STATE OF TENNESSEE
OFFICE OF THE
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April 25, 2012

Opinion No. 12-48

Licensing Exemption for Parents' Day Out Programs

QUESTIONS

1. Does the exemption from "child care agency" licensure set forth at Tenn. Code Ann. § 71-3-503(a)(7) allow a church or church organization to operate a "Parents' Day Out" program for any number of days in the same calendar week as long as no single child enrolled in the program attends for more than two calendar days during the same calendar week and for no more than six hours during each of those two days?

2. If the answer to question one is no, then can the church or church organization have multiple Parents' Day Out programs at the same church facility operating on different days during the same calendar week in order to qualify for the exemption?

OPINIONS

1. No, a church may not operate a Parents' Day Out program for more than two days in a calendar week (and for not more than six hours each day) without a license, even if no individual child enrolled attends for more than two days in the same calendar week.

2. No, the church organization cannot have multiple Parents' Day Out programs operating at the same church facility on different calendar days and still qualify for the exemption.

ANALYSIS

Tennessee has enacted a comprehensive system for the regulation and licensure of child care agencies operating in Tennessee, codified at Tenn. Code Ann. § 71-3-501 to -534. "Child care" is defined as "the provision of supervision and protection, and, at a minimum, meeting the basic needs, of a child or children for less than twenty-four (24) hours a day." Tenn. Code Ann. § 71-3-501(3). A child care agency is any place or facility, regardless of whether it is licensed, that is operated as a "family child care home," a "group child care home," a "child care center," or a "drop-in center," as those terms are defined by the statute, or that provides child care for five or more children who are not related to the primary caregiver for three or more hours per day. Tenn. Code Ann. § 71-3-501(4). All persons or entities operating a child care agency must be licensed by the Department of Human Services, unless exempt under Tenn. Code Ann. § 71-3-503. Tenn. Code Ann. § 71-3-502(a)(1). Pursuant to Tenn. Code Ann. § 71-3-502(a)(1), the

Department has promulgated extensive regulations applicable to licensed child care centers for the "enforcement of appropriate standards for the health, safety and welfare of children in their care." *Tennessee Dep't. of Human Services v. Priest Lake Cmty. Baptist Church*, No. M2006-00302-COA-R3-CV, 2007 WL 1828871 at *5 (Tenn. Ct. App. June 25, 2007).

Tenn. Code Ann. § 71-3-503 lists a number of programs and facilities that are exempt from these licensure requirements. In order to qualify for exemption, the program or facility must demonstrate by "clear and convincing evidence" that it meets the criteria for one of the listed exemptions. Tenn. Code Ann. § 71-3-503(a)(1). The "clear and convincing evidence" standard evidences that the General Assembly imposed an enhanced standard of proof for an entity seeking an exemption from licensure. Tennessee courts have defined the elements of this standard of proof as follows:

> To be clear and convincing, the evidence must eliminate any "serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *In re Valentine,* 79 S.W.3d 539, 546 (Tenn. 2002) (citing *Hodges v. S.C. Toof & Co.,* 833 S.W.2d 896, 901 n. 3 (Tenn. 1992)). The evidence should produce a firm belief or conviction as to the truth of the allegations sought to be established. *In re H.L.F.,* 297 S.W.3d [223] at 233 [Tenn. Ct. App. 2009]; *In re M.L.P.,* 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007); *In re Giorgianna H.,* 205 S.W.3d 508, 516 (Tenn. Ct. App. 2006). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is "highly probable" as opposed to merely "more probable than not." *In re H.L.F.,* 297 S.W.3d at 233 (citing *In re M.A.R.,* 183 S.W.3d 652, 660 (Tenn. Ct. App.2005) (quoting *In re C.W.W.,* 37 S.W.3d 467, 474 (Tenn. Ct. App.2000)).

In re Melanie T., 352 S.W.3d 687, 695 (Tenn. Ct. App. 2011).

The questions posed concern Parents' Day Out programs operated by a church or a church organization. Such programs are exempt if they meet the following criteria:

> (7) "Parents' Day Out" or similar programs carried on by churches or church organizations that provide custodial care and services for children of less than school age for not more than two (2) days in each calendar week for not more than six (6) hours each day.

Tenn. Code Ann. § 71-3-503(a)(7).

This Office, in reviewing this statute, is guided by the general rule of statutory construction to ascertain legislative intent from the plain meaning of the language of the statute, without unduly restricting or expanding the statute beyond its intended scope. *Wilson v. Johnson County,* 879 S.W.2d 807, 809 (Tenn. 1994). Furthermore, given the General Assembly's directive that any exemption must be demonstrated by clear and convincing evidence, the statutory language granting any exemption must be narrowly construed.

The exemption in question is limited to programs that do not exceed defined day and hour restrictions. The plain language of the exemption limits the provision of custodial care to: (a) children of less than school age,[1] (b) for not more than two days in each calendar week, and (c) for not more than six hours each day. Tenn. Code Ann. § 71-3-503(a)(7). Thus to qualify a program may only serve children within the defined age for not more than two days a week, and for not more than six hours each day the program operates.

To read the exemption to allow multiple programs during the week which meet these day and time restrictions, or to allow the program to operate the entire week so long as no single child enrolled attends for more than two days and no more than six hours each day would effectively eviscerate the time and date restrictions set by the statute. This interpretation also would in effect allow these programs to operate on a full time basis without complying with the statute's licensure and regulatory requirements. Such a broad reading of this provision is contrary to the plain meaning and intent of the statute to allow Parents' Day Out programs to operate without licensure only on a limited basis, contravenes the "clear and convincing evidence" standard for obtaining an exemption and would render the time and date restrictions in the exemption meaningless. *See State v. Northcutt,* 568 S.W.2d 636, 637-38 (Tenn. 1978) (stating that a statute should be construed so that "no part will be inoperative, superfluous, void or insignificant"). *See also Priest Lake Cmty. Baptist Church,* 2007 WL 1828871 at *14-16 (rejecting a constitutional challenge to the Department of Human Services finding that a church-operated "Bible School" program caring for many children, which operated every weekday for approximately twelve hours, was not exempt).

Nor could any church or church organization whose Parents' Day Out program failed to meet the exemption criteria under Tenn. Code Ann. § 71-3-503(a)(7) satisfy the requirements of the "catch-all" exemption at Tenn. Code Ann. § 71-3-503(c). This exemption states:

> (c) In analyzing whether the program or activity is exempt pursuant to this section, unless the department determines upon clear and convincing evidence that the program or activity qualifies for an exemption based upon the criteria set forth in subdivisions (a)(2)-(12), the department shall consider the following nonexclusive criteria to determine if the program or activity is *clearly distinguishable from child care services typically regulated by the department* and otherwise qualifies for exemption from licensing:
>
> > (1) The sole or primary purpose of the program or activity is to provide *specialized* opportunities for the child's educational, social, cultural, religious or athletic development, or to provide the child with mental or physical health services;
> >
> > (2) The time period in which the program or activity provides these opportunities is consistent with a reasonable time period for

[1] Tenn. Comp. R. & Regs. 1240-04-01.01(5)(u) defines a "school-age child" as a "person who is five years of age and in kindergarten or older (refers to kindergarten through grade six)."

> the completion of the program or activity, considering the age of each child served and the nature of the program;
>
> (3) The primary purpose of the program or activity is *not routinely available* or could not be made routinely available in the typical child care settings regulated by the department;
>
> (4) Parents could reasonably be expected to choose the program or activity because of the *unique nature* of what it offers, rather than as a substitute for full-time, before or after school, holiday or weather-related child care; and
>
> (5) If the program or activity is regulated by any other federal, state or local agency, it is required by such other agency to comply with standards that substantially meet or exceed department licensing regulations.

Tenn. Code Ann. § 71-3-503(c) (emphasis added).

A Parents' Day Out program operating outside of the time and date limitations of Tenn. Code Ann. § 71-3-503(a)(7) would not qualify for the "catch all" exemption in Tenn. Code Ann. § 71-3-503(c) because a Parents' Day Out program is not clearly distinguishable from child care services typically regulated by the Department nor does it provide services not routinely available in the typical child care settings regulated by the Department. *See Priest Lake Cmty. Baptist Church*, 2007 WL 1828871 at *12. (noting that including a specialized component, such as religious development, in a program that primarily constitutes child care is not sufficient to qualify for the catch-all exemption). Furthermore, from a statutory construction perspective, given Tenn. Code Ann. § 71-3-503(a)(7) specifically addresses under what circumstances a Parents' Day Out program is exempt from licensure, then this provision should exclusively govern such programs rather than the general catch-all exemption at Tenn. Code Ann. § 71-3-503(c). *See Keough v. State,* 356 S.W.3d 366, 371 (Tenn. 2011) (citing the generally accepted rule of statutory construction that "a special statute, or a special provision of a particular statute, will prevail over a general provision in another statute or a general provision in the same statute").

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