



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 91- 1

Fred W. Johnson  
Labette County Counselor  
1805 Parsons Plaza  
P.O. Box 409  
Parsons, Kansas 67357

Re: Elections--Recall of Elected Officials--Recall of  
Local Officers; Petition; Contents; Affidavit;  
Jurat; Date of Notarial Act

Synopsis: A petition seeking the recall of a local officer must be certified by an affidavit by the sponsor who personally circulated the petition. The oath or affirmation required for an affidavit may be administered by a notary public. The fact that an oath or affirmation has been administered may be proved by presence of a valid jurat or by evidence aliunde presented at the time the petition is filed with the county election officer. The jurat must be in one of the forms set forth in K.S.A. 1989 Supp. 53-508 and must include the date of the notarial act. If the jurat fails to meet either of these requirements, the jurat is invalid and the petition will lack the required affidavit. A petition seeking the recall of a local officer which lacks the affidavit by the sponsor who personally circulated the petition will be deemed insufficient. Cited herein: Kan. Const., art. 4, § 3; K.S.A. 1989 Supp. 25-3601; K.S.A. 25-3602, as amended by L. 1990, ch. 129, § 2; K.S.A. 25-4301; 25-4304; 25-4318; K.S.A. 1989 Supp. 25-4325; K.S.A. 25-4326; 25-4331; K.S.A. 1989 Supp. 53-502; 53-504; 53-508.

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Dear Mr. Johnson:

As counselor for Labette county, you request our opinion regarding the sufficiency of a petition filed with the Labette county clerk on December 12, 1990, seeking the recall of a county commissioner. Specifically you ask:

"Does the failure of the Notary Public to state the date upon which the sponsor signed and swore his or her oath invalidate the signatures on that petition or may the notary by affidavit correct this error after filing of the petition with the Clerk/Election Officer?"

The Kansas Constitution mandates that all elected public officials in the state, except judicial officers, are subject to recall by voters of the state or political subdivision from which elected. Kan. Const., art. 4, § 3. Where a state constitutional provision provides for the recall of public officials, recall is viewed as a fundamental right which the people have reserved to themselves. Unger v. Horn, 240 Kan. 740, 741 (1987). When the power of recall is a fundamental right, statutes governing the exercise of the power are to be liberally construed in favor of the ability to exercise it, and any limitations on that power must be strictly construed. Id. To liberally construe statutes governing the exercise of the power to recall is not, however, to ignore entirely the requirements of those statutes. 63A Am.Jur.2d Public Officers and Employees § 190, 810 (1984).

The recall of a local officer, including a county commissioner, is proposed by filing a petition with the county election officer of the county in which all or the greater part of the population of the election district of the local officer is located. K.S.A. 25-4318.

"When under the laws of this state a petition is required or authorized as a part of the procedure applicable to the state as a whole or any legislative election district or to any county, city, school district or other municipality, or part thereof, the provisions of [K.S.A. 25-3601 et seq.] shall apply, except as is otherwise specifically provided in the statute providing for such petition. The sufficiency of each signature and the number thereof on any such petition shall be determined in accordance with the provisions of K.S.A. 25-3601 to 25-3607,

inclusive, and amendments thereto by the county election officer or such other official as designated in the applicable statute. When any statute makes specific provisions concerning matters that K.S.A. 25-3601 et seq. and amendments thereto also has requirements which are different therefrom, the provisions of the specific statute shall control." (Emphasis added.) K.S.A. 1989 Supp. 25-3601.

Therefore, in order to determine the sufficiency of a petition seeking the recall of a local officer, consideration must be given to requirements set forth at K.S.A. 25-3601 et seq. and at K.S.A. 25-4318 to 25-4331. See K.S.A. 25-4304.

K.S.A. 1989 Supp. 25-4325 states that "[b]efore being filed, each petition shall be certified by an affidavit by the sponsor who personally circulated the petition." An affidavit is defined as being a written statement, under oath, sworn to or affirmed by the person making it before some person who has authority to administer an oath or affirmation. Halsey v. Pat Reichenberger Lumber, Inc., 5 Kan.App.2d 622, 623 (1981); State v. Knight, 219 Kan. 863, 867 (1976). Whether at common law or under statute, every affidavit has, aside from the body of the instrument, certain component parts which may be either proper or absolutely essential, according to the law of the particular jurisdiction; these parts are usually designated as the caption or title, the venue, the signature of the affiant, and the jurat. 3 Am.Jur.2d Affidavits § 12, 474 (1986).

The jurat is the certificate of the officer or person before whom a writing is sworn to, generally consisting of a clause written at the foot of an affidavit, stating when, where and before whom such affidavit was sworn. Black's Law Dictionary, 765 (1979). It is simply a certificate evidencing the fact that the affidavit was properly made before a duly authorized officer. 3 Am.Jur.2d, supra, § 16, 477. The jurat is evidence that an oath was duly administered, and in the absence of a jurat the fact may be proved by evidence aliunde. State v. Journey, 1 Kan.App.2d 150. 152 (1977); American Home Life Ins. Co. v. Heide, 199 Kan. 653, 655 (1967). [Evidence aliunde, is "evidence from outside, from another source. In certain cases a written instrument may be explained by evidence aliunde, that is, by evidence drawn from sources exterior to the instrument itself, e.g., the testimony of a witness to

conversations, admissions, or preliminary negotiations." Black's Law Dictionary 68 (1979).]

As stated above, an affidavit is a written statement, sworn to or affirmed by the person making it before some person who has authority to administer an oath or affirmation. Administering an oath or affirmation is included within the definition of a notarial act, K.S.A. 1989 Supp. 53-502, and may be performed by a notary public of this state. K.S.A. 1989 Supp. 53-504.

K.S.A. 1989 Supp. 53-508 states:

"(a) A notarial act must be evidenced by a certificate signed and dated by a notarial officer. The certificate must include identification of the jurisdiction in which the notarial act is performed and the title of the office of the notarial officer and may include the official stamp or seal of office. If the officer is a notary public, the certificate must also indicate the date of expiration, if any, of the commission of office, but omission of that information may subsequently be corrected. . . .

"(b) A certificate of a notarial act is sufficient if it meets the requirements of subsection (a) and it:

"(1) Is in the short form set forth in K.S.A. 1984 Supp. 53-509;

"(2) is in a form otherwise prescribed by the law of this state;

"(3) is in a form prescribed by the laws or regulations applicable in the place in which the notarial act was performed; or

"(4) sets forth the actions of the notarial officer and those are sufficient to meet the requirements of the designated notarial act." (Emphasis added.)

The petition you submit for our review contains the following statement:

"I, [name of sponsor], am a sponsor of the recall petition and the only circulator of this copy. The signatures contained were in my actual presence and to the best of my knowledge the signatures [sic] are those persons who they purport to be and I circulated this petition in accordance with K.S.A. 24-4201 [sic] to 24-4331. I, being duly sworn, on oath state that the statements of grounds for recall contained in the recall petition are true."

At the bottom of the statement, one signature line is provided. To the left of the signature line is the signature of the sponsor. The signature of a notary public followed by a notation stating "notary, Labette - Kansas - exp. 10-15-91" occupies the signature line. The stamp of the notary has been placed upon the petition; one complete stamp is under the sponsor's signature and an incomplete stamp is under the notary's signature.

This statement fails to constitute an affidavit as required by K.S.A. 1989 Supp. 25-4325 as the statement does not include a valid jurat or prove through evidence aliunde that an oath was duly administered. The jurat is invalid as it is not in one of the forms set forth in K.S.A. 1989 Supp. 53-508(b) nor does it contain the date of the notarial act as required under K.S.A. 1989 Supp. 53-508(a). While K.S.A. 1989 Supp. 53-508 recognizes that omission of the date of expiration of the commission of a notary public may subsequently be corrected, addition of the items necessary for this statement to constitute a valid jurat is not permissible as each petition must contain an affidavit before being filed. See K.S.A. 1989 Supp. 25-4325. Later or successive filings of documents relating to the same issue or proposition shall be deemed to be separate petitions and not a part of any earlier or later filing. K.S.A. 25-3602, as amended by L. 1990, ch. 129, § 2. Because the county election officer cannot determine the sufficiency of a petition until after it has been filed, K.S.A. 25-4326, the county election officer would not know that evidence aliunde is necessary to prove the existence of a valid jurat. The petition in question was filed with the county election officer on December 12, 1990. A valid jurat cannot now be added to the petition seeking the recall of a local officer.

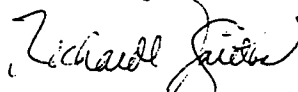
Because the petition lacks the affidavit required by K.S.A. 1989 Supp. 25-4325, the petition does not conform to the

requirements of K.S.A. 25-4301 et seq. and is insufficient. While this analysis does not answer all the questions you set forth for our consideration, the overriding issue regarding the sufficiency of a petition seeking the recall of a local officer is addressed. It is therefor unnecessary for us to address your remaining questions at this time.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Richard D. Smith  
Assistant Attorney General

RTS:JLM:RDS:jm