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ATTORNEY GENERAL OPINION NO. 92-81

The Honorable Eric R. Yost
State Senator, Thirtieth District
9132 Funston Ct.
Wichita, Kansas 67207

Re: Elections--Independent and Other Nomination Certificates; Terms of Office; Filling Vacancies--Independent Nominations; Requirements; Party Affiliation; Party Candidacy; Petitions

Synopsis: No person who has declared and retains a political party affiliation in accordance with K.S.A. 25-3301 is eligible to accept an independent nomination for office. A person who is affiliated with a political party may, 14 days prior to the primary election, change the person's party or voter affiliation. If the person timely changes to an unaffiliated status, the person may accept an independent nomination provided the independent nomination petitions are properly filed pursuant to K.S.A. 1991 Supp. 25-305, as amended by 1992 House Bill No. 3213. A person who files as a partisan candidate in the primary election and who maintains such candidacy may not file as an independent candidate in the general election immediately following. A person who has filed as a partisan candidate in a primary election may, after withdrawing such candidacy and timely changing to an unaffiliated status, file as an independent candidate in the general election.

The United States District Court for the district of Kansas has determined that K.S.A. 1991 Supp. 25-303, as amended by 1992 Senate Bill No. 789

requires only that signers of independent nomination petitions reside in the same county and election district of the office sought. This requirement does not restrict circulators to their home county and election district. The circulators may seek signatures anywhere in the state, but the signers must reside in the same county and election district as the circulators. While a qualified elector who is circulating an independent nomination petition is restricted to collecting signatures of those persons residing in that area intersected by the county and the election district in which the qualified elector resides, the candidate may collect signatures of persons residing anywhere within the election district. Cited herein: K.S.A. 1991 Supp. 25-202; 25-303, as amended by 1992 Senate Bill No. 789; 25-305, as amended by 1992 House Bill No. 3213; K.S.A. 25-3301; K.S.A. 1991 Supp. 25-3304; K.S.A. 25-303 (Ensley 1988); L. 1989, ch. 106, § 2; L. 1988, ch. 119, § 1.

* * *

Dear Senator Yost:

As senator for the thirtieth district, you request our opinion regarding interpretation of statutory provisions pertaining to independent nominations. Specifically, you ask:

1. Whether a person who has retained a party affiliation is prohibited from accepting nomination as an independent candidate for office;

2. Whether a person who has filed as a partisan candidate for office, the nomination for which is to be determined by a primary election, may withdraw such candidacy and then file as an independent candidate in the general election for that same office; and

3. Whether a circulator of an independent nomination petition is permitted to circulate the petition only in the county in which the circulator resides.

1. Effect of party affiliation on independent nomination --

K.S.A. 1991 Supp. 25-303, as amended by 1992 Senate Bill No. 789, provides in part:

> "(b) All nominations other than party nominations shall be independent nominations. No person who has declared and retains a party affiliation in accordance with K.S.A. 25-3301 and amendments thereto shall be eligible to accept an independent nomination for any office."

The fundamental rule of statutory construction is that the intent of the legislature governs when that intent can be ascertained from the statute. Brabander v. Western Cooperative Electric, 248 Kan. 914, 916 (1991). When a statute is plain and unambiguous the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. State v. Coley, 236 Kan. 672, 675 (1985). K.S.A. 1991 Supp. 25-303, as amended, clearly prohibits a person who has declared and retains a party affiliation from accepting an independent nomination.

> "(b) Any person, who, having declared a party or voter affiliation, desires to change the same, may file a written declaration with the county election officer, stating the change of party or voter affiliation. Such declaration shall be filed not less than 14 days prior to the date of any national, state, county or township primary election. The county election officer shall enter a record of such change on the party or voter affiliation list of such preceding primary election in the proper column opposite the voter's name." K.S.A. 1991 Supp. 25-3304 (emphasis added).

Therefore, a person who has declared a party or voter affiliation may file as an independent candidate for office if he or she changes his or her affiliation at least 14 days prior to the primary election. Failure to do so will result in an inability on the part of the person to accept an independent nomination.

2. Effect of party candidacy on independent nomination --

Recognizing that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes," Storer v. Brown, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974), the United States Supreme Court has provided that the mere fact that a state's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny." Bullock v. Carter, 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972).

> "Instead, as the full court agreed in Anderson, [460 U.S.] at 788-789; [McDonald, 394 U.S.] at 808, 817 (Rehnquist, J., dissenting), a more flexible standard applies. A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the state as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.' Id. at 789; Tashjian, [479 U.S.] at 213-214.
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> "Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' Norman v. Reed, 502 U.S. ____, ____ (1992). But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to

> justify' the restrictions. Anderson, supra, at 788; see also id., at 788-789, n. 9." Burdick v. Takushi, 60 U.S.L.W. 4459, 4461 (U.S. June 9, 1992).

After acknowledging that this standard provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the equal protection clause, the United States Supreme Court in Storer v. Brown, supra, upheld as constitutional California election laws which forbid ballot position to an independent candidate for elective public office if that person voted in the immediately preceding primary election or if the person had a registered affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election. The court determined that "[t]he requirement that the independent candidate not have been affiliated with a political party for a year before the primary is expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot." Id. at 733, 93 S.Ct. at 1281. Although the restrictions addressed in Storer directly impact on the candidate rather than the voter, the court recognized that the state's interests supporting the restrictions are very similar to the state's interests recognized in Rosario v Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973). In Rosario, the court upheld a New York law requiring that to vote in a party primary the voter must have registered as a party member 30 days prior to the previous general election, a date eleven months prior to the non-presidential primary. A similar Illinois provision requiring party registration 23 months prior to the primary date was struck down in Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973). The United States Court of Appeals for the Tenth District, acknowledging that "[c]andidacy itself is not a fundamental right which is comparable to the right to vote," Thournir v. Meyer, 909 F.2d 408, 412 (10th Cir. 1990), upheld Colorado's one-year disaffiliation requirement for filing as an independent candidate for office.

K.S.A. 1991 Supp. 25-202(c) provides:

> "No candidate for any national, state, county or township office shall file for office as a partisan candidate in a primary election and also file for office as an independent candidate for any

> national, state, county or township office in the general election immediately following."

The interpretation of a statute is a matter of law and it is the function of the court to interpret the statute to give it the effect intended by the legislature. Brabander, 248 Kan. at 917. In determining legislative intent, courts are not limited to a mere consideration of the language employed but may properly look into the historical background of the enactment, the circumstances attending and subsequent to its passage, the purposes to be accomplished and the effect the statute may have under the various constructions suggested. Workers Compensation Fund v. Silicon Distributing, Inc., 248 Kan. 551, 558 (1991). When a statute is susceptible of more than one construction, it should be given the construction which, when considered in its entirety, gives expression to its intent and purpose, even though such construction is not within the strict literal interpretation of the statute. State v. Micheaux, 242 Kan. 192, 199 (1987).

L. 1989, ch. 106, § 2 (1989 House Bill No. 2393) which contained the provision cited above, was proposed after several potential candidates had inquired at the secretary of state's office about filing for office as a partisan candidate for the primary election and again as an independent candidate for the general election, thereby guaranteeing a place on the general election ballot. Minutes, House Committee on Elections, February 21, 1989, attachment IV; Minutes, Senate Committee on Elections, March 27, 1989. The provisions of 1989 House Bill No. 2393 were to prevent such dual filings, id., and maintain the integrity of the various routes to the ballot. The legislative intent of K.S.A. 1991 Supp. 25-202(c) is to prohibit a person who has filed as a partisan candidate in a primary election and who maintains such candidacy from filing as an independent candidate in the general election immediately following.

This interpretation of K.S.A. 1991 Supp. 25-202(c) is further supported by the fact that a literal interpretation of the statute could result in an unconstitutional restriction. An example of the inequity is that, under a literal interpretation, a person who filed one day following the general election held in November, 1990, as a partisan candidate for governor, and then withdrew such candidacy and changed his party affiliation pursuant to K.S.A. 1991 Supp. 25-3304 to independent status in that same month, would be precluded from filing as an independent candidate for governor

in a general election, to be conducted in November, 1994. However, a person who remains an active member of a political party but who did not file as a partisan candidate in the primary election would be permitted to change his party affiliation fourteen days prior to the primary election to be conducted in August, 1994, and file as an independent candidate for that office in the election to be conducted in November, 1994. (The independent nomination petition would need to filed prior to 12:00 noon on the Monday preceding the first Tuesday of August preceding the general election. K.S.A. 1991 Supp. 25-305, as amended by 1992 House Bill No. 3213.) Therefore, a person who has been an independent voter for about four years would not be permitted to accept an independent nomination while another person who has been disaffiliated for a period of only a few weeks would be permitted to accept the independent nomination. If the literal interpretation of the statute was followed, it would be difficult to accept that such an arrangement was an essential instrument for maintaining the integrity of the various routes to the ballot, and the provision would meet the same fate as that provision reviewed in Kusper. Given the court's obligation in interpreting statutes, it is our opinion that the legislature in enacting K.S.A. 1991 Supp. 25-303(c), as amended, intended to preclude a person who had filed as a partisan candidate in a primary election and who maintains such candidacy from filing as an independent candidate in the general election immediately following.

3. Circulation of independent nomination petitions --

Subsection (e) of K.S.A. 1991 Supp. 25-303, as amended, provides:

> "The signatures to such nomination petitions need not all be appended to one paper, but each registered voter signing an independent certificate of nomination shall add to the signature such petitioner's place of residence and post office address. All signers of each separate nomination petition shall reside in the same county and election district of the office sought. The affidavit of a qualified elector who resides in such county and election district or of the candidate shall be appended to each petition and shall contain at the end of each set of documents carried by each

> circulator, a verification, signed by the circulator, to the effect that such circulator personally witnessed the signing of the petition by such person whose name appears thereon. The person making such affidavit shall be duly registered to vote."

Prior to March 24, 1988, circulators and signers of independent nomination petitions were required to reside within the same precinct. However, due to concerns regarding the constitutionality of such provision, the legislature enacted 1988 Senate Bill No. 501, L. 1988, ch. 119, § 1. Minutes, Senate Committee on Elections, January 20, 1988; Minutes, House Committee on Elections, February 18, 1988. "Several sections of S.B. 501 address [the 'precinct rule'] and change the precinct requirements to county or district wide requirements." Testimony of Danton B. Rice, House Committee on Elections, February 18, 1988. In determining that the above cited provision is constitutional, the United States District Court for the district of Kansas stated in Merritt v. Graves, 702 F.Supp. 828 (D. Kan. 1988) that:

> "Plaintiffs believe that the county of residence requirement restricts circulators to obtaining signatures only in the county or election district where they reside. This interpretation is incorrect and is not mandated by the language of the statute. K.S.A. 25-303 requires only that signers of nominating petitions shall reside in the same county and election district of the office sought. This requirement does not restrict circulators to their home county and election district. The circulator may seek signatures anywhere in the state, but the signers must reside in the same county and election district as the circulators. This distinction is critical since we are considering the burdens placed on the plaintiffs by this legislation. Thus, the statute does not preclude the plaintiffs from obtaining signatures at the state fair, at shopping malls, or at other places where there are large gatherings." Merritt, 702 F.Supp. at 833 (emphasis added).

Where a statute has been construed by the highest court having jurisdiction to pass on it, such constructions are as much a part of the statute as was written into it originally. Early Detection Center, Inc. v. Wilson, 248 Kan. 869, 874 (1991). All statutes are presumed to be enacted with full knowledge of the existing condition of the law and with reference to it. Id. Although the form of K.S.A. 25-303 (Ensley 1988) has been modified since the court's determination in Merritt, the provision interpreted in Merritt has remained substantively unchanged. The legislature has adopted the court's interpretation of the provision as its own. Therefore, pursuant to K.S.A. 1991 Supp. 25-303, as amended, a circulator of an independent nomination petition may circulate the petition in areas outside the county and the election district in which the circulator resides. However, those persons signing the petition must reside in both the same county and election district as does the circulator for the signatures to be valid.

K.S.A. 1991 Supp. 25-303, as amended, permits either a qualified elector who resides in the county and the election district of the office sought or the candidate to sign the affidavit that must be appended to each petition. In construing statutes, the legislative intent must be determined from a general consideration of the entire act. State ex rel Stephan v. Kansas Racing Comm'n, 246 Kan. 708, 719 (1990). If possible, effect must be given to all provisions of the act, and different provisions must be reconciled in a way that makes them consistent, harmonious, and sensible. Id. In construing statutes, qualifying words, phrases and clauses are ordinarily confined to the last antecedent, or to the words and phrases immediately preceding. Ruthrauff, Administratrix v. Kensinger, 214 Kan. 185, 190 (1974). The last antecedent, within the meaning of this rule, has been regarded as the last word or clause which can be made an antecedent without impairing the meaning of the sentence. Id. at 190-91.

The statute specifically provides that "[t]he affidavit of a qualified elector who resides in such county and election district or of the candidate" is to be appended to each petition. The qualification regarding residence in the same county and election district as the office sought, through its placement in the statute, is to apply only to the qualified elector who is circulating a petition, not to the candidate who is circulating a petition. The qualified elector may collect signatures of persons residing within the same county and election district, which restricts the qualified elector

to collecting signatures of persons residing within that area intersected by the county and the election district in which the circulator resides. The legislature did not intend for this restriction to apply to a petition being circulated by the candidate. Because the restriction appears in the statute prior to the term authorizing the candidate to collect signatures, the restriction does not apply to those signatures collected by the candidate. Therefore, while a qualified elector is restricted to collecting signatures of those persons residing in that area intersected by the county and the election district in which the qualified elector resides, the candidate may collect signatures of persons residing anywhere within the election district.

In review, no person who has declared and retains a political party affiliation in accordance with K.S.A. 25-3301 is eligible to accept an independent nomination for office. A person who is affiliated with a political party may, 14 days prior to the primary election, change the person's party or voter affiliation. If the person timely changes to an unaffiliated status, the person may accept an independent nomination provided the independent nomination petitions are properly filed pursuant to K.S.A. 1991 Supp. 25-305, as amended. A person who files as a partisan candidate in the primary election and who maintains such candidacy may not file as an independent candidate in the general election immediately following. A person who has filed as a partisan candidate in a primary election may, after withdrawing such candidacy and timely changing to an unaffiliated status, file as an independent candidate in the general election. The United States District Court for the district of Kansas has determined that K.S.A. 1991 Supp. 25-303, as amended, requires only that signers of independent nomination petitions reside in the same county and election district of the office sought. This requirement does not restrict circulators to their home county and election district. The circulators may seek signatures anywhere in the state, but the signers must reside in the same county and election district as the circulators. While a qualified elector who is circulating an independent nomination petition is restricted to collecting signatures of those persons residing in that area intersected by the county and the election district in which the qualified elector

resides, the candidate may collect signatures of persons residing anywhere within the election district.

Very truly yours,

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