Midwifes; Statutory Limitations
Pregnancy; Assistancy by Midwifes

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04330

January 27, 1977

Honorable Charlotte Byers
House of Representatives
State House
Augusta, Maine 04333

RE: Opinion regarding midwifery

Dear Rep. Byers:

The above opinion request concerns whether legal restrictions exist in the State of Maine concerning the capacity of a person to deliver a baby. There are no laws or cases at present within this State which specifically refer to who may deliver a baby. Title 22 M.R.S.A. Section 1521 does recognize the status of midwife by differentiating between the terms midwife, nurse and physician regarding treatment of infants with medicinal eyedrops after birth if the child exhibits certain symptoms. However, statutes relating to the practice of medicine and the practice of nursing provide answers to the problem posed.

Title 32 M.R.S.A. Sections 2101 and 2102 (Nurses and Nursing Act) refer to the practice of professional and practical nursing. In order to be subject to the licensing provisions of the Nurses and Nursing Act, a person must perform certain services for compensation. If there is no monetary exchange or other provision for compensation, then a person may perform certain acts, including midwifery, without fear of violation of the licensing provisions. However, a violation of the statute regarding the practice of medicine without a license may be present and will be discussed later.

Assuming that a person delivers a baby for compensation, the next question posed is whether or not he will be subjected to the Nurses and Nursing Act. The most obvious snag to be encountered by the practicing midwife concerns the definition of professional nursing as found in 32 M.R.S.A. 2102(2)(B):

> 2. Professional nursing. The practice of "professional nursing" means the performance for compensation of any of the services which necessitate the specialized knowledge, judgment and skill required for the application of nursing as based upon principals of biological, physical and social sciences in the:
>
> (B) Maintenance of health or prevention of illness of others.

Certainly, midwifery or the assisting of child delivery falls within the penumbra of subsection B. If drugs are prescribed or administered, further violations of other laws may exist. Considering the above statements, it is my opinion that:

1. Midwifery without compensation does not violate any of the licensing provisions of the Nurses and Nursing Act.
2. Midwifery with compensation would necessitate compliance with licensing provisions of the Nurses and Nursing Act.

Whether or not baby delivery is practiced with or without compensation is of no consequence regarding possible violations of 32 M.R.S.A. 3263, et. al. (Board of Registration in Medicine). Section 3270 of this Act states that a person must be registered to practice medicine or surgery or any branch thereof. Included within the definition of "practice of medicine" is:

> diagnosing, relieving in any degree or curing or professing or attempting to diagnose, relieve or cure any human disease, ailment, defect, or complaint, whether physical or mental or of physical and mental origin, by attendance or by advice, or by prescribing or furnishing any drug, medicine, applicance, manipulation, method or any therapeutic agent whatsoever or in any other manner unless otherwise provided by statutes of this State. (emphasis added)

Pregnancy (without complications, etc.) does not appear to be defined as a disease, ailment, defect or complaint. Rather, it seems to be a condition. According to Webster's Seventh New Collegiate Dictionary, (1967) pregnancy is: "the condition of being pregnant; the quality of being pregnant." Blakiston's New Gould Medical Dictionary, 1st Ed., (1949) defines pregnancy as "being with child; the state of a woman from conception to childbirth." Bouvier's Law Dictionary, ed. William Baldwin, 2d ed., (1940), defines pregnancy as "the condition of a woman who has within her the product of a conception which has occurred within a year." Pregnancy is the "condition of being with child." Taber's Cyclopedic Medical Dictionary, Revised Sixth ed., (1955).

Caselaw in other jurisdictions (research has been limited due to the time factor involved) does not include pregnancy within the realm of a disease, ailment, defect or complaint. "Pregnancy is a condition which begins at moment of conception and terminates with delivery of child." State v. Colmer, 133 A2d. 325, 329; 45 N.J. Super. 481. Pregnancy is not, per se, a condition of unsound health or disease or ailment within the meaning of such terms in an insurance policy providing for payment of disability benefits. Lee v. Metropolitan Life Insurance Company, 186 S.C. 376, 382; 180 S.C. 475. Pregnancy is not a "disease" or "injury". Canten v. Howard, 86 P. 2d 451, 455; 160 or 507.

Title 32 M.R.S.A. 3270-A, allows individuals to render medical services if under the supervision of a physician or surgeon. A training program and possibly a competency examination are also required.

It would appear that a person practicing child delivery services with or without compensation would not be subjected to the provisions of the Board of Registration in Medicine unless a disease, ailment, defect or complaint was present. Also emergency situations may allow others to assist in delivery if no registered nurses or doctors are available.

As an aside, the Supreme Court of the State of California has recently ruled that the State may require the licensure of those who assist in childbirth. A synopsis of that decision is attached for your edification.

Very truly yours,

James Eastman Smith
Assistant Attorney General

JES:bjw

The United States
LAW WEEK

Court Decisions
Agency Rulings

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NEW COURT DECISIONS

Significant Opinions Not Yet Generally Reported

Constitutional Law

RIGHT OF PRIVACY—

California's statutory ban on unlicensed practice of healing arts, as applied to prohibit person who does not hold valid midwifery certificate from assisting woman during normal childbirth, does not violate prospective mother's constitutional right of privacy.

The defendants were charged with violation of Section 2141 of the Business and Professions Code, which prohibits the unlicensed practice of the healing arts, in that, as unlicensed persons, they have practiced or held themselves out as practicing midwifery. Section 2140 of the Code authorizes the holder of a certificate to practice midwifery to attend cases of normal childbirth. It does not authorize such persons to use any instrument, except as may be necessary to sever the umbilical cord, nor does it include the right to assist childbirth by any artificial, forcible or mechanical means. Certified midwives are not permitted to use any drug either before or after childbirth. As we construe Section 2141 it prohibits unlicensed persons from diagnosing, treating, operating upon, or prescribing drugs for women undergoing normal pregnancy or childbirth. The defendants are thus charged with performing functions which, under Section 2140, are to be performed only by certified midwives.

The defendants argue that if Section 2141 is construed to prohibit them from attending and assisting a pregnant woman in childbirth, it violates the expectant mother's right of privacy. It is argued that a woman's privacy right encompasses the liberty to choose whomever she wants to assist in delivery of her child.

In recent years the constitutional right to privacy, derived from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, has been substantially expanded to protect certain personal choices pertaining to child-rearing, marriage, procreation, and abortion. However, the right of privacy has never been interpreted so broadly as to protect a woman's choice of the manner and circumstances in which her baby is born. Indeed, Roe v. Wade, 410 U.S. 113 (1973), appears specifically to exclude the right to make such choices from the constitutional privacy right. In Roe, the Supreme Court held expressly that the state may proscribe the performance of an abortion at any stage of pregnancy by a person who is not a licensed physician. More significantly, the Court held that at the point of viability of the fetus, the state's interest in the life of the unborn child supersedes the woman's own privacy right, and at that point, the beginning of the third trimester, abortion may be prohibited except where necessary for preservation of the mother's life or health.

The legislature has never attempted to require women to give birth in a hospital or with a physician in attendance, just as it has not generally sought to compel adults to obtain medical treatment. However, the state has a recognized interest in the life and well being of an unborn child. Roe v. Wade; People v. Barksdale, 8 Cal.3d 320 (1972). For the same policy reasons for which the legislature may prohibit the abortion of unborn children who have reached the point of viability, it may require that those who assist in childbirth have valid licenses. Its interest in regulating the qualifications for those who hold themselves out as childbirth attenders is an equally strong one, for many women must necessarily rely on those with qualifications which they cannot personally verify. Nor has the state's interest in requiring a license been diminished by the fact that childbirth with assistance, even the assistance of an unlicensed person, may be safer than self-delivery. The state need not prohibit the most unlikely of circumstances — childbirth without assistance—in order to justify the much more common event, which is assistance of the mother at childbirth. The defendants' arguments as to the safety of home deliveries are more properly addressed to the legislature than to the courts, particularly since the legislature by its recent enactments pertaining to midwifery has shown continuing interest in the area.—Richardson, J.

—Calif SupCt; Bowland v. The Municipal Court for the Santa Cruz Ct; Judicial District, 12/6/76.

Federal Courts and Procedure

LAW GOVERNING—

New rule of law announced by U. S. Supreme Court after district court has acted on case but before court of appeals has reviewed it must be applied by court of appeals if Supreme Court fails to limit substantive scope of its new rule to purely prospective cases.

U. S. v. Schooner Peggy, 5 U. S. (1 Cranch) 103 (1801), established that when a lower court relies on a legal principle that is changed by a treaty, statute, or decision prior to direct review, an appellate court must apply the current law rather than the law as it existed at the time the lower court acted. Citing a number of Supreme Court rulings that held that a newly announced constitutional rule need not be applied in cases where trials had already commenced, the petitioner argues that this court is not bound by the rule of Schooner Peggy and that it should make its own determination as to the retroactivity of Beckwith v. U. S., 44 LW 4499 (1976).