DATE: May 17, 1993


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
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-

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."

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
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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.

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.

"Midwife" 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

1But 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).

2Some 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.
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
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cc: Patrick J. O'Donnell
Clerk of the Legislature