



The State of South Carolina  
**OFFICE OF THE ATTORNEY GENERAL**

CHARLES MOLONY CONDON  
 ATTORNEY GENERAL

November 29, 1995

William D. Bilton, Chairman  
 Adult Protection Coordinating Council  
 Post Office Box 8206  
 Columbia, South Carolina 29202-8206

In Re: Informal Opinion

Dear Mr. Bilton:

On behalf of the Adult Protection Coordinating Council, you pose the following questions as to whether:

- (1) Residents of places that are providing nursing home or community residential care facility services without a license are "vulnerable adults" as defined in Section 43-35-10(10) and should be provided "protective services" as defined in Section 43-35-10(9).
- (2) The Adult Protective Services Program has the authority and duty to take custody of adults who are residents of facilities that DHEC has determined, through appropriate administrative and/or judicial procedures as required by law, are required to be licensed as a nursing home or community residential care facility but are not entitled to such licensure.

In your letter, you set forth an excellent summary of the existing statutory law. I quote this statement in full:

The Omnibus Adult Protection Act is encoded at § 43-35-5, et seq., S. C. Code of Laws, 1976, as amended. The primary purpose of the act is to provide a system of adult protection in South Carolina.

Section 43-35-310 creates the Adult Protection Coordinating Council. Section 43-35-330(A) states, in part:

Duties of the council are to:

- (1) provide oversight in adult protection and to recommend changes in the system;
- (8) assist with problem resolution and facilitate interagency coordination of efforts;
- (10) promote prevention and intervention activities to ensure quality of care for vulnerable adults and their families;

A recurring issue that must be resolved is protective custody of residents/patients of unlicensed long term care facilities (nursing homes and community residential care facilities) and of facilities whose license has been suspended or revoked. Adults in those situations must be relocated to places, such as licensed facilities or as otherwise authorized by law, in which their care can be provided.

Acting under the authority of the S. C. Code of Laws, as specified below, the Department of Health and Environmental Control (DHEC) determines whether or not a facility may provide nursing home or community residential care facility services. If a facility is not appropriately licensed, then the residents/patients must be relocated.

The State Certification of Need and Health Facility Licensure Act (§ 44-17-110, et.seq., S. C. Code of Laws, 1976, as amended) provides the following definitions:

§ 44-7-130:

- (6) "Community residential care facility" means a facility which offers room and board and provides a degree of personal assistance for two or more persons eighteen years old or older.

- (13) "Nursing home" means a facility with an organized nursing staff to maintain and operate organized facilities and services to accommodate two or more unrelated persons over a period exceeding twenty-four hours which is operated either in connection with a hospital or as a freestanding facility for the express or implied purpose of providing intermediate or skilled nursing care for persons who are not in need of hospital care.

Further, § 44-7-260 provides that:

- (A) If they provide care for two or more unrelated persons, the following facilities or services may not be established, operated, or maintained in this State without first obtaining a license in the manner provided by this article and regulations promulgated by the department:
- (2) nursing homes;
  - (6) community residential care facilities;
- (C) The department is authorized to investigate, by inspection or otherwise, any facility to determine if its operation is subject to licensure.

§ 44-7-290 states:

The department may not issue licenses for the operation of facilities or services subject to this article unless the facility and persons names in the application are found to comply with the provisions of this article and the department's regulations.

§ 44-7-320 provides that:

- (A)(1) The department may deny, suspend revoke licenses or a monetary penalty against a person or facility for:
- (a) violating a provision of this article or departmental regulations;

- (c) conduct or practices detrimental to the health or safety of patients, residents, clients, or employees of a facility or service.
- (3) If in the department's judgment conditions or practices exist in a facility that pose an immediate threat to the health, safety, and welfare of the residents, the department immediately may suspend the facility's license and shall contact the appropriate agencies for placement of the residents. Within five days of the suspension a preliminary hearing must be held to determine if the immediate threatening conditions or practices continue to exist. If they do not, the license must be immediately reinstated. Whether the license is reinstated or suspension remains due to the immediate threatening conditions or practices, the department may proceed with the process for permanent revocation pursuant to this section.

DHEC does not have authority to effect the relocation of residents. If DHEC revokes a facility's license and residents must be relocated, DSS may assist any resident who voluntarily requests or accepts assistance. The law does not allow DSS to take custody of or provide involuntary services to an adult who is not, first, within the statutory definition of "vulnerable adult" and second, subject to abuse, neglect or exploitation.

§ 43-35-45 states that:

- (B) At any time during or subsequent to an investigation where a vulnerable adult is at substantial risk to be or has been abused, neglected, or exploited and consent to provide services cannot be obtained, the Adult Protective Services Program may petition the family court for an order to provide protective services. In those cases requiring emergency protective services or emergency removal of the vulnerable adult from the place the adult is located or residing, the Adult Protective Services Program may seek ex parte relief...

§ 43-35-10 provides the following definitions:

- (2) "Caregiver" means a person who provides care to a vulnerable adult, with or without compensation, on a temporary or permanent or full or part-time basis and includes, but is not limited to, a relative, household member, day care personnel, adult foster home sponsor, and personnel of a public or private institution or facility.
- (3) "Exploitation" means:
  - (b) an improper, illegal, or unauthorized use of the funds, assets, property, power of attorney, guardianship, or conservatorship of a vulnerable adult by a person for the profit or advantage of that person or another person.
- (4) "Facility" means a nursing care facility, community residential care facility, a psychiatric hospital, or a facility operated or contracted for operation by the State Department of Mental Health or the South Carolina Department of Mental Retardation.
- (6) "Neglect" means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health or safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services. Neglect may be repeated conduct or a single incident which has produced or can be proven to result in serious physical or psychological harm or substantial risk of death. Noncompliance with regulatory standards alone does not harm or constitute neglect. Neglect includes the inability of a vulnerable adult, in the absence of a caretaker, to provide for his or her own health or safety which produces or could reasonable be expected to produce serious physical or psychological harm or substantial risk of death.

- (9) "Protective services" means those services whose objective is to protect a vulnerable adult from harm caused by the vulnerable adult or another. These services include, but are not limited to, evaluating the need for protective services, securing and coordinating existing services, arranging for living quarters, obtaining financial benefits to which a vulnerable adult is entitled, and securing medical services, supplies, and legal services.
- (10) "Vulnerable adult" means a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.

At any point when conditions or circumstances constitute abuse, neglect, or exploitation, DSS has the power to act to protect the vulnerable adults in a facility, even without consent. This may include asking the family court to award custody for the purposes of placement or to order other protective services. Law enforcement officers have the power to take vulnerable adults in imminent danger into custody without court order.

Not all facility closures involve the need for immediate relocation. License revocations can be appealed and the process can take months, permitting DHEC authorities and facility operators to work with residents on relocation plans. DSS maintains that the current statutes do not allow DSS to effect involuntary relocation of competent adults who are not subject to abuse, neglect or exploitation. DHEC maintains that protective custody is necessary in the situations described above.

LAW/ANALYSIS

There are a number of principles of statutory construction which are pertinent here. The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980), appeal after remand, 283 S.C. 408, 323 S.E.2d 523 (1984). The statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of lawmakers. Browning v. Hartvigsen, 307 S.C. 122, 414 S.E.2d 115 (1992). Statutes in pari materia have to be construed together and reconciled, if possible, to render each operative. Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 (1970). A remedial statute should be liberally construed in order to effectuate its purpose. South Carolina Dept. of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). However, this latter canon of construction does not authorize the court to disregard the plain wording of the statute. Hines v. United Parcel Service, Inc., 736 F.Supp. 675 (D.S.C. 1990).

Reading the Omnibus Adult Protection Act as a whole, in my judgment, it is evident that the intent of the General Assembly was to make the triggering mechanism of the Act the abuse, neglect or exploitation of a vulnerable adult. In virtually every provision in the Act, reference is made to a vulnerable adult being abused, neglected or exploited. Section 43-35-25 requires those persons enumerated to report that a vulnerable adult "has been or is likely to be abused, neglected or exploited...". Section 43-35-30 requires persons mandated to report to photograph visible trauma on an abused adult. Section 43-35-40 requires an investigative entity, as defined, upon receipt of a report, to initiate an investigation; moreover, Section 43-35-45 provides, in detail the procedure for the investigative entity to seek authority from the Family Court either for a warrant to inspect and photograph the premises or for an order to provide protective services.

Subsection (B) specifically provides that "[i]n those cases requiring emergency protective services or emergency removal of the vulnerable adult from the place the adult is located or residing, the Adult Protective Services Program may seek ex parte relief." Importantly, the Subsection further states:

[t]he family court may order ex parte that the vulnerable adult be taken into emergency protective custody without the consent of the vulnerable adult or the guardian or others exercising temporary or permanent control over the vulnerable adult, if the court determines there is probable cause to believe that by reason of abuse or neglect there exists an imminent danger to the vulnerable adult's life or physical safety. The

court also may order emergency services or other relief as necessary to protect the vulnerable adult.

The statute further provides that at the hearing on the merits, the Court may order the Adult Protective Services Program to provide "protective services" if the vulnerable adult is at substantial risk of being or has been abused, neglected or exploited and is unable to protect herself or himself and protective services are necessary. Moreover, Section 43-55-55 authorizes a law enforcement officer to take a vulnerable adult in a life-threatening situation into protective custody if:

- (1) there is probable cause to believe that by reason of abuse, neglect or exploitation there exists an imminent danger to the vulnerable adult's life or physical safety;
- (2) the vulnerable adult or caregiver does not consent to protective custody;
- (3) there is not time to apply for a court order.

(emphasis added).

To my mind, it would be superfluous for the General Assembly to have adopted such an intricate and carefully detailed statutory procedure, centered around the abuse, neglect or exploitation of a vulnerable adult, if the suspension or loss of a facility's license was in itself sufficient to authorize the investigative entity to take custody of the adult and remove him from the facility. In such instance, if the Legislature had deemed the loss of a facility's license a per se case of abuse, neglect or exploitation in every instance, it would appear to me that the Legislature would have so stated. Indeed, Section 43-35-10(6) explicitly provides that "[n]oncompliance with regulatory standards alone does not constitute neglect." (emphasis added).

We have previously recognized that a state agency can exercise only such authority as is expressly conferred upon it by the General Assembly or which may be reasonably implied from such express authority. Op. Atty. Gen., September 22, 1988; Op. Atty. Gen., March 19, 1979. As a creature of statute, administrative agencies "possess only those powers expressly conferred or necessarily implied for them to effectively fulfill the duties with which they are charged." Op. Atty. Gen., February 11, 1993, citing Captain's Quarters Motor Inn, Inc. v. S. C. Coastal Council, 306 S.C. 488, 413 S.E.2d 13 (1991). Subsection (11) does provide that "[a] resident of a facility is a vulnerable adult". However, the purpose here appears simply to have made clear that a resident of facility, by such residency is a "vulnerable adult", not that every resident of a facility is subject



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to the protective custody which the Act authorizes if the "vulnerable adult" is abused, neglected or exploited. Nothing contained in the Omnibus Adult Protection Act of 1993 either expressly states or implies that a facility's loss of a license in and of itself constitutes abuse, neglect or exploitation. When a statute expressly mentions certain conditions of applicability, there is a strong inference that others were not intended. Pa. Nat. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984).

An Opinion of the New Hampshire Attorney General is instructive here. In Op. No. 86-57 (July 2, 1986), the New Hampshire Attorney General addressed the question of the "responsibilities of the various involved agencies as they pertain to a health care facility which is not or should not be licensed." New Hampshire appears to have had, at that time, an Adult Protection Law which is somewhat similar to our own Omnibus Adult Protection Act. The Attorney General of New Hampshire reviewed that enactment, as well as the statute governing the licensing of facilities such as nursing homes, and concluded as follows:

[y]ou have asked which agency has the responsibility to remove, place and care for residents in a facility which must be closed because of a license denial or revocation, or because it is operating without a license. The answer depends on whether the situation involves the neglect, abuse or exploitation of the adult residents of the facility. If such a situation exists, the DHS [equivalent to our DSS] has the responsibility to provide protective services pursuant to RSA 161D:4 (Supp. 1985). Those protective services include securing sanitary living accommodations; actions which include removing, placing and caring for the residents. Although DHS is the responsible agency in this situation, the other agencies are not precluded from rendering assistance as requested by DHS and deemed appropriate by the other agencies. If the situation does not involve the neglect, abuse or exploitation of the adult residents, the statutes do not explicitly allocate responsibility to remove, place and care for the residents. Since the DPHS [equivalent to our DHEC], DHS and SCOA [equivalent to Ombudsman] have functions that are pertinent to such a situation, the agencies may develop a plan between themselves to ensure that the needs of residents are adequately addressed. (emphasis added).

Thus, each situation would have to be examined on its own merits to determine whether abuse, neglect or exploitation of a vulnerable adult is occurring. Obviously, there

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are situations where the reason for revoking or suspending the facility's license is directly related to conditions at the facility which, together with other evidence, will be construed as constituting abuse, neglect or exploitation of the vulnerable adult. Indeed Section 44-7-320(3) states that "[i]f in the department's [DHEC'S] judgment conditions or practices exist in a facility that pose an immediate threat to the health, safety and welfare of the residents, the department immediately may suspend the facility's license and shall contact the appropriate agencies for placement of the residents." Clearly, in such circumstances, this would be powerful evidence for DSS that the residents are abused, neglected or exploited pursuant to the Omnibus Adult Protection Act.

Likewise, where a facility is operating without a license, such may indicate that conditions there are substantially substandard and that a vulnerable adult may be being abused, neglected or exploited. I am advised that DHEC typically seeks suspension or revocation of the license of a nursing home facility for reasons such as hazardous or unsanitary conditions, repeat violations of statutes and DHEC regulations or improper administration of medication. Moreover, where a nursing home facility is required to close because of violations, a resident or occupant of the facility may have nowhere else to go. Again, in such situations, these conditions may likely meet the statutory definitions of abuse, neglect or exploitation.

On the other hand, the specific reason for DHEC's seeking to suspend or revoke a license of a facility may have little or nothing to do with the abuse, neglect or exploitation of residents. In such situations - where there is no abuse, neglect or exploitation of vulnerable adults - there is no statutory authority for taking adults into protective custody or seeking to have them taken into custody. It is well-recognized that the seizure of an individual in such circumstances constitutes a significant deprivation of liberty, thereby invoking the Due Process Clause of the federal and state constitutions. See, Addington v. Texas, 441 U.S. 418 (1979). Depending upon the circumstances, the adult may simply desire to continue living at the facility while it continues to operate. Absent harm to him or threatened harm consistent with the Omnibus Adult Protection Act's definitions of abuse, neglect or exploitation, I know of nothing in South Carolina law which undermines or interferes with his right to do so.

Several other options are available. Of course, if a vulnerable adult desires adult protective services, I am informed that such services are provided. Moreover, as in New Hampshire, if there is no abuse, neglect or exploitation involved, the relevant agencies could develop a plan of action to determine how the vulnerable adult may be assisted should such become necessary or desired. Section 43-35-310 et seq. establishes the Adult Protection Coordinating Council which contains representation from numerous social services agencies and law enforcement agencies, including the Long Term Care Ombudsman, the Adult Protective Services Program and DHEC, among many others.

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Pursuant to Section 43-35-320, members of the Council are mandated to "facilitate problem resolution and develop action plans to overcome problems identified within the system." Section 43-35-330(10) authorizes the Council to "promote prevention and intervention activities to ensure prevention and intervention activities to ensure quality of care for vulnerable adults and their families...". Subsection (12) also permits the Council to

... promote coordination and communication among groups and associations which may be affected by the Adult Protection Coordinating Council's actions through the use of memoranda of agreement.

Finally, of course, you may wish to seek legislative amendments or clarification as an ultimate resolution. I am not aware of whether any other state treats a suspension or revocation of a facility's license to operate automatically constitutes a situation of abuse, neglect or exploitation. One possible approach might be to designate certain reasons for license revocation, such as hazardous or unsanitary conditions as requiring emergency protective custody; or mandating that the reason for the suspension be sent to the "investigative entity"; or placing the operation without a license within the definition of abuse, neglect, or exploitation. Of course, I express no endorsement of or opinion as to any specific proposal for legislative change, but simply state that such amendment could be sought as an ultimate resolution of your questions.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General

RDC/ph