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8 **BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**

9 In the Matter of:

11 **WENDI LEE CLECKNER,**

13 Licensee.

)
)
) **Docket No.: 2014C-MDW-0318-DHS**
)
) **ADHS' FINAL ARGUMENTS REGARDING**
) **PATIENT RIGHTS AND RESPONSE TO**
) **LICENSEE'S POST HEARING MEMORANDUM**
)
) **(Honorable Dorinda Lang)**

15 Pursuant to the Order Holding Record Open filed by Administrative Law Judge Lang on
16 September 16, 2014, the Arizona Department of Health Services, Bureau of Special Licensing
17 ("Department") hereby files its final arguments regarding patient rights and responds to Licensee
18 Wendi Lee Cleckner's ("Ms. Cleckner") Post Hearing Memorandum ("Memorandum") filed in the
19 above entitled matter.

20 **The Rule Violation is the Only Issue to be Determined by the Administrative Law Judge**

21 The Department emphasizes that, despite Ms. Cleckner's Memorandum, the *only* issue to be
22 determined in this matter is the proposed one-year suspension of the License LM127 for Ms. Cleckner,
23 as noted in the Amended Notice of Hearing, filed on July 2, 2014. *See* DHS Ex. D. The Department
24 maintains, based on knowledge and evidence discovered in its investigation and presented during the
25

1 hearing, that Ms. Cleckner violated Arizona Administrative Code (“A.A.C.”) R9-16-111(B)(25),
2 formerly R9-16-108(C)(1)(f), by continuing midwifery services after the client had hemorrhaged more
3 than 500 cc or 500 milliliters.¹ See DHS Ex. F, pg. 0003, 0024-25. Given the Department’s statutory
4 duty to protect the health and safety of the mother and child in regulating midwifery pursuant to A.R.S.
5 § 36-755, they affirm that Ms. Cleckner’s license should be suspended based on that violation.²

6 The Department agrees that the purpose of HB 2247, 2012 Leg., 2nd Sess. was to reduce the
7 regulatory burden on licensed midwives and to streamline the regulation process. See *Id.* And the
8 Department maintains that is exactly what occurred. In fact, the new rules, effective July 2013, now
9 allow a licensed midwife to perform a V-BAC (Vaginal Birth After a Cesarean section), something the
10 midwife community has been anxious to add to their scope of practice. See A.A.C. R9-16-108(B)(1).³
11 Additionally, the new rules also took the testing role out of the Department’s hands and adopted
12 national testing standards. See A.A.C. R9-16-102(A)(6), compare former rule R9-16-104.

13 Regardless of Ms. Cleckner’s opinion and the Memorandum is filled with opinion, the rule
14 prohibiting a midwife from providing services when a client has “a postpartum hemorrhage of greater
15 than 500 cc/milliliters in the current pregnancy” has not changed.” See A.A.C. R9-16-111(B)(25)

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18 ¹ For the sake of clarity, the old rule used “500 cc” while the new rule uses “500 Milliliters” See R9-16-
108(C)(1)(f) and R9 R9-16-111(B)(25) . The measurement is identical.

19 ² Ms. Cleckner spends a great deal of time arguing that ADHS exceeded its rule-making authority in enacting
20 the rules pursuant to HB 2247 and therefore the rules should not be applied to Ms. Cleckner in this matter. That
21 position is a misunderstanding of the role of the administrative law judge. First, while an administrative law
22 judge can do many things, they are still bound to follow the statutes and rules of the State of Arizona. If they
23 find that the evidence presented before them does not support the application of certain statutes or rules, they
24 may recommend that the agency refrain from applying such rules in their administrative recommendation.
However, they do not have the power to determine that an agency has exceeded its authority. Second, as already
argued, the rule violated by Ms. Cleckner in this case did not change with the introduction of the new rules in
July 2013.

25 ³ In the hearing, Mr. Salow testified to the fact that Ms. Cleckner had been a member of the advisory committee
designated to assist the Director in adopting and amending rules related to the scope of practice for licensed
midwives pursuant to H.B. 2247, and she participated fully in that process.

1 formerly R9-16-108(C)(1)(f). Consequently, Ms. Cleckner's arguments are irrelevant to the
2 determination to be made by this tribunal in this matter.

3 Patient Rights and the Scope of Midwifery Practice

4 Naturally, the Department is concerned with the rights of a midwife's patients just as they are
5 concerned about the safety of those patients and their infants. That is precisely why the Department is
6 obligated to create rules to "[d]efine and describe...the duties *and limitations* of the practice of
7 midwifery." A.R.S. § 36-755(B)(1)(emphasis added). The dilemma facing the midwife is not a simple
8 one when a client refuses transfer of care, but the entire purpose underlying the rules of informed
9 consent are to ensure that a client understands what services her midwife can and cannot provide. *See*
10 A.A.C. R9-16-108 (C)(The midwife is required to explain, orally and in writing, the services she can
11 and *cannot* provide, including prohibited practices and the requisite transfer of care).

12 The midwife must make a decision when she begins the relationship with the client – does she
13 take on a client even if she knows she will refuse transfer of care? Does she have a plan to transfer
14 care to emergency personnel or a physician? What does she do if the client refuses? Ms. Cleckner, a
15 licensed midwife for more than 13 years and a member of the advisory committee charged with
16 adopting the 2013 rule changes (for which she is now finding fault), knows the prohibited practice rule
17 and when she is required to transfer care. Yet, she knowingly took the risk not to transfer care when
18 her patient had excessive bleeding.

19 There was much discussion, during the hearing and in the Memorandum, concerning the rights
20 of midwife's patient to refuse treatment. While it is true that the right to refuse medical treatment has
21 been recognized by the Arizona Supreme Court in *Rasmussen by Mitchell v. Fleming*, 154 Ariz. 207,
22 215 (1987), the Court there also made an excellent point, that "the Legislature is best suited to address
23 these matters (of the right to refuse medical treatment)" *Id.* The Department, under the statutes created
24 by the Arizona Legislature, is tasked with the duty to "[a]dopt standards with respect to the practice of
25 midwifery designed to safeguard the health and safety of the mother and child." *See* A.R.S. § 36-

1 755(B)(2). Therefore, the Legislature is the proper venue for issues relating to the balance between
2 patient rights and the duties of the Department to regulate midwifery to ensure safe mothers and
3 babies.⁴

4 Finally, Ms. Cleckner also makes the argument that the duty of care, certainly applicable to a
5 midwife, "is to not unilaterally terminate a patient relationship without adequate notice." See Memo at
6 pg. 9. Yet, notice is precisely the reason for the oral and written informed consent portion of the rules.
7 As a result, if a patient knows that if any of the circumstances occur in A.A.C. R9-16-111 require her
8 midwife to discontinue and transfer care, that is, by definition, notice. See A.A.C. R9-16-108(C).

9 **Conclusion**

10 The Department, while sympathetic to the dilemmas that face licensed midwives, also must
11 trust that they will follow the statutes and rules assigned to regulate their profession. The health and
12 safety of women and infants are paramount. In this spirit, the Department has determined that Ms.
13 Cleckner's violation of A.A.C. R9-16-111(B)(25) put the safety of the patient at significant risk, and
14 should result in the one-year suspension of Ms. Cleckner's midwife license.

15 DATED: 21st day of October, 2014.

16 THOMAS C. HORNE
17 Attorney General

18
19 /s/ Patricia C. LaMagna
20 Patricia C. LaMagna
21 Assistant Attorney General
22 *Attorney for Arizona Department of Health Services*

23 _____
24 ⁴ Ms. Cleckner's patient in this particular case testified that, as a "medical student" (she is apparently studying to
25 be a naturopath), she refused transfer of care because she "knew" she was not in danger. However, no matter
the kind of patient, their education or experience or profession, while receiving midwifery services, they are not
the professional with the duty to safely care for the patient; in this particular case, that professional was Ms.
Cleckner.

1 ORIGINAL filed this
2 21st day of October, 2014, with:

3 Hon. Dorinda Lang
4 Administrative Law Judge
5 Office of Administrative Hearings
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8 COPIES of the foregoing were mailed/e-mailed
9 this 21st day of October, 2014 to:

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By: /s/ Estela Priano
Estela Priano, Legal Secretary II

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