ALAN WILSON
ATTORNEY GENERAL

January 18, 2018

Mr. Marshall Taylor, General Counsel
South Carolina Department of Health and Environment Control
2600 Bull Street
Columbia, SC 29201

Dear Mr. Taylor:

You seek guidance concerning the licensure of lay midwives in South Carolina. Currently, the Department of Health and Environmental Control ("DHEC") licenses and regulates the practice of midwifery by lay midwives. You note that § 40-47-5 et seq. creates ambiguity regarding this licensure and regulation.

By way of background, you provide the following information:

> **I. BACKGROUND OF DHEC'S REGULATION OF MIDWIFERY**
> DHEC currently licenses and oversees the practice of midwifery by lay midwives in South Carolina pursuant to Regulation 61-24, Licensed Midwives. There are currently 36 lay midwives licensed by DHEC in South Carolina. DHEC relies on its general health powers for authority to regulate lay midwives. See S.C. Code Ann. Section 44-1-140. Two statutory provisions mention DHEC's licensure of midwives; however, no statute specifically directs DHEC to regulate midwifery.
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> The South Carolina Board of Health, predecessor to DHEC, first adopted rules for midwives in 1919. Rules and regulations for midwives have since been amended several times, most recently in 2013. A brief history of the regulation of midwifery is as follows:
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> • October 22, 1919 — The State Board of Health approved an amendment to its Sanitary Code to adopt rules governing midwives.
> • July 14, 1937 – Rules and Regulations Governing Midwives in the State of South Carolina, Approved and Promulgated by the Executive Committee of the South Carolina State Board of Health. (Sanitary Codes, 1937, pp. 60-63)
> • January 27, 1946 – Revised midwife regulation filed with Secretary of State after approval by Executive Committee of the Board of Health on December 1, 1945.
> • February 26, 1979 – DHEC files Notice of Proposed Regulation for repeal of R.6 1 -24, Licensed Midwives, with Legislative Counsel. 3-4 S.C. Reg. 24 (Mar. 8, 1979).
> • May 8, 1 979 – Board of Health and Environmental Control approves repeal of R.6 1 -24. Annual Report of the Department of Health and Environmental Control of South Carolina, Vol. 101, p. 9 (1980).

- July 17, 1979 – Joint Resolution to disapprove the repeal of R.6 1-24, Licensed Midwives, signed by governor and in effect. Act No. 212, 1961 S.C. Acts 903-04.
- April 27, 1990 – Amendment of R.6 1 -24, Licensed Midwives, transferring administration of Midwife program from DHEC's Division of Maternal Health to DHEC's Division of Health Licensing. 14-5 S.C. Reg. 230-33 (April 27, 1990).
- June 28, 2013 – Amendment of R.6 1-24, Licensed Midwives, incorporating North American Registry of Midwives (NARM) testing as a prerequisite to DHEC licensure. 37-6 S.C. Reg. 1 56- 76 (June 28, 2013).

II. ATTORNEY GENERAL'S 1971 OPINION RELATED TO DHEC'S REGULATION OF MIDWIVES UNDER ITS GENERAL HEALTH POWERS

In 1971, the South Carolina Attorney General opined, based on a prior iteration of Section 44-1-140, that DHEC's authority to regulate midwives under its general health powers "can be properly assumed" despite there being "no specific statutory delegation of this responsibility[.]" S.C. Attn'y Gen. Op. of May 24, 1971 (1971 WL 22299) (citing 1962 South Carolina Code Sections 32-1, et seq.). The opinion noted the MPA specifically exempted midwives from the Act. Id. The MPA stated, "nor shall [this chapter] be construed to apply to or to change the laws relating to dentists, trained nurses, pharmaceutists, opticians and optometrists or midwives." S.C. Code Section 56-1372 (1962) (emphasis added).

III. 2006 AMENDMENTS TO THE MPA AFFECTING MIDWIFERY

The exemption to the MPA cited in the 1971 Attorney General Opinion referenced above was carried forward in the 1976 version of the Code. See S.C. Code Section 40-47-240 (1976). However, the appearance of the word "midwives" in the exemption did not survive amendments to the MPA in 2006. 2006 Act No. 385. The exemption provision now reads:

> Nothing in this article may be construed to...prohibit practicing dentistry, nursing, optometry, podiatry, psychology, or another of the healing arts in accordance with state law[.]

S.C. Code Ann. Section 40-47-30(A)(8). Nursing remains exempt from the MPA. The Nurse Practice Act, S.C. Code Ann. Sections 40-33-5, et seq., governs the practice of nursing. It defines a "Certified Nurse-Midwife," or "CNM," as "an advanced practice registered nurse who holds a master's degree in the specialty area and provides nurse-midwifery management of women's health care, focusing particularly on pregnancy, childbirth, postpartum, care of the newborn, family planning, and gynecological needs of women." S.C. Code Ann. § 40-33-20(19). Therefore, while Certified Nurse-Midwives remain exempt from the MPA, it appears lay midwives are no longer exempt.

In addition to removing "midwives" from the exemption provision, the 2006 amendments added "the management or [sic] pregnancy and parturition" to the definition of "practice of medicine." S.C. Code Ann. Section 40-47-20(3 6)(c). "A

> person may not practice medicine in [South Carolina] unless the person is twenty-one years of age and has been authorized to do so pursuant to the provisions of [the MPA]." S.C. Code Ann. Section 40-47-30(A). Therefore, to the extent their services constitute the "practice of medicine," lay midwives, not otherwise licensed as a physician under the MPA and not certified as a Nurse-Midwife under the Nurse Practice Act, may be prohibited from practicing in South Carolina. Moreover, by excluding midwives from the exemption to the MPA and expanding the definition of "practice of medicine," the Legislature may have intended for services provided by lay midwives (i.e. midwifery) to be performed by licensed physicians or Certified Nurse-Midwives.

Law/Analysis

In an opinion, dated May 24, 1971, this Office concluded that the predecessor to DHEC properly regulates midwives. Such opinion, see Op. S.C. Att'y Gen., 1971 WL 22299 (May 24, 1971), stated as follows:

> [w]e have found no statutory definition of 'midwife' in South Carolina law. Therefore, precisely what practice is referred to is problematical. Section 32-554 and 32-555 clearly reveal a legislative recognition of the practice of midwifery as including the attending the delivery at birth of a child. Section 32-555 also impliedly assumes that the functions of a midwife may be performed by a doctor or nurse or by a person other than a doctor or nurse.
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> The State Department of Health has assumed the responsibility of Registering and Regulating Midwives (see Rules and Regulations Vol. 17, S.C. Code of Laws p. 211 et seq.), but [we] can find no specific statutory delegation of this responsibility to that Department. Such responsibility, however, can be properly assumed by that Department pursuant to its broad and general powers affecting the public health. Sections 32-1, et seq.

As noted, this Opinion has been on the books and has been followed continuously since 1971. We have repeatedly noted that where an opinion of the Attorney General has been acquiesced in by the General Assembly, "the absence of any legislative amendment following the issuance of an opinion of the Attorney General strongly suggests that the views expressed therein were consistent with the intent of the Legislature." Op. S.C. Att'y Gen., 2005 WL 1609293 (June 10, 2005).

However, your letter references an amendment in the 2006 Act (Act. No. 385 of 2006), which for the first time, omitted the word "midwives" from the exemptions contained in the Medical Practice Act. Section 40-47-30(A)(8) now exempts as follows:

> [n]othing in this article may be construed to . . . prohibit practicing dentistry, nursing, optometry, podiatry, psychology, or another of the healing arts in accordance with state law[.].

(emphasis added). However, the Nurse Practice Act, § 40-33-30(D)(7), continues to exempt midwives "trained and supervised under the authority of the South Carolina Department of Health and Environmental Control. . . ."

It is not clear as to the reason the Medical Practice Act removed the word "midwives" from the exemptions therefrom. However, § 40-47-30(A)(8) continues to maintain an exemption for the all-inclusive "another of the healing arts in accordance with state law." Although the Act does not define the term "healing arts," under general rules of statutory construction, the common, ordinary definition of that phrase applies. See Op. S.C. Att'y Gen., 2006 WL 2849793 (September 29, 2006). In Shaw v. State, 181 S.E.3d 450, 455 (Tex. 2005), the Court stated the following with respect to the meaning of "healing arts":

> "[h]ealing has been defined as 'tending to heal or cure.'" Webster's Third New International Dictionary of the English Language Unabridged 1043 (Merriam-Webster, Inc. 1993). "Art" has been defined as "the power of performing certain actions esp. as acquired by experience, study, or observation." Id. at 22. Internet research through the Google search engine reveals that the term "healing arts" in common usage includes a broad range from physicians to massage therapists and crystal healers. The legislature, in the Healing Art Identification Act, broadly defined the "healing art" as "any system, treatment, operation, diagnosis, prescription, or practice to ascertain, cure, relieve, adjust, or correct a human disease, injury or unhealthy or abnormal physical or mental condition."

Courts have held that midwifery is included in this broad term "healing arts" as that term is commonly defined. See Peckmann v. Thompson, 745 F.Supp. 1388 (C.D. Ill. 1990).

Thus, § 40-47-30(A)(8) may be deemed to exclude midwifery from the Medical Practice Act even though the word "midwives" was omitted by virtue of the 2006 Amendment. Based upon the foregoing, we thus read midwifery to be included as part of the "healing arts," as that term is commonly understood. Accordingly, omission of the word "midwives" from the Medical Practice Act by virtue of the 2006 Amendment may be insignificant in terms of your question. As was stated in Hinton v. S.C. Dept. of Probation, Parole and Pardon Services, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004), an interpretation of a statute should give "effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless." Thus, we read the Medical Practice Act as still exempting midwives as other "healing arts," despite omission of the word "midwives" from the text.

Conclusion

Based upon the foregoing, we see no need to modify or alter our 1971 opinion. The Legislature has long acquiesced in the analysis contained in that opinion and has not seen fit to alter it. The fact that the 2006 amendment to the Medical Practice Act omitted the word "midwives" from the Act's exemptions cannot be deemed controlling. As discussed above, the Nurse Practice Act continues to exempt "midwives trained and supervised under the authority of

[DHEC]." Moreover, the Medical Practice Act continues to exempt "another of the healing arts...." As discussed, midwifery is included within the form "healing arts" as that term is commonly understood.

Notwithstanding our interpretation, because of these ambiguities, we would suggest that the General Assembly further clarify the statutes involved to make its intent clear. Our 1971 Opinion relied upon the "broad and general powers [of DHEC] affecting the public health." In our view, these statutory provisions involved are long in need of clarification. In this regard, we note specifically that other states have adopted statutory schemes specifically governing lay midwifery. See Ark. Code Ann. § 15-85-101 thorugh 108; Colo. Rev. State. § 12-37-101 et seq., Idaho Stat. § 54-5501 et seq., Vermont, 26 Vt. Stat. § 4181 et seq. Thus, a statutory enactment may well be advisable in order to clarify the authority to regulate.

Sincerely,

Robert D. Cook
Solicitor General