any physical . . . condition . . . of human beings" (emphasis added). "Physical condition," as used in similar statutes in other states, has been defined to encompass pregnancy. *Bowland v. Municipal Court*, 134 Cal. Rptr. 630, 556 P.2d 1081 (1976) (statutes prohibiting unlicensed health practice); *Smith*, 459 N.E.2d 401 (statute defining the practice of medicine).

As noted above, the practice of medicine by lay midwives under sections 71-1,102(1), (2), or (3) when not excepted under section 71-1,103 would be punishable as a misdemeanor under section 71-167.[2]

We believe this construction of the above-cited statutes is necessitated by the plain import of the language used and the obvious legislative purposes of protecting the health, safety, and welfare of Nebraska citizens and insuring that health providers meet minimum standards of competency and proficiency. *See* Neb. Rev. Stat. §§ 71-112.03 (1990) (purpose of each board of

---

when a physician is unavailable, and prescribes drugs engages in the practice of medicine).

[2]Some cases have referred to vital statistics statutes which mention midwives, such as Neb. Rev. Stat. § 71-1405 (1990) (physicians and midwives to file statements setting forth congenital deformities with the Bureau of Vital Statistics), as evidence that the legislature intended midwifery to be a distinct profession from the practice of medicine and surgery. *Banti*, 163 Tex. Crim. 89, 289 S.W.2d 244 (refers to statutes requiring physicians, nurses, and midwives to use prophylactic drops in newborns' eyes and prohibiting midwives from signing certain birth certificates); *People v. Hildy*, 289 Mich. 536, 286 N.W. 819 (1939) (refers to physicians' and midwives' duty to file birth certificates). However, the *Banti* court noted that Texas statutes did not include obstetrics within the definition of practicing medicine, as is the case in Nebraska. Similarly, the *Hildy* case did not cite a statute which defines acts constituting the practice of medicine, as Neb. Rev. Stat. § 71-1,102 does. Therefore, these cases can be distinguished from the issue at hand.

examiners); 71-1739 (1990) (purpose of the Nebraska Certified Nurse Midwifery Practice Act).

Despite our interpretation of the relevant statutes, you should note that the Nebraska Legislature's failure to specifically mention midwifery in section 71-1,102, or to define it, could cause section 71-1,102 to be challenged as being unconstitutionally vague should a lay midwife be prosecuted for the unauthorized practice of medicine under this statute. *See Jihan*, 127 Ill. 2d 379, 537 N.E.2d 751. You may wish to consult the statutory language upheld in *People v. Rosburg*, 805 P.2d 432, 434 n.1 (1991), as well as consider defining the practice of midwifery.

CONCLUSIONS

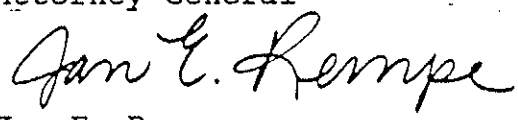
(1) Opinion of the Attorney General No. 206, dated March 28, 1984, is still the opinion of this office.

(2) The disposition of *State v. Gourley*, Docket 93F01, Page 8326 (Lancaster County Court 1993) does not affect our conclusion in (1), above.

(3) The practice of lay midwifery--that is, assisting at childbirth--by persons not certified as nurse midwives under sections 71-1738 to 71-1765, not licensed to practice medicine in Nebraska, and not excepted by section 71-1,103 constitutes the unauthorized practice of medicine, punishable under section 71-167.

Sincerely,

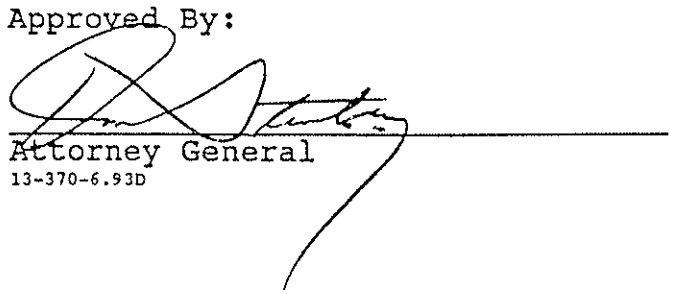
DON STENBERG
Attorney General



Jan E. Rempe
Assistant Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved By:



Attorney General
13-370-6.93D