



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 1, 1996

The Honorable Randal Lee
Cass County District Attorney
P.O. Box 940
Linden, Texas 75563

Letter Opinion No. 96-119

Re: Whether a justice of the peace must conduct an inquest regarding the death of a nursing home resident who was under the regular care of a physician (ID# 38865)

Dear Mr. Lee:

You ask whether a justice of the peace must conduct an inquest regarding the death of a nursing home resident who is under the regular care of a physician. Article 49.04 of the Code of Criminal Procedure sets forth the circumstances under which a justice of the peace must conduct an inquest. The pertinent subarticles of that provision are as follows:

(a) A justice of the peace shall conduct an inquest into the death of a person who dies in the county served by the justice if:

....

(6) the person dies without having been *attended by a physician*;

(7) the person dies while *attended by a physician* who is unable to certify the cause of death and who requires the justice of the peace to conduct an inquest;[]

....

(b) Except as provided by Subsection (c) of this section, a *physician who attends* the death of a person and who is unable to certify the cause of death shall report the death to the justice of the peace of the precinct where the death occurred and request that the justice conduct an inquest.

(c) If a person dies in a hospital or other institution and *an attending physician* is unable to certify the cause of death, the

superintendent or general manager of the hospital or institution shall report the death to the justice of the peace. [Emphasis added].¹

You state in your letter that physicians in your county, who generally are not present at a nursing home resident's death, and who may or may not be treating the resident for the ailment that causes the death, refuse, as a matter of policy, to certify the cause of death. A justice of the peace now refuses to perform inquests into nursing home residents' deaths because, he contends, that a physician's regular treatment of a resident constitutes "attended by a physician" for purposes of article 49.04(a)(7) and (b) of the Code of Criminal Procedure. You state, however, that since "attended" has no statutory meaning, the most common definition, "to be present at," indicating "actual presence or at least presence enough to willingly certify the cause of death" should apply, and that if a physician on duty is not present at time of death or will not certify the cause of death for some reason, then the justice of the peace must conduct an inquest. We agree that the statute should be construed in accordance with common usage, and that an inquest must be conducted when a physician is unable to certify the cause of death. However, we do not believe that defining "attend" to mean "to be present with" is consistent with article 49.04 of the Code of Criminal Procedure.

To answer your specific question, we must first construe the meaning of the words and phrases "attends," "attended by a physician," and "attending physician" in accordance with the rules of statutory construction. In analyzing a statute, the Code Construction Act provides that "[w]ords and phrases shall be read in context and construed according to rules of grammar and common usage."² The legislature has not defined the words and phrases for the purposes of article 49.04. The dictionary definitions of "attend," pertaining to the issue in question, are "to be present at" and "to serve as a doctor during

¹Sections 193.002 and 193.004(a)(2) of the Health and Safety Code state that the person in charge of internment or in charge of removal of a body shall obtain the required medical certification from the physician who was last in attendance if the death occurred with medical attendance. If no physician was in attendance, the local health officer is authorized to make the death certificate, and "[i]f there is no local health authority, the local registrar may complete the death certificate." *Id.* § 193.005(b). Only when "the authority or registrar is in doubt as to the cause of death; or the case is otherwise properly referable for inquest," must the case be referred to the justice of the peace or the medical examiner. *Id.* § 193.005(c). While this provision conflicts with articles 49.04 and 49.16 (requiring justice of the peace who conducts an inquest to sign death certificate) in that it requires a physician in attendance to submit medical certification, we believe that the subarticles 49.04(b) and (c) prevail over sections 193.002, 193.004(a)(2) and 193.005(a)(b)(c) because article 49.04 is the later enactment. See Gov't Code § 311.025. The language in the death certificate provision first appeared in 1927 while the article 49.04 language was originally adopted in 1947. See Act of June 9, 1927, 40th Leg., R.S., 1st C.S., ch. 41, §§ 1-21, 23, 24, 1927 Tex. Gen. Laws 116, 128-29, 129-30, 130; Act of June 2, 1947, 50th Leg., R.S., ch. 369, § 1, 1947 Tex. Gen. Laws 745, 745-46.

²Gov't Code § 311.011.

an illness.”³ Given that the provision uses the operative verb “to attend” in the context involving physicians, we believe that the legislature intended the word to be read and construed according to the dictionary definition that pertains to physicians who “serve during an illness,” rather than the verb’s ordinary meaning, “to be present at,” that refers to attending an event or place. Although we cannot define the pertinent words and phrases for all fact situations involving inquests and death certificates, we rely on the common meaning that applies to physicians to assert that the phrases “attends,” “attended by a physician,” and “attending physician” refer to a physician who is responsible for the care and treatment of a patient.

This definition is further refined after reading article 49.04 in conjunction with section 193.004(a)(2) of the Health and Safety Code.⁴ Section 193.004(a)(2), bearing on the same subject of deaths occurring with medical attendance, provides that the person required to file a death certificate shall obtain the required medical certification from the physician who was *last in attendance* on the decedent if the death occurred with medical attendance. Applying the phrase “last in attendance” to article 49.04, we conclude that a physician under this definition would include one who has sufficient contact with the patient so as to be knowledgeable about the status of a patient’s health care at the time of the patient’s death.

While the derivation of “attend” in subsection (b), “the physician who attends the death of a person,” could be read as requiring the physician to be present at the time of the patient’s death, we believe that this language was used probably for other reasons, such as brevity in drafting, and not to impose a new requirement that the physician be physically present at the time of death. The language at issue was previously in subarticles (6) and (7) of former article 49.01, the predecessor to article 49.04.⁵ Article 49.01 consistently used the words and phrases, “attended by a duly licensed and practicing physician” and an “attending physician.”⁶ In fact, the particular subsection (b) phrase, “a physician who attends the death,” first appears in a non-substantive 1987 enactment that renumbered article 49.01 to article 49.04.⁷

³WEBSTER’S NEW WORLD DICTIONARY 89 (2d ed. 1972).

⁴*See Reed v. State Dept. of Licensing and Regulation*, 820 S.W.2d 1 (Tex. App.—Austin 1991, no writ) (in construction of an act, court should consider all laws in *pari materia* to ascertain consistent purpose of legislature in enactment of laws).

⁵*See* Gov’t Code § 311.023(4) (in construing a statute, predecessor provisions may be considered).

⁶*Id.*

⁷The 1987 enactment was non-substantive, except for changes not relevant to article 49.04. House Research Organization, Bill Analysis, H.B. 1104, 70th Leg. (1987).

Having established the meaning of the words and phrases, “attends,” “attended by a physician,” and “attending physician,” we also hold that, under subarticles (a)(6) and (a)(7) of article 49.04, inquests are mandatory when a resident of a nursing home dies without being under the regular care of a physician or where the patient’s regular physician is unable to certify the cause of death.⁸ A 1962 attorney general opinion supports this conclusion.⁹ The office reviewed this provision, then former article 968 of the Code of Criminal Procedure, which enumerated all the circumstances, including those now delineated in subarticles (a)(6), (a)(7), (b), and (c), under which a justice of the peace would be required to hold an inquest. The former provision provided that “the inquests authorized and required by this article shall be held by the Justice of the Peace of the precinct in which the death occurred.”¹⁰ This office reasoned that the statute clearly and unambiguously placed a duty on the justice of the peace to order inquests in the circumstances set out.¹¹ Similarly, we find the current provision which provides that “a justice of the peace shall conduct an inquest” in all cases set out under subsection (a), is clear and unambiguous.

⁸You state that physicians in your county may refuse, as a matter of policy, to certify the cause of a nursing home resident death, for liability reasons. In this opinion, we do not determine what “unable to certify” means under subarticles 49.04(a)(7), (b), and (c). In the past, the predecessor statute to subarticle 49.04(7) provided as follows:

When a person dies who has been attended by a duly licensed and practicing physician or physicians, and such physician or physicians are not certain as to the cause of death and are unable to certify with certainty the cause of death In case of such uncertainty the attending physician or physicians . . . shall so report to the Justice of the Peace of the precinct in which the death occurred, and request an inquest. Act of June 2, 1947, 50th Leg., R.S., ch. 369, § 1, 1947 Tex. Gen. Laws 745, 745-46 (current version at Code Crim. Proc. art. 49.04).

Ultimately, whether a physician who is “unable to certify” a death includes the category of doctors in your county may be a question of fact that cannot be decided by our office.

⁹Attorney General Opinion WW-1261 (1962).

¹⁰*Id.* at 2 (citing Code Crim. Proc. art. 968, Act of June 2, 1947, 50th Leg., R.S., ch. 369, § 1, 1947 Tex. Gen. Laws 745-46) (current version at Code Crim. Proc. art. 49.04).

¹¹*Id.*

S U M M A R Y

The words and phrases "attends," "attended by a physician," and "attending physician" in article 49.04 of the Code of Criminal Procedure mean a physician who is responsible for providing treatment and care at the time of a person's death. Under subarticles (a)(6) and (a)(7), inquests are mandatory in situations involving the deaths of nursing home residents where either the person, at the time of death, does not have a physician responsible for the patient's treatment and care or the attending physician is unable to certify the cause of death.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kimberly K. Oltrogge". The signature is written in a cursive, flowing style.

**Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee**