



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

May 17, 1978

ATTORNEY GENERAL OPINION NO. 78-164

Mr. Michael J. Malone
Douglas County Attorney
Judicial and Law Enforcement Center
Lawrence, Kansas 66044

Re: I. Public Health--Healing Arts--Unlawful Practice of
Healing Arts: Midwifery

II. Crimes and Punishments--Crimes Against Persons--
Involuntary Manslaughter; Aiding and Abetting

Synopsis: 1. The practice of midwifery is a *per se* violation
of the Kansas Healing Arts Act, K.S.A. 65-2801, *et seq.*

2. A fetus unintentionally killed without malice in
the commission of a violation of the Kansas Healing
Arts Act is a violation of K.S.A. 21-3404: involuntary
manslaughter.

3. Any person who intentionally aids, abets, advises,
hires, counsels or procures midwives to practice ob-
stetrics may be charged with involuntary manslaughter.

* * *

Dear Mr. Malone:

I have your letter of March 14, 1978, wherein you request the opinion of this office concerning the legality of persons performing services generally referred to as midwifery, or assisting pregnant women in childbirth. You advise that certain women in Douglas County hold themselves out to the public as midwives and have in fact assisted with more than one home childbirth, although they possess no formal medical training regarding such practice.

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First, you specifically inquire whether the provisions of the Healing Arts Act, K.S.A. 65-2801, *et seq.* and as amended, prohibit the practice of midwifery by nonlicensed persons.

K.S.A. 1977 Supp. 65-2802 provides thus:

"For the purpose of this act the following definitions shall apply:

(a) The healing arts include any system, treatment, operation, diagnosis, prescription, or practice for the ascertainment, cure, relief, palliation, adjustment, or correction of any human disease, ailment, deformity, or injury, and includes specifically but not by way of limitation *the practice of medicine and surgery*; the practice of osteopathic medicine and surgery; and the practice of chiropractic." [Emphasis supplied.]

K.S.A. 1977 Supp. 65-2869 further amplifies the foregoing provision thus:

"For the purpose of this act the following persons shall be deemed to be engaged in the practice of medicine and surgery:

(a) Persons who publicly profess to be physicians or surgeons, or *publicly profess to assume the duties incident to the practice of medicine or surgery or any of their branches.*" [Emphasis supplied.]

K.S.A. 65-2803 also provides:

"No person shall engage in the practice of any branch of the healing arts, as hereinafter defined, unless he shall have obtained from the board a license for that purpose."

As relates to the facts alleged in your letter the proscription of these statutes is clear: individuals not licensed under the

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Act may not engage in activities which entail duties incident to the practice of medicine or any of its branches. Thus, the question necessarily presented is whether assisting at childbirth or practicing midwifery is tantamount to the practice of a branch of medicine or, in other words, a branch of the healing arts.

"Midwifery" is defined by *Webster's New Third International Dictionary* as:

"1: the act of assisting at childbirth;
also obstetrics"

The term "obstetrics" is defined by the same source as:

"a branch of medical science that deals with₁
birth and with its antecedents and sequels."¹

That obstetrics or midwifery has long been recognized as a branch of medicine is evident from the following observation of the Supreme Judicial Court of Massachusetts:

"Both medical and popular lexicographers define midwife as a female obstetrician, and midwifery as the practice of obstetrics.

* * *

Although childbirth is not a disease, but a normal function of women, yet the practice of medicine does not appertain exclusively to disease, and obstetrics as matter of common knowledge has long been treated as a highly important branch of the science of medicine." [Emphasis supplied.] *Commonwealth v. Porn*, 196 Mass. 326, 82 N.E. 31 (1907).

1. See, *Stedman's Medical Dictionary* definitions for "midwifery" and "obstetrics," pp. 1004 and 1105 respectively.

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Accord, Bowland v. Municipal Court for Santa Cruz County, Etc.,
134 Cal.Rptr. 630, 556 P.2d 1081 (1977).

It is the opinion of this office therefore that an individual who assists with childbirth and who holds himself or herself out to the public as offering such assistance is overtly assuming the duties incident to the practice of a branch of medicine and thus a branch of the healing arts, *i.e.*, obstetrics, and must accordingly hold the requisite license per K.S.A. 65-2803. To the extent that such activities are *per se* violations of the express language of the Act, it is not necessary to determine the effects of gratuitous midwife services or the nontrained medical status of the midwives. Nor does it appear necessary to address the exception to the act for gratuitous services in emergency situations provided at K.S.A. 1977 Supp. 65-2872(a).

You also ask what, if any, remedies exist in this Act regarding the unauthorized practice of healing arts aside from the injunction and quo warranto provisions of K.S.A. 1977 Supp. 65-2857. Your attention is directed to criminal charges which may be filed under K.S.A. 65-2862 which states:

"Any person violating any of the provisions of this act, except as specific penalties are herein otherwise imposed, shall be deemed guilty of a misdemeanor and upon conviction thereof shall pay a fine of not less than fifty dollars (\$50) nor more than two hundred dollars (\$200) for each separate offense, and a person for a second violation of any of the provisions of this act, wherein another specific penalty is not expressly imposed, shall be deemed guilty of a misdemeanor and upon conviction thereof shall pay a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for each separate offense."

Last, you ask concerning the applicability of K.S.A. 21-3404 to the situation which involves the midwives as previously discussed, where the fetus dies as a result of "such a practice," *i.e.* the activities of the midwives. K.S.A. 21-3404 provides thus:

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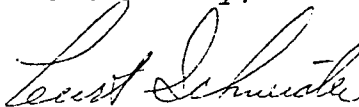
"Involuntary manslaughter is the unlawful killing of a human being, without malice, which is done unintentionally in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act in an unlawful or wanton manner. As used in this section, an 'unlawful act' is any act which is prohibited by a statute of the United States or the state of Kansas or an ordinance of any city within the state which statute or ordinance is enacted for the protection of human life or safety.

Involuntary manslaughter is a class E felony."

As opined, *supra*, practicing midwifery without the required license from the Board of Healing Arts is the commission of an unlawful act not amounting to felony. If the fetus under the circumstances you describe was in fact unintentionally killed without malice in the commission of the unlawful act, then it appears reasonable to conclude that the midwives and husband (if he was so involved) may be charged with involuntary manslaughter. Insofar as concerns the pregnant woman who attempted to give birth to the fetus, if she "intentionally aids, abets, advises, hires, counsels or procures" the husband or midwives to practice midwifery or obstetrics, then she likewise may be charged with violating K.S.A. 21-3404, pursuant to K.S.A. 21-3205.

Of course, the decision to prosecute for any of the above or similar acts must rest with the local prosecutors and their assessment of the specific facts presented to them.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:JPS:kj