



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

March 17, 1988

Mr. Marlin W. Johnston
Commissioner
Texas Department of Human Services
P. O. Box 2960
Austin, Texas 78769

LO-88-31

Dear Mr. Johnston:

By letter of October 23, 1987, you requested an Attorney General Opinion on the authority of the Texas Department of Human Services to make a rule exempting from licensure as a child care facility under chapter 42, Human Resources Code, a court-appointed managing conservator who resides with and personally provides daily care and supervision to one child or a sibling group. After researching this question, we have decided to answer it by letter rather than Attorney General Opinion.

The discussion of this question in your letter indicates that you interpret the Child Care Licensing Act of 1975, Human Resources Code, ch. 42, as not applying to a court-appointed managing conservator. Thus, the rule you wish to promulgate would merely state your interpretation of the statute and would not attempt to except from chapter 42 of the Human Resources Code an entity which is actually subject to its requirements. See Attorney General Opinion H-890 (1976) (administrative agency may not create new exemption from law by rule).

Chapter 42 of the Human Resources Code provides for the regulation of child-care facilities. The statute provides the following definition:

(3) 'Child-care facility' means a facility that provides care, training, education, custody, treatment; or supervision for a child who is not related by blood, marriage, or adoption to the owner or operator of the facility, for all or part of the 24-hour day, whether or not the facility is operated for profit or charges for the services it offers.

Human Resources Code §42.002(3).

Section 14.01 of the Family Code authorizes the court to appoint a managing conservator in any suit affecting the parent-child relationship. This statute provides that "[a] managing conservator must be a suitable, competent adult, or a parent, or an authorized agency." An "authorized agency"

means a public social agency authorized to care for children or to place children for adoption, or a private association, corporation, or person approved for that purpose by the Texas Department of Human Services through a license, certification, or other means. (Emphasis added.)

Family Code §11.01(7). An authorized agency is defined to include associations, corporations, and persons licensed or certified to care for children by the Texas Department of Human Services. Thus, the legislature expressly indicated its intent that "authorized agencies" include child care facilities, licensed or otherwise, regulated by the Department of Human Services. No such legislative intent was expressed as to "a suitable, competent adult," indicating that the legislature did not intend such persons to be licensed by the Department of Human Services.

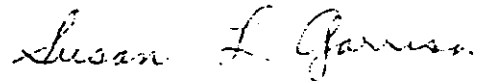
Moreover, chapter 14 of the Family Code includes provisions designed to provide for the health, safety, and well-being of children entrusted to non-parent managing conservators. The court makes the determination that an individual is "a suitable, competent adult" and orders "reasonable terms and conditions" for implementing the managing conservatorship. Family Code §14.01(a); see also §14.02(b). The "best interest of the child" is the primary consideration of the court in determining questions of managing conservatorship. Family Code §14.07. A non-parent managing conservator is required to file a yearly report with the court of facts concerning the child's welfare, including his whereabouts and physical condition. Family Code §14.01(d). The appointment of a non-parent managing conservator under chapter 14 of the Family Code thus involves the court's consideration of the adult's competence and suitability, the individual child's interests and some supervision of the ongoing conservatorship. This is a different and more individualized system for providing for the health and welfare of children than the system adopted as the Child Care Licensing Act of 1975 which provides for regulation of facilities rather than supervision of individual children.

Attorney General Opinion H-1166 (1978) determined that the Child Care Licensing Act did not authorize the Department of Human Resources to license county detention facilities certified by juvenile courts under section 51.12 of the Family Code. Section 51.12 provided for an independent certification scheme for the facilities it covered. Attorney General Opinion H-1166 (1978). Similarly, chapter 14 of the Family Code provides for an independent method of protecting children cared for by non-parent managing conservators, who are not subject to licensing under chapter 42 of the Human Resources Code.

Finally, you state that it has been the department's policy since 1975 not to require the home of a managing conservator to be licensed as a child care facility, even though the managing conservator is not always related by blood, marriage or adoption. If the meaning of a statute is ambiguous, the construction placed upon it by the agency charged with its administration is entitled to weight. Ex parte Roloff, 510 S.W.2d 913 (Tex. 1974), see also Gov't Code §311.023(b) (court may consider administrative construction of a statute even though it is not ambiguous).

Based on the reasoning and authorities set out in this letter, we conclude that non-parent managing conservators appointed by a court are not subject to regulation under chapter 42 of the Human Resources Code. Accordingly, your agency may adopt a rule stating that a court-appointed managing conservator who resides with and personally provides daily care to one child or a sibling group is not subject to licensure as a child care facility under chapter 42 of the Human Resources Code.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Opinion Committee

SLG/er