



BOARD OF NURSE EXAMINERS
FOR THE STATE OF TEXAS

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mBJ

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LOUISE WADDILL, R.N., Ph.D.
EXECUTIVE DIRECTOR

RQ-338

March 4, 1992

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The Honorable Dan Morales
Attorney General of Texas
Post Office Box 12548
Austin, Texas 78711

Dear General Morales:

The Board of Nurse Examiners for the State of Texas hereby requests an opinion to determine whether the Board has jurisdiction over a registered nurse that is engaged in the practice of 'lay' midwifery. There are currently 43 registered nurses who are also identified midwives under Article 4512i, V.T.C.S.. The Board has received several complaints regarding the practice of these individuals.

Article 4518, Section 5 states that:

"'Professional Nursing' shall be defined as the performance for compensation of any nursing act (a) in the observation, assessment, intervention, evaluation, rehabilitation, care and counsel, and health teachings of persons who are ill, injured or infirm or experiencing changes in normal health processes; (b) in the maintenance of health or prevention of illness; (c) in the administration of medications or treatments as ordered by a licensed physician, including a podiatric physician licensed by the Texas State Board of Podiatry Examiners, or dentist; (d) in the supervision or teaching of nursing, (e) in the administration, supervision, and evaluation of nursing practices, policies and procedures."

Mosby's Medical and Nursing Dictionary defines pregnancy as "the gestational process comprising the growth and development within a woman of a new individual from conception through the embryonic and fetal periods to birth ... Though the mother does not activate an immune response, all of her tissues and organs undergo change, many of them profound and some of them permanent [including] psychological changes, cardiovascular changes, pulmonary changes, renal changes, gastrointestinal changes, endocrine changes, breast changes, skin changes, weight changes, [and] nutritional changes." Pregnancy is a normal health process which is marked by many changes.

Article 4528(5) of the Nurse Practice Act states that "This law shall not be construed to apply to: acts done by persons licensed by any board or agency of the State of Texas if such acts are authorized by such licensing statutes."

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Article 4512i provides in pertinent part:

Sec. 1 - SHORT TITLE; FINDINGS; DEFINITIONS. (a) This Act may be cited as the Texas Midwifery Act;

(b) The legislature finds that:

(1) a parent has the responsibility and right to give birth where and with whom the parent chooses;

(2) childbirth is a natural process of the human body, not a disease; and

(3) midwifery has been practiced in Texas since the days of the Republic.

(c) In this Act:

(1) "Midwife" means a person who practices midwifery and has met the requirements of the standards of the midwifery board.

(2) "Midwifery" means the practice by a midwife of:

(A) giving the necessary supervision, care, and advice to a woman during normal pregnancy, labor, and the postpartum period;

(B) conducting a normal delivery of a child; and

(C) newborn care.

(II) "Normal childbirth" means the labor and delivery, at or close to term, of a pregnant woman whose assessment reveals no abnormality or signs or symptoms of complications.

Section 2. EXCEPTIONS. This Act does not apply to a certified nurse-midwife, a natural childbirth trainer, a physician, a health care professional licensed by the state and operating within the scope of his license, or a person other than a midwife who assists childbirth in an emergency.

Section 17 states that a midwife may not: (8) except as authorized by rules adopted by the Board of Nurse Examiners and the Board of Vocational Nurse Examiners, use in combination with the term "midwife", the term "nurse" or other title, initials, or other designation that implies that the midwife is licensed as a registered nurse or licensed vocational nurse.

Section 18. CRIMINAL PENALTIES. (a) A midwife commits an offense if the midwife knowingly or intentionally: ... (3) commits an act prohibited by Section 17 of this Act; ... (b) an offense under this section is a Class C misdemeanor.

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In 1985, in compliance with the Lay Midwifery Act of 1983, the Lay Midwife Training and Practice Manual was developed by the Texas Department of Health, Section 1.6 of the manual describes the History of Midwifery in Texas as follows:

History of Midwifery in Texas

"In 1983, after years of relatively unrestrained practice of lay midwifery, a law was enacted that delineated the scope of practice and voluntary educational preparation for those attending birth. It is known as the Law Midwifery Act, Texas Civil Statutes, Article 4512i

Historically, there was no all-inclusive law which addressed the practice of midwifery in Texas. References to midwifery practice are contained in several laws, some of which date back to 1925. These imposed requirements on anyone practicing "midwifery," including nurses and physicians. They address subjects such as registration, the filing of birth certificates, a blood test for syphilis, and drops in the eyes of the newborn to prevent infection. In 1956, in the case of Banti vs. State of Texas, (289 S.W.2d 244) - Court of Criminal Appeals) the court ruled that lay midwifery is not unlawful in Texas if the practitioner stays within certain limits and does not do anything which constitutes the practice of medicine.

Until 15 years ago, lay midwifery in Texas was practiced almost exclusively by persons who generally learned their trade as apprentices to others attending births. This included "granny" midwives, both black and white, and the "parteras," of Hispanic background. Over the years, granny midwives have almost completely disappeared as a result of an increase in the availability of hospitals for the population served by these midwives. However, for economic, cultural, and other reasons unique to Hispanic populations, "parteras" continue to be active, although their numbers are somewhat reduced.

Recently there has been revived interest in the practice of lay midwifery and home birth, after many years of steady decline nationally in the number of birth attendants. Women educated in health and other occupations, are taking on the practice of midwifery - the art of assisting other women in the birthing of their babies. There are very few schools currently for formal midwifery training, so the majority of these practitioners are self-taught through study and apprenticeship.

Mention should also be made of certified nurse-midwives (CNM), a group of advanced nurse practitioners who, over the last 25 years have gained nationally recognized certification from the American College of Nurse-Midwives. They are employed in hospitals, birthing centers, physicians' offices, and health departments, or have their own practices. For statistical purposes, deliveries attended by certified nurse-midwives in Texas are counted separately from those of lay midwives, and these CNM's are exempt from the provisions of the Lay Midwifery Act."

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It is the Board's position that any act performed by an individual licensed to practice professional nursing that falls within the definition of professional nursing, as defined by Article 4518, Section 5, is within the scope of that individual's professional nursing practice and, therefore, under the jurisdiction of the Board of Nurse Examiners. If a registered nurse chooses to practice as a midwife, then he or she must comply with the Nurse Practice Act and all applicable laws and rules. Nurses practicing midwifery remain under the Board's jurisdiction. Complaints filed against the registered nurse would be subject to proceedings under the Nurse Practice Act as outlined in Article 4525(b). Specifically, an investigation will be conducted, charges may be filed, and the Board may take disciplinary action against the license to practice professional nursing in the State of Texas.

The position of the midwives is that the Board would be acting outside of its jurisdiction, that midwives act on a different, not lower, standard of care than registered nurses, that the public is protected by the midwifery act, and that if the practice of midwifery is the practice of professional nursing, then all midwives are in violation of the Nurse Practice Act for practicing professional nursing without a license. The midwives also state that the exception provided in Article 4528(5) would except the practice of midwifery by registered nurses out of the jurisdiction of the Nurse Practice Act. APTRA, in Article 6252-13a, Section 3(3), states that "'License' includes the whole or part of any agency permit, certificate, approval, registration, or similar form of permission required by law." To support this position they cite Payne v. Massey, 145 Tex. 237, 196 S.W.2d 493 (1946); Lipsey v. Texas Dept. of Health, 727 S.W.2d 61 (Tex. App.-Austin 1987, writ ref'd n.r.e.); Johnson v. City of Austin, 674 S.W.2d 894 (Tex. App.-Austin, 1984, no writ).

At this time, the advice that we have received from the Attorney General's Office indicates that, except for the power to conduct a preliminary investigation to determine whether or not the licensee is engaged in the practice of nursing, the position of the Board of Nurse Examiners is not legally supported and there is no indication that we would prevail in any type of attempt to exercise jurisdiction over a registered nurse engaged in the practice of 'lay' midwifery.

We would like to thank you in advance for the thorough consideration that we know will be given to this matter. If you require any additional information, please do not hesitate to contact me.

Sincerely,



Louise Waddill, Ph.D., R.N.
Executive Director

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