STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

April 17, 1986

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

ATTORNEY GENERAL OPINION NO. 86- 55

Theodore J. Nichols
Harper County Attorney
119 West Main Street
P.O. Box 35
Harper, Kansas 67058-0035

Re: Counties and County Officers -- Clerk of District Court -- Exemption from Limitations Imposed by County Home Rule Powers

Synopsis: A county may not exempt itself by charter resolution from limitations imposed by K.S.A. 1985 Supp. 19-1322, subsection (a), which establishes limits on the tax the clerk of the district court shall impose as a filing fee for the benefit of the county law library. Such resolution would violate the limitation placed on the home rule powers a county is authorized to exercise under K.S.A. 1985 Supp. 19-101a, subsection (a)(3), that "counties may not affect the courts located therein." Cited herein: K.S.A. 19-101; K.S.A. 1985 Supp. 19-101a; K.S.A. 19-1310; K.S.A. 1985 Supp. 19-1322; K.S.A. 20-101; Kan. Const., Art. 3, §1; Art. 12, §5.

* * *

Dear Mr. Nichols:

As County Attorney for Harper County, you request our opinion on several questions concerning the home rule powers of a county. You first inquire whether K.S.A. 1985 Supp. 19-1322 is an act non-uniform in its application to all counties, and whether any entity other than a county or a city is granted home rule powers. K.S.A. 1985 Supp. 19-1322 is not

uniformly applicable to all counties, in that the statute makes special provisions for the clerks of the district courts in Sedgwick and Wyandotte Counties. Further, home rule powers are granted to counties and cities only: the home rule powers of a county are derived from the legislature (K.S.A. 1985 Supp. 19-101a), while the home rule powers of a city are derived from the Home Rule Amendment to the Kansas Constitution (Kan. Const., Art. 12, §5).

You next inquire whether a county may exempt itself by charter resolution from limitations imposed by K.S.A. 1985 Supp. 19-1322, subsection (a), which establishes limits on the tax the clerk of the district court shall impose as a filing fee for the benefit of the county law library. Further, you ask whether such a resolution would violate the limitation placed on the home rule powers a county is authorized to exercise under K.S.A. 1985 Supp. 19-101a, subsection (a)(3), that "counties may not affect the courts located therein."

K.S.A. 1985 Supp. 19-1322(a) states:

> "Except as provided in subsection (b), <u>the clerk of the district court</u> shall tax in all cases commenced pursuant to chapter 60 of the Kansas Statutes Annotated and in all felony criminal cases a library fee of not less than $2 or more than $5 and shall tax in all other cases a library fee of not less than $.50 or more than $4, for the benefit and account of the law library in the county." (Emphasis added.)

The statute goes on at subsection (b) to provide:

> "The clerks of the district courts in Sedgwick and Wyandotte counties shall tax in all cases commenced pursuant to chapter 60 of the Kansas Statutes Annotated and in all felony criminal cases a library fee of not less than $2 or more than $8 and shall tax in all other cases a library fee of not less than $.50 or more than $5 for the benefit and account of the law library in the county."

You inform us that additional funds are deemed necessary by the board of trustees of the Harper County law library, in

order to purchase equipment and materials for the library. Thus, the board of trustees has attempted to exempt Harper County from limitations set by K.S.A. 1985 Supp. 19-1322, subsection (a), and bring the county within the limitations set forth by subsection (b) of that statute.

In order to determine whether a county is empowered to opt out from under a state statute, it is necessary to examine the general provisions which govern the home rule powers of counties, as contained in K.S.A. 19-101 et seq. K.S.A. 19-101 covers the general powers which are granted by statute to a county as a public corporation. As provided in K.S.A. 19-101, a county is authorized to exercise the home rule powers to determine its local affairs and government, as authorized under the provisions of K.S.A. 19-101a. K.S.A. 1985 Supp. 19-101a, subsection (a), provides:

> "The board of county commissioners may transact all county business and perform all powers of local legislation and administration it deems appropriate, subject only to the following limitations, restrictions or prohibitions:
>
> . . . .
>
> "(3) Counties may not affect the courts located therein." (Emphasis added.)

Among the 20 limitations, restrictions and prohibitions mentioned, only this one appears to be applicable to the case at hand. As noted earlier, the home rule powers of a county, as provided in K.S.A. 1985 Supp. 19-101a, are derived from the legislature, not from the Kansas Constitution. Thus, they are subject to the specific statutory limitation and restriction that a county may not affect the courts located therein. Accordingly, we must determine whether the maintenance of the law library pertains to the government and affairs of Harper County and is a home rule function, or alternatively, whether its management is a matter of statewide concern and is a judicial function under our unified court system, as provided in Article 3, §1 of the Kansas Constitution.

We have found no Attorney General opinions which address whether it is the state or the local government which has the ultimate responsibility for a law library located within a county, the management of which is vested in the district judges and representatives of the bar. However, several

recent court cases are helpful in examining this issue. In Board of Sedgwick County Commr's. v. Noone, 235 Kan. 777 (1984), the Kansas Supreme Court addressed the issue of whether any statutory authority exists by which Sedgwick County could require the Clerk of the Eighteenth Judicial District, who is a state officer, to turn over moneys generated by county traffic resolutions to the county treasurer. The attorney general, on behalf of the defendants, took the position that no such statutory authority exists, and that the clerk of the district court is bound by the clear and unequivocal provisions of the statutes in the handling of public moneys. The Supreme Court agreed, stating:

> "It cannot be denied that the clerk of the court is a ministerial officer and is bound by statutes in the performance of his or her official duties involving the handling of public moneys. Cook v. City of Topeka, 232 Kan. 334 (1982)."

The court went on to explain:

> "Under K.S.A. 1983 Supp. 19-101a, the home rule powers of a county are derived from the legislature, not from the Kansas Constitution. They are subject to the specific statutory limitation and restriction that a county may not affect the courts located therein. A county under its home rule powers, does not have the authority to control the official acts of a clerk of the district court." (Emphasis added.)

The court concluded that the attorney general was correct in his argument that the clerk of the District Court, as a state officer, was bound by statutory provisions to remit the fines, penalties and forfeitures generated by county traffic regulations to the state treasurer. Board of Sedgwick County Commr's., 235 Kan. at 784. Clearly, the county's home rule powers did not authorize it to exercise control over matters which did not pertain to the county's own affairs.

In Brewster v. City of Overland Park, 233 Kan. 390 (1983), the issue was whether a city could, under authority of the Home Rule Amendment to the Kansas Constitution (Kan. Const., Art. 12, §5), opt out from under K.S.A. 19-1310, which exempts attorneys registered for county law library purposes from

payment of any occupation tax or city license fee. In discussing whether the cities could exempt themselves from the statute, the court noted that the county law library statutes are located in Article 13 of Chapter 19, which concerns the functions of the clerk of the district court. The court went on to state:

> "The clerk has charge of the election, registration, and fees paid by attorneys as well as deducting the appropriate docket fees for the library's maintenance. Management of the library is vested in the district judges and representatives of the bar. The county law library is only peripherally a governmental function, although the county commission is required to provide space therefor or pay a sum in lieu thereof." Brewster, 233 Kan. at 392. (Emphasis added.)

The court concluded that K.S.A. 19-1310 does not meet the threshold requirement of the Home Rule Amendment that an enactment from which a city wishes to exempt itself from be applicable to cities. Brewster, 233 Kan. at 393. Likewise, it is our opinion that K.S.A. 1985 Supp. 19-1322, subsection (a), does not meet the threshold requirement of K.S.A. 1985 Supp. 19-101a that an enactment from which a county wishes to exempt itself be applicable to counties. We reach this result because of the specific limitation contained in subsection (a)(3) that counties may not affect the courts located therein.

In Ampersand, Inc. v. Finley, 61 Ill. 2d 537 (1975), the Supreme Court of Illinois decided the identical question this opinion examines. In that case, plaintiff brought suit challenging the constitutionality of a Cook County ordinance which directed the clerk of the circuit court to collect a county law library fee of $2 to be paid at the time of the filing of the first pleading or other appearance by each party in all civil cases. The ordinance purported to supersede "[a]n Act in relation to the establishment, maintenance and operation of county law libraries," (Ill. Rev. Stat. 1973, ch. 81, par. 81), by increasing the amount of the filing fee from $1 to $2. Similarly, Harper County has attempted to pass a charter resolution which would supersede the limitations of K.S.A. 1985 Supp. 19-1322, subsection (a), and bring the

county within the limitations of subsection (b) of that statute.

In Ampersand, the defendants contended that the ordinance was a valid exercise of the home rule authority which Cook County possessed under section 6(a) of Article VII of the 1970 Illinois Constitution. The grant of power to a home rule unit as found in that section of the 1970 Constitution provides in part:

> "Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt."

The defendants argued that the filing fee was a tax and because it was for the purpose of supporting a county law library which the county was authorized by statute (Ill. Rev. Stat. 1973, ch. 81, par. 81) to maintain, the tax related to the government and affairs of Cook County. Ampersand, 61 Ill. 2d at 541.

Alternatively, the plaintiff assumed that the maintenance of the law library pertained to the government and affairs of Cook County and was a home rule function. However, plaintiff also contended that a home rule unit has no authority to impose a filing fee as a condition precedent to a litigant's right of access to the courts of Illinois. Ampersand, 61 Ill. 2d at 541. Plaintiff claimed that the administration of justice was not a function of the local governmental unit wherein the court was located, but rather was a matter of statewide concern under article VI of the Constitution of 1970.

In comparing the Illinois case to the case at hand, we feel it is important to note the similarities in the Kansas and Illinois court systems. Although the home rule powers of a county in Kansas are derived from the legislature (K.S.A. 1985 Supp. 19-101a), while the home rule powers of a county in Illinois are derived from the constitution [Ill. Const., Art. VII, §6(a)], both states offer similar guidance on the manner in which the powers of home rule are to be construed. K.S.A. 19-101c provides, in substance, that a county's home rule powers shall be liberally construed for the purpose of

giving to counties the largest measure of self-government. Likewise, section 6(m) of article VII of the Illinois Constitution states that "powers and functions of home rule units shall be construed liberally." However, the Illinois court emphasized that:

> "[S]uch powers are not absolute, and in construing the ordinance we must also consider that, as stated by the local government committee, 'the powers of home rule units relate to their own problems, not to those of the state or the nation.' (7 Proceedings 1621.)" Ampersand, 61 Ill. 2nd at 542.

We concur with the Illinois Supreme Court's reasoning that a county's authority to exercise its home rule powers must be limited to its local affairs. Thus, although we are aware of the liberal construction mandate contained in K.S.A. 19-101c, we are of the opinion that a home rule ordinance should be struck down if it does not pertain to the local affairs and government as authorized under the provisions of K.S.A. 1985 Supp. 19-101a.

Both Illinois and Kansas function under a unified court system. Under Article 3, §1 of the Kansas Constitution, and K.S.A. 20-101, the Supreme Court of Kansas has general administrative authority over all courts in Kansas. Similarly, under Article VI of the Illinois Constitution, only one unified court system operates statewide. In discussing the authority of a home rule unit to exercise power over the Illinois court system, the Ampersand court said:

> "Article VI of the 1970 Constitution does not contemplate nor does it authorize the exercise of any control over or permit the imposition of a burden on the judicial system by any local entity.
>
> "The administration of justice under our constitution is a matter of statewide concern and does not pertain to local government or affairs."

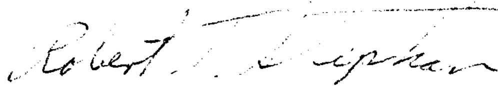
The court went on to emphasize that, as explained by the local government committee, the powers of a home rule unit relate only to its own affairs and not to those of the state. Thus, the court concluded that the ordinance imposing the filing fee

was invalid, as the county had overstepped the boundaries of its home rule powers by attempting to pass an ordinance affecting the affairs of the state. Ampersand, 61 Ill. 2d at 542-43. The charge of the fee, whether characterized as a tax or otherwise, as a condition to the right to litigate in the courts, was a burden which could not be imposed by a home rule unit. Ampersand, 61 Ill. 2d at 543.

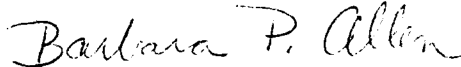
We concur with the Illinois Supreme Court's decision to invalidate the Cook County ordinance as an unauthorized exercise of a county's home rule powers. In the same manner, we find Harper County's attempt to pass a resolution affecting the court system in Kansas to be outside the scope of that county's home rule powers, and conclude that the resolution is invalid.

In summary, it is our opinion that Harper County may not exempt itself by charter resolution from limitations imposed by K.S.A. 1985 Supp. 19-1322, subsection (a), which establishes limits on the tax the clerk of the district court shall impose as a filing fee for the benefit of the county law library. Such resolution would violate the limitation placed on the home rule powers a county is authorized to exercise under K.S.A. 1985 Supp. 19-101a, subsection (a)(3), that "counties may not affect the courts located therein."

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Barbara P. Allen
Assistant Attorney General

RTS:JLM:BPA:crw