



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

December 21, 1981

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 81-286

Mr. Thomas C. Lysaught
Wyandotte County Counselor
600 Security National Bank Bldg.
Kansas City, Kansas 66101

Re: Counties and County Officers -- General Provisions --
Use of Home Rule Power to Require Pre-Marital Blood
Tests

Synopsis: K.S.A. 1980 Supp. 19-101a authorizes counties to
transact county business only. Hence, a county
is without authority to require a blood test as
a condition precedent to obtaining a state marriage
license. Cited herein: K.S.A. 1980 Supp. 19-101a,
23-101, K.S.A. 23-301.

* * *

Dear Mr. Lysaught:

As you state, the Kansas legislature repealed K.S.A. 23-301
et seq. which required persons wishing to obtain marriage
licenses to have pre-marital blood tests and examinations
before the license could be issued. You ask whether the
Wyandotte Board of County Commissioners may now exercise
county home rule powers pursuant to K.S.A. 1980 Supp. 19-101a
and by resolution require persons who seek marriage licenses
in Wyandotte County to have pre-marital blood tests before
the license may be issued.

K.S.A. 1980 Supp. 19-101a permits counties to exercise home
rule powers in matters of local legislation and administra-
tion for purposes of transacting county business, unless

such action is otherwise restricted or prohibited. The power to regulate marriage is vested in the state legislature, 55 C.J.S. Marriage, §2 (1948) and has been so regulated in Chapter 23 of the Kansas Statutes Annotated. The Kansas Supreme Court has held that the marriage relationship is a matter of public concern, Burnett v. Burnett, 192 Kan. 247, 251 (1963), and the United States Supreme Court has stated:

"Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." (Emphasis added.) Maynard v. Hill, 125 U.S. 190, 194 (1887).

Historically, "[i]t has been held that the state is a party at interest to the marriage contract or status, together with the husband and wife, and that the relationship is one in which the state is deeply concerned, and over which the state exercises a jealous and exclusive dominion." (Citations omitted.) (Emphasis added.) 55 C.J.S. Marriage, §2 (1948).

We note that in Kansas, the state has always retained exclusive authority over marriage in that we find no instance in which the state has delegated any portion of that authority to a local governmental entity. Thus, in our opinion, any aspect of the regulation of marriage is more than a matter of local concern; it is a matter of state concern, and, therefore, is not a proper subject for home rule action. This view of utilizing home rule only for matters involving local legislation and administration has been previously acknowledged in Attorney General Opinion Nos. 75-66 and 81-112. Former Attorney General Schneider said in No. 75-66:

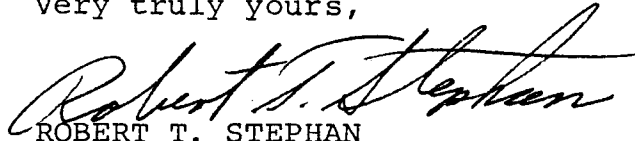
"[I]t must be pointed out that the eight express statutory restrictions and limitations set out in K.S.A. 19-101a are not the only limitations upon the powers of self-government granted by that provision. It empowers counties to 'transact [only] all county business,' and to perform only such powers of 'local legislation and administration' as they deem appropriate. No matter of legisla-

Mr. Thomas C. Lysaught
Page Three

tive or administrative concern is an appropriate subject for the exercise of the statutory powers of self-government granted by this section unless it is local in nature and pertains locally to the county." [Emphasis and bracketed material in original.] Id. at 5.

In conclusion, because pre-marital blood tests and examinations are but a part of the regulation of marriage which is a matter of state concern generally, not a matter of local county concern, the county is precluded from enacting local legislation requiring such tests as a condition precedent to obtaining a state marriage license.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Brenda L. Hoyt
Assistant Attorney General

RTS:BJS:BLH:hle