ALAN WILSON
ATTORNEY GENERAL

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SCDDSN
STATE DIRECTOR'S OFFICE

June 21, 2018

Mr. Patrick J. Maley
Interim State Director
South Carolina Department of Disability and Special Needs
P.O. Box 4706
Columbia, SC 29240

Dear Director Maley:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

> South Carolina Department of Disability and Special Needs (DDSN) provides services for person with Intellectual, Related Disabilities, Autism and Head and Spinal Cord Injuries. Many of the consumers that receive services also have health care concerns that must be addressed. Therefore, DDSN is requesting an opinion concerning the Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 et Seq. (2018), as it relates to S.C. Code Ann. § 44-26-50 (2018).
>
> There was a change that occurred in the statute in 2016 that removed one of the listed priorities of persons that can give consent, when a person is determined by two licensed physicians to be unable to consent on their own behalf to health care. The change removed S.C. Code Ann. § 44-66-30(8) which stated "a person given authority make health care decision for the patient by a different statutory provision." However, there remains S.C. Code Ann. §44-66-30(3) (2018) which states a person given priority to make health care decisions for the patient by another statutory provision. For DDSN, the statutory provision that gives the agency priority and authority is S.C. Code Ann. § 44-26-50 (2018). This refers back to S.C. Code Ann. § 44-66-30 (8) (2018) which now is listed as grandparents.
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> ...
>
> DDSN would like an opinion from your office to clarify the issue of the agency's authority to make health care decisions.

535-07-DD Attachment 5

Law/Analysis

As stated in the request letter, the Adult Health Care Consent Act lists the order of priority of persons who may make health care decisions when a patient is unable to consent. S.C. Code Ann. § 44-66-30. As originally adopted, the listed order of priority was as follows:

> (A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:
>
> > (1) a guardian appointed by the court pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of the guardianship;
> >
> > (2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant to Section 62-5-501, if the decision is within the scope of his authority;
> >
> > (3) a person given priority to make health care decisions for the patient by another statutory provision;
> >
> > (4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:
> >
> > > (a) entry of a pendente lite order in a divorce or separate maintenance action;
> > >
> > > (b) formal signing of a written property or marital settlement agreement;
> > >
> > > (c) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
> >
> > (5) a parent or adult child of the patient;
> >
> > (6) an adult sibling, grandparent, or adult grandchild of the patient;
> >
> > (7) any other relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient;

> (8) a person given authority to make health care decisions for the patient by another statutory provision.

1990 Act No. 472, § 1.[1] In 1992, DDSN was given authority to make health care decisions for a client that is "found incompetent to consent or refuse medical treatment" by 1992 Act No. 366, § 1. This authority is codified at Section 44-26-50 of the South Carolina Code of Laws as follows:

> If the client is found incompetent to consent to or refuse major medical treatment, the decisions concerning his health care must be made pursuant to Section 44-66-30 of the Adult Health Care Consent Act. An authorized designee of the department may make a health care decision pursuant to Section 44-66-30(8) of the Adult Health Care Consent Act. The person making the decision must be informed of the need for major medical treatment, alternative treatments, and the nature and implications of the proposed health care and shall consult the attending physician before making decisions. When feasible, the person making the decision shall observe or consult with the client found to be incompetent.

S.C. Code Ann. § 44-26-50 (Supp. 2017) (emphasis added).[2] This statute granted DDSN the final listed priority after any relative of the patient by blood or marriage.

However, following the enactment of Section 44-26-50 and its 2011 amendment, S.C. Code Ann. § 44-66-30 was amended by 2016 Act No. 226 (H.3999), § 1 (the "2016 Act"). The act is titled as follows:

> AN ACT TO AMEND SECTION 44–66–30, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO PERSONS WHO MAY MAKE HEALTH CARE DECISIONS FOR PATIENTS WHO ARE UNABLE TO PROVIDE CONSENT, SO AS TO MAKE CHANGES TO THE ORDER OF PRIORITY, TO ADD CLASSES OF PERSONS WITH THE AUTHORITY TO MAKE THESE HEALTH CARE DECISIONS, AND FOR OTHER PURPOSES.

Id. As the stated intention in the act's title is to make changes to the order of priority, Section 44-66-30 was amended to list the order of priority as follows:

> (A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:

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[1] S.C. Code Ann. § 44-66-30 was subsequently amended by 1992 Act No. 306, § 4, but this act did not affect the order of priority.

[2] SC Code Ann 44-26-50 was subsequently amended by 2011 Act No. 47, § 6, but this act did not affect the order of priority.

(1) a guardian appointed by the court pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of the guardianship;

(2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant to Section 62-5-501, if the decision is within the scope of his authority;

(3) a person given priority to make health care decisions for the patient by another statutory provision;

(4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:

(a) entry of a pendente lite order in a divorce or separate maintenance action;

(b) formal signing of a written property or marital settlement agreement; or

(c) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;

(5) an adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;

(6) a parent of the patient;

(7) an adult sibling of the patient, or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;

(8) a grandparent of the patient, or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation;

(9) any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient, or if the patient has more than one other adult

> relative, a majority of those other adult relatives who are reasonably available for consultation.

S.C. Code Ann. § 44-66-30 (Supp. 2017) (emphasis added). The 2016 Act removed the priority description which DDSN was assigned at former subsection (8). Subsection (8) now assigns priority to "a grandparent of the patient, or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation." It is also important to note that subsection (8) is no longer the final listed priority. Subsection (9) now lists "any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient" as the final priority.

This opinion will give this Office's analysis of what authority DDSN has to make health care decisions under the Adult Health Care Consent Act as amended after the 2016 Act according to the rules of statutory interpretation. Statutory interpretation of the South Carolina Code of Laws requires a determination of the General Assembly's intent. Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible."). Where a statute's language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The Supreme Court of South Carolina has stated, however, that where the plain meaning of the words in a statute "would lead to a result so plainly absurd that it could not have been intended by the General Assembly… the Court will construe a statute to escape the absurdity and carry the [legislative] intention into effect." Duke Energy Corp. v. S. Carolina Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016); Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ("[C]ourts are not confined to the literal meaning of a statute where the literal import of the words contradicts the real purpose and intent of the lawmakers."). "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), *reh'g denied* (Aug. 5, 2015). Where statutes deal with the same subject matter, it is well established that they "are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." Penman v. City of Columbia, 387 S.C. 131, 138,691 S.E.2d 465, 468 (2010) (quoting Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000)); see also Busby v. State Farm Mut. Auto. Ins. Co., 280 S.C. 330, 335, 312 S.E.2d 716, 719 (Ct. App. 1984) ("The sections here are part of the same statute, thereby presenting an even stronger case that they be construed together and reconciled.").

Yet, there are instances where the terms and purposes of statutes cannot be reconciled harmoniously. In such instances, the Supreme Court of South Carolina has stated that the law clearly provides, "the latest statute passed should prevail so as to repeal the earlier statute to the extent of the repugnancy." Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991); Penman, 387 S.C. at 138, 691 S.E.2d at 468 ("[W]here two statutes are in conflict, the more recent and specific statute should prevail so as to repeal the earlier, general statute."). However, it is equally

clear that the Court has consistently found the law disfavors this method of repeal by implication. Mullinax v. J.M. Brown Amusement Co., 333 S.C. 89, 95-96, 508 S.E.2d 848, 851 (1998) ("Repeal by implication is disfavored and is found only when two statutes are incapable of reconcilement."); Mims v. Alston, 312 S.C. 311, 313, 440 S.E.2d 357, 359 (1994); City of Rock Hill v. South Carolina Dept. of Health & Envtl. Control, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990) ("[T] he repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconcilement; for if they can be construed so that both can stand, the [c]ourt will so construe them."); In Interest of Shaw, 274 S.C. 534, 539, 265 S.E.2d 522, 524 (1980) ("If the provisions of the two statutes can be construed so that both can stand, this Court will so construe them."). The South Carolina Court of Appeals explained the basis for disfavoring implied repeal as follows, "It must be presumed that the legislature intended to achieve a consistent body of law. In accord with this principle, subsequent legislation is not presumed to effectuate a repeal of existing law in the absence of expressed intent." Busby, 280 S.C. at 334, 312 S.E.2d at 719; see also Justice v. Pantry, 330 S.C. 37, 43-44, 496 S.E.2d 871, 874 (Ct. App. 1998), a*ff'd as modified sub nom.* Justice v. The Pantry, 335 S.C. 572, 518 S.E.2d 40 (1999) ("It is presumed that the Legislature [is] familiar with prior legislation, and that if it intend[s] to repeal existing laws it would ... expressly [do] so ..." (quoting State v. Hood, et al., 181 S.C. 488, 491, 188 S.E. 134, 136 (1936))). With these principles in mind, we turn back to the relevant statutes and legislative acts to determine whether there is a conflict and, if so, how our state courts would likely resolve such a conflict.

It is this Office's opinion that a court would likely find the 2016 Act did not create a conflict between S.C. Code Ann. § 44-66-30 and S.C. Code Ann. § 44-26-50 such that the two statutes are incapable of being reconciled. While legislative clarification is warranted to resolve the ambiguity with finality, a court would likely construe the statutes in a way that would allow both statutes to remain operative. There are several different ways of interpreting DDSN's resulting priority under S.C. Code Ann. § 44-66-30.

First, one could interpret DDSN to retain priority at S.C. Code Ann. § 44-66-30(8) in the 2016 Act even though the former description in that subsection was struck through and replaced with a separate description, namely the priority given to a patient's grandparents. However, even accepting such an unsuitable description, such an interpretation would give DDSN priority ahead of "any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient" in subsection (9). It is this Office's opinion that a court would not find the General Assembly intended to grant DDSN an order of priority between degrees of familial relations without a clearer statement of legislative intent.

Second, one could interpret DDSN to have the priority listed at S.C. Code Ann. § 44-66-30(3). Subsection (3) grants priority to "a person given priority to make health care decisions for the patient by another statutory provision." Indeed, DDSN was statutorily granted authority to act on behalf of a patient according to another statute, S.C. Code Ann. § 44-26-50. However, the description in subsection (3) existed prior to the 2016 Act and Section 44-26-50 continues to

designate DDSN's priority at subsection (8). Had the General Assembly intended such a result, it likely would have included a conforming amendment to Section 44-26-50 in the 2016 Act. It is this Office's opinion that a court would not find the General Assembly intended to grant DDSN an order of priority higher than that explicitly listed in Section 44-26-50 and higher than that of all familial relations without a clearer statement of legislative intent.

Third, DDSN's priority designation could be interpreted to have been repealed entirely by the 2016 Act because the former priority description which DDSN was assigned at S.C. Code Ann. § 44-66-30(8) was removed from the statute. However, S.C. Code Ann. § 44-26-50, which directs DDSN to make decisions for clients "pursuant to Section 44-66-30," was not repealed or even addressed in the 2016 Act. As discussed above, our state courts presume subsequent legislation does not "effectuate a repeal of existing law in the absence of expressed intent." Busby, *supra*. If possible, a court will endeavor to reconcile S.C. Code Ann. § 44-66-30 and S.C. Code Ann. § 44-26-50 so that they both remain effective. City of Rock Hill, *supra*. It is this Office's opinion that a court would not construe S.C. Code Ann. § 44-26-50 as having been repealed by the 2016 Act, but would instead reconcile the statutes in the manner described below.

It is this Office's opinion that a court would reconcile S.C. Code Ann. § 44-66-30 and S.C. Code Ann. § 44-26-50 by construing DDSN's priority to come after "any other adult relative by blood or marriage" of the patient under Section 44-66-30(9). As discussed above, prior to the 2016 Act, DDSN was assigned the final listed priority after any relative of the patient by blood or marriage. S.C. Code Ann. § 44-66-30 (Supp. 2015). Without a clearer statement of legislative intent, it is this Office's opinion that a court would resolve the ambiguity created by the 2016 Act's removal of former subsection (8) description by maintaining DDSN's priority relative to the rest of the listed classifications. While the 2016 Act altered the listed order of priority, none of the listed priority classifications were moved to a higher priority. Rather, the classes of persons within the same order of priority were split to simplify the determination of which persons would exercise priority. See, e.g., S.C. Code Ann. §§ 44-66-30(5) (Supp. 2015) ("a parent or adult child of the patient"); 44-66-30(5) (Supp. 2017) ("an adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation"); 44-66-30(6) (Supp. 2017) (" a parent of the patient"). Therefore, rather than interpret DDSN's status as being repealed or given a higher priority, it appears more consistent with legislative intent to construe DDSN's priority to remain at the relative position within the order of priority when S.C. Code Ann. § 44-26-50 was last amended. Although this conclusion is not free from doubt, it is this Office's opinion that a court would likely adopt this interpretation of placing DDSN's priority after that of all other listed priorities.

Conclusion

It is this Office's opinion that a court would likely find the 2016 Act did not create a conflict between S.C. Code Ann. § 44-66-30 and S.C. Code Ann. § 44-26-50 such that the two statutes are incapable of being reconciled. While legislative clarification is warranted to resolve the ambiguity with finality, a court would likely construe the statutes in a way that would allow both statutes to remain operative. It is this Office's opinion that a court would reconcile S.C. Code Ann. § 44-66-30 and S.C. Code Ann. § 44-26-50 by construing DDSN's priority to come after "any other adult relative by blood or marriage" of the patient under Section 44-66-30(9). As discussed above, prior to the 2016 Act, DDSN had the final listed priority after any relative of the patient by blood or marriage. S.C. Code Ann. § 44-66-30 (Supp. 2015). Rather than interpret DDSN's status as being repealed or given a higher priority, it appears more consistent with legislative intent to construe DDSN's priority to remain at the relative position within the order of priority when S.C. Code Ann. § 44-26-50 was last amended.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General