S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 08-45

State Nursing Practice Act

QUESTION

In its Home and Community Based Services (HCBS) waiver program(s), the TennCare program is considering providing "routine health maintenance activities" in program recipients' homes or other alternative community-based residential settings through unlicensed assistive personnel such as attendants or aides. Such "routine health maintenance activities" would be limited to activities or procedures that could be performed by the recipient if he were physically capable of doing so, and would be limited to activities or procedures that can be safely performed in the home or community-based residential setting. Such activities or procedures would include, but not be limited to, oral, rectal, vaginal, ophthalmic, otic, nasal, topical, and transdermal administration of medications; hydration and nutrition which may include gastrostomy tube feedings; surface care of stoma sites; and assistance with toileting which may include irrigation of catheter, and bowel maintenance. Certain activities would be specifically excluded; *i.e.*, administration of intravenous medications, intramuscular injections, sliding scale insulin, blood thinners, and controlled (scheduled) drugs; and any activity or procedure that would require the exercise of clinical judgment in order to properly perform the activity or procedure and/or to ensure the health and safety of the individual.

Is the TennCare program's proposal consistent with the requirements of the Tennessee Nursing Practice Act?

OPINION

Yes, to the extent that the proposed care is provided in compliance with any applicable federal requirements and with the statutory exemption from the Tennessee Nursing Practice Act that is set out at Tenn. Code Ann. § 63-7-102(5). To fall within this statutory exemption, the care must be provided to program recipients in their homes. It must be provided by domestic servants, housekeepers, attendants, or household aides, whether employed regularly or because of an emergency or illness. Finally, the servants, housekeepers, attendants or household aides must not be initially employed in a nursing capacity.

We caution that provision of care that falls within the parameters of Tenn. Code Ann. § 63-7-102(10), (11) or (12) (Supp. 2007) must comply with the restrictions set out in those statutory paragraphs; *i.e.*, care provided by persons trained in accordance with Tenn. Code Ann. § 68-1-904(c), who are employed by agencies that are both licensed under Title 33 and under contract to

provide residential or adult day programs for persons with mental retardation; care provided by persons trained in accordance with Tenn. Code Ann. § 68-1-904(c), who are employed by community-based licensed intermediate care facilities for the mentally retarded who will administer medication only at a location other than the community-based facility; care provided by persons employed by an agency licensed under Title 33, Chapter 2, Part 4, who are providing personal support services to clients living in their own home or private residence; and persons trained in accordance with Tenn. Code Ann. § 68-1-904(c)(2), who are employed by agencies that are both licensed under Title 37 and under contract with the Department of Children's Services to provide services.

ANALYSIS

The purpose of the Tennessee Nursing Practice Act, Tenn. Code Ann. § 63-7-101, *et seq*., is to "safeguard life and health by requiring each person who is practicing, or is offering to practice, nursing to submit evidence that the person is qualified to practice and to be licensed as provided in this chapter." Tenn. Code Ann. § 63-7-101 (Supp. 2007). To this end, the Act establishes two primary categories of state-licensed nurses. "Professional nursing," the practice of which is engaged in by registered nurses ("RNs"), is defined as "the performance for compensation of any act requiring substantial specialized judgment and skill based on knowledge of the natural, behavioral and nursing sciences, and the humanities, as the basis for application of the nursing process in wellness and illness care." Tenn. Code Ann. § 63-7-103(a)(1). The statute specifically defines the practice of professional nursing as including the following acts and activities:

> (A) Responsible supervision of a patient requiring skill and observation of symptoms and reactions and accurate recording of the facts;
> (B) Promotion, restoration and maintenance of health or prevention of illness of others;
> (C) Counseling, managing, supervising and teaching of others;
> (D) Administration of medications and treatments as prescribed by a licensed physician, dentist, podiatrist or nurse authorized to prescribe pursuant to § 63-7-123;
> (E) Application of such nursing procedures as involve understanding of cause and effect; and
> (F) Nursing management of illness, injury or infirmity including identification of patient problems.

Tenn. Code Ann. § 63-7-103(a)(2).

The practice of "practical nursing," which is engaged in by licensed practical nurses ("LPNs"), is defined as "the performance for compensation of selected acts required in the nursing care of the ill, injured or infirm and/or carrying out medical orders prescribed by a licensed physician or dentist under the direction of a licensed physician, dentist or professional registered nurse." Tenn. Code Ann. § 63-7-108. This statute provides that an LPN must have preparation in

and understanding of nursing, but shall not be required to have the same degree of education and preparation as required of a registered nurse. *Id.*

Tenn. Code Ann. § 63-7-102 is entitled "Exemptions," and sets out a list of activities to which "[n]othing in [the Nursing Practice Act] shall be construed as applying." Pertinent to your question, this statutory list of exemptions from the Nursing Practice Act includes:

> (5) Care of persons in their homes by domestic servants, housekeepers, attendants, or household aides of any type whether employed regularly or because of an emergency or illness if such persons are not initially employed in a nursing capacity.

The fundamental rule of statutory construction requires ascertaining and giving effect to the intention and purpose of the legislature. *Worrall v. Kroger Co.*, 545 S.W.2d 736, 738 (Tenn. 1977). Legislative intent and purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, without any forced or subtle construction that would limit or extend the meaning of the language. *See Metropolitan Government v. Motel Systems, Inc.*, 525 S.W.2d 840, 841 (Tenn. 1975). Where the language contained within the four corners of a statute is plain, clear, and unambiguous and the enactment is within legislative competency, "the duty of the courts is simple and obvious, . . . obey it." *Miller v. Childress*, 21 Tenn. (2 Hum.) 320, 321-22 (1841). As to legislative intent:

> [I]f [the legislative intent] is expressed in a manner devoid of contradiction and ambiguity, there is no room for interpretation or construction, and the judges are not at liberty, on consideration of policy or hardship, to depart from the words of the statute . . ..

Austin v. Memphis Pub. Co., 655 S.W.2d 146, 148 (Tenn. 1983).

Applying the foregoing principles of statutory construction, we observe that Tenn. Code Ann. § 63-7-102(5) plainly provides that "care of persons in their homes" by attendants, household aides or other similar employees is exempt from the requirements of the Nursing Practice Act "if such [employees] are not initially employed in a nursing capacity." Thus, even if provision of such care would otherwise constitute the practice of nursing, it is exempted from Tenn. Code Ann. § 63-7-101, *et seq.* -- so long as it falls within the four corners of the statutory exemption.

We therefore conclude that the TennCare program's proposal is consistent with the requirements of the Tennessee Nursing Practice Act to the extent that the proposed care is provided in compliance with any applicable federal requirements and with the statutory exemption from the Act that is set out at Tenn. Code Ann. § 63-7-102(5). To fall within this statutory exemption, the care must be provided to program recipients in their homes. It must be provided by domestic servants, housekeepers, attendants, or household aides, whether employed regularly or because of an emergency or illness. Finally, the servants, housekeepers, attendants or household aides must not be initially employed in a nursing capacity.

We caution that provision of care that falls within the parameters of Tenn. Code Ann. § 63-7-102(10), (11) or (12) (Supp. 2007) must comply with the restrictions set out in those statutory paragraphs; *i.e.*, care provided by persons trained in accordance with Tenn. Code Ann. § 68-1-904(c), who are employed by agencies that are both licensed under Title 33 and under contract to provide residential or adult day programs for persons with mental retardation; care provided by persons trained in accordance with Tenn. Code Ann. § 68-1-904(c), who are employed by community-based licensed intermediate care facilities for the mentally retarded who will administer medication only at a location other than the community-based facility; care provided by persons employed by an agency licensed under Title 33, Chapter 2, Part 4, who are providing personal support services to clients living in their own home or private residence; and persons trained in accordance with Tenn. Code Ann. § 68-1-904(c)(2), who are employed by agencies that are both licensed under Title 37 and under contract with the Department of Children's Services to provide services.

ROBERT E. COOPER, JR.
Attorney General and Reporter

BARRY TURNER
Deputy Attorney General

SUE A. SHELDON
Senior Counsel

Requested by:

Darin J. Gordon
Deputy Commissioner
Bureau of TennCare
Department of Finance and Administration
310 Great Circle Road
Nashville, TN 37243