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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2020-CV-000469

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

JULIA LYNN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 2020-CV-000469**
	)	
SCOTT SCHWAB, in his official capacity as the Secretary of State for the State of Kansas,	)	
	)	
	)	
Respondent.	)	
	)	

Filed Pursuant to K.S.A. Chapter 60

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF KANSAS ATTORNEY GENERAL DEREK SCHMIDT IN SUPPORT OF NEITHER PARTY

Kansas Attorney General Derek Schmidt, by and through counsel, respectfully moves the Court to allow him to participate as *amicus curiae* and to file the attached brief in the above-captioned action in support of neither party. In an effort to be of assistance to the Court, the Attorney General will offer what he believes to be the applicable law in situations such as the instant matter, including authorities presented to the Court by neither party. In support of this motion, the Attorney General states as follows:

1. Kansas Attorney General Derek Schmidt is a constitutional officer and has the statutory and common law authority to represent the State of Kansas in litigation. *See* Kan. Const. Art. 1, § 1; K.S.A. 75-702. The Attorney General is authorized to represent the State in cases such as this to provide that the State's interests are protected through the proper interpretation of the law.

2. This case involves an issue of substantial public interest arising out of the interpretation and application of K.S.A. 2019 Supp. 25-306b concerning whether and when a nomination may be withdrawn and when an omission of the name of the nominee on an official ballot in the general election is permitted. The State has an interest in ensuring the correct and uniform interpretation of the statute.

3. This is a matter of state-wide importance and urgency. Pursuant to the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C.A. § 20302, the State is required to transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter not later than 45 days before the election. As applied to the upcoming 2020 general election, this deadline is September 19, 2020. Consequently, timely appellate review of any decision of this Court may prove difficult.

4. The Attorney General seeks leave to address the following two issues that are before the Court:

> i) Whether a certification of severe medical hardship is "signed by a medical doctor" as required in K.S.A. 2019 Supp. 25-306b if the doctor's name is affixed to the certification at the direction of and on behalf of the medical doctor but not by the doctor's own hand; and
>
> ii) Whether substantial compliance with the statutory requirement for timely certification by a medical doctor satisfies K.S.A. 2019 Supp. 25-306b.

5. The Attorney General requests to file the amicus brief attached hereto as Exhibit A for consideration by and for the assistance of the Court. The Attorney General does not seek to participate in oral argument.

WHEREFORE, the Attorney General respectfully requests that this motion be granted and the Court accept for filing *instanter* the attached amicus brief.

Respectfully Submitted,

OFFICE OF THE ATTORNEY GENERAL
DEREK SCHMIDT

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CERTIFICATE OF SERVICE

I hereby certify that notice was sent via the electronic filing system to all parties electronically registered with the Court on the date indicated by the electronic file stamp.

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EXHIBIT A

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

JULIA LYNN,	)	
	)	
Petitioner,	)	
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v.	)	**Case No. 2020-CV-000469**
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SCOTT SCHWAB, in his official capacity as the Secretary of State for the State of Kansas,	)	
	)	
Respondent.	)	
	)	

Filed Pursuant to K.S.A. Chapter 60

BRIEF *AMICUS CURIAE* OF
KANSAS ATTORNEY GENERAL DEREK SCHMIDT
IN SUPPORT OF NEITHER PARTY

Kansas Attorney General Derek Schmidt submits the following arguments and authorities as *amicus curiae* to assist the court in determining the law applicable to this case, and in support of neither party. As the State's chief legal officer, the Attorney General is authorized to represent the State in cases such as this to provide that the State's interests are protected through the proper interpretation of the law.

This case involves an issue of substantial public interest arising out of the interpretation and application of K.S.A. 2019 Supp. 25-306b, concerning whether and when a nomination may be withdrawn and when an omission of the name of the nominee on an official ballot in the general election is permitted. Because of the compressed timeline for preparing, printing and distributing ballots for the November general election, any appeal of this court's decision may be impractical; consequently, the State has a particular interest in assisting this court in interpreting the applicable statute in the first instance.

I. STATEMENT OF THE ISSUES

1. **Whether a certification of severe medical hardship is "signed by a medical doctor" as required in K.S.A. 2019 Supp. 25-306b if the doctor's name is affixed to the certification at the direction of and on behalf of the doctor but not by the doctor's own hand.**

2. **Whether substantial compliance with the statutory requirement for timely certification by a medical doctor satisfies K.S.A. 2019 Supp. 25-306b.**

II. NATURE OF THE CASE AND STATEMENT OF FACTS

For the purposes of this amicus brief, the Attorney General adopts Petitioner's introduction and factual summary in the Petitioner's Memorandum of Law in Support of Petition for Writ of Mandamus as the nature of the case and statement of facts. The Attorney General has no independent knowledge of, and has not attempted to confirm, the accuracy or completeness of those facts, but rather adopts them for the limited purpose of enabling the Attorney General to set forth what he believes to be the law applicable to this case.

The dispositive question for the court in this case is whether the doctor's certification of severe medical hardship that was submitted in this case was "signed by a medical doctor" within the meaning of K.S.A.25-306b(b)(1)(A). That statute provides, in pertinent part:

> (a) Except as provided by this section, no person who has been nominated by any means for any national, state, county or township office may be withdrawn from nomination after the day of the primary election.
>
> (b) (1) A person who has been nominated by any means for any national, state, county or township office may be withdrawn from nomination if:
>
> (A) The nominee certifies to the secretary of state that such nominee is withdrawing from nomination because of a severe medical hardship on the nominee or the nominee's immediate family. Such nominee shall send the secretary a certification of the severe medical hardship signed by a medical doctor; or . . . .

It appears that all requirements of the statute except the disputed signature have been satisfied. In general, the parties do not dispute that the name of a medical doctor appeared typewritten on the certification accompanied by the handwritten signature of a licensed practical nurse, but not by the handwritten signature of the doctor himself. Apparently, the doctor intended to sign the certification and instructed the nurse to affix to it a signature on behalf of the doctor; and the nurse intended to carry out the doctor's instruction by affixing a signature in this manner.

The principal position of petitioner, Senator Julia Lynn, is that the certification was "signed by a medical doctor" because the affixed signature was an electronic signature that complied with the Uniform Electronic Transactions Act, K.S.A. 16-1601 et seq. The position of respondent, Secretary of State Scott Schwab, is that the certification was not "signed by a medical doctor" because it did not bear a signature affixed by the doctor's hand but instead bore the doctor's typewritten name and the handwritten signature of a licensed practical nurse.

The Attorney General suggests to the court two alternative legal reasons, not briefed by the parties, why Kansas law may recognize a certification with a signature affixed in this manner as having been "signed by a medical doctor." First, the Kansas Healing Arts Act, K.S.A. 65-2801 et seq., may authorize a doctor to delegate to a nurse legal authority to sign on the doctor's behalf. Second, the common law rule of amanuensis may permit a nurse to carry out a doctor's instruction to perform the mechanical act of affixing his signature to a legal instrument.

In addition, the Attorney General suggests that the totality of circumstances in a case such as this may indicate substantial compliance with the statute, which may be sufficient to satisfy the statute's requirement.

III. ARGUMENT AND AUTHORITIES

1. Whether a certification of severe medical hardship is "signed by a medical doctor" as required in K.S.A. 2019 Supp. 25-306b if the doctor's name is affixed to the certification at the direction of and on behalf of the medical doctor but not by the doctor's own hand.

The Attorney General suggests to the court that Kansas law may recognize the medical doctor's certification required by K.S.A. 25-306b((b)(1)(A) as having been "signed by" the doctor under either of two legal theories not otherwise briefed by the parties. Each is set forth below.

A. The Kansas Healing Arts Act, K.S.A. 65-2801, et seq., may authorize a doctor to delegate to a nurse legal authority to sign on the doctor's behalf.

K.S.A. 65-28,127(a) authorizes a licensed medical doctor to "delegate[] acts which constitute the practice of the healing arts to other persons" provided that six statutory requirements are satisfied. Two of those requirements appear in need of assessment here, namely that a medical doctor may "direct" or "delegate to" other persons such "acts and functions" that (1) can be competently performed by such person and are not in violation of any other statute or regulation, K.S.A. 65-28,127(a)(3), and (2) are "within the normal and customary specialty, competence and lawful practice" of the delegating medical doctor, K.S.A. 65-28,127(a)(4). Thus, as pertinent in this case, a medical doctor may direct or delegate to a licensed practical nurse the act or function of signing a certification required by K.S.A. 25-306b(b)(1)(A) provided that: (1) the nurse can "competently perform" such signing, (2) such direction or delegation is not "in violation of any other statute or regulation," (3) such signing was "within the normal and customary specialty, competence and lawful practice" of the delegating medical doctor, and (4) the act or function of such signing constituted the practice of the healing arts. Requirement (1) is a factual determination but does not appear to be disputed in this case. Requirement (2) is a legal determination. The Attorney General is not aware of any other statute or regulation that would be violated by a medical doctor's direction or delegation to a nurse to sign the certification. The plain language of

K.S.A. 25-306b(b)(1)(A) contains no such limitation and is, at most, silent on how the direction or delegation authorized by the Kansas Healing Arts Act applies. Requirement (3) is a factual determination but does not appear to be disputed in this case. Requirement (4) presents the question whether the signing of a doctor's certification under K.S.A. 25-306b(1)(A) constitutes the practice of the healing arts. The "healing arts include any system ... or practice for the ascertainment ... of any human disease, ailment ... and includes specifically, but not by way of limitation, the practice of medicine..." K.S.A. 65-2802(a). In order to certify a severe medical hardship as required by K.S.A. 25-306b(1)(A), a medical doctor must first determine the existence of such hardship. That determination would appear to necessitate the "ascertainment ... of any human disease" and, consequently, would constitute the practice of healing arts.

B. The common-law rule of amanuensis may permit a nurse to carry out a doctor's instruction to perform the mechanical act of affixing his signature to a legal instrument.

Whether or not a medical doctor may as a matter of law direct or delegate to a licensed practical nurse authority to sign a doctor's certification required by K.S.A. 25-306b(1)(A), or if a doctor as a matter of fact has not done so, Kansas law still may recognize a signature such as the one in dispute in this case as legally valid under the common law rule of amanuensis. Long-recognized by Kansas courts, *see e.g. Treadway v. Ryan*, 3 Kan. 437 (1866) (acknowledging the rule), our Court of Appeals has explained as recently as June that "A person's signature may take many forms. Caselaw and statutes have recognized that a person may affix his or her signature ... by having an amanuensis sign in a person's stead. Regardless of the form used, courts have emphasized that it is the person's intent in signing – to communicate and memorialize his or her authorization or agreement – that matters." *Brungardt v. Kansas Department of Revenue*, 468 P.3d 791, 793 (2020). Courts recognize amanuensis because "'signing' is broader than the physical act of handwriting a person's name." *Id.*

The principal case explaining this common law rule was decided by our Supreme Court one year ago this month. Our Supreme Court explained that an "amanuensis is one who takes dictation or who writes down what another has dictated." *Matter of Estate of Moore*, 310 Kan. 557, 562 (2019) (citation omitted). In particular, "[w]here a person's name is signed for him at his direction and in his presence by another,[1] the signature becomes his own, and is sufficient to give the same validity to an instrument as though written by the person himself." *Id.* Our Supreme Court proceeded to describe the "rich history in Kansas" of this rule and then explained that even if a particular statute "does not expressly allow signature by another, [ ] this does not defeat permitting a directed signature by an amanuensis" and further that the "common law on amanuensis requires only direction and understanding on the part of the principal; it does not require inability to sign." *Id.* at 562-564. In determining whether a person affixing a signature for another is acting as an amanuensis, Kansas courts require proof by clear and convincing evidence that the amanuensis is merely performing "a mechanical act" on behalf of the principal and "did not exercise independent judgment." *Id.* at 565-566. These are questions of fact to be determined by the court.

The Attorney General is not aware of Kansas cases applying an amanuensis theory to a nurse signing a legal instrument at the direction of a medical doctor. But Kansas courts have recognized amanuensis analysis in the context of, *inter alia*, license suspensions, *Brungardt*; estate disputes, *Matter of Estate of Moore*; murder prosecutions, *State v. Uhls*, 121 Kan. 587 (1926); insurance disputes, *Filley v. Illinois Life Ins.* Co., 93 Kan. 193 (1914); and even operations of the

[1] Courts in other states have not uniformly required the signature of an amanuensis to be accomplished in the presence of the principal, see *Estate of Stephens*, 28 Cal. 4th 665,676, 49 P.3d 1093,1099 (2002), and that was not at issue in the dispute our Supreme Court decided in *Matter of Estate of Moore*. Therefore, it is possible that the in-the-presence-of-another requirement is dicta rather than a binding holding. Even if the requirement is binding, whether the nurse in this case signed in the presence of the medical doctor is a factual question for this court to determine.

courts themselves, *Chicago, Kan. & Western R.R. v. Abilene Town-Site Co.*, 42 Kan. 97 (1889). We see no logical reason to preclude the rule's application here.

2. Whether substantial compliance with the statutory requirement for timely certification by a medical doctor satisfies K.S.A. 2019 Supp. 25-306b.

The Petitioner alternatively claims that "substantial compliance" saves her attempted withdrawal. In support Petitioner points to the general rule that "[a] substantial compliance with the law regulating the conduct of elections is sufficient, and when the election has been held and the will of the electors has been manifested thereby, the election should be upheld even though there may have been attendant informalities and in some respects a failure to comply with statutory requirements; mere irregularities should not be permitted to frustrate the will of the voters, nor should the carelessness of election officials." *See e.g. Matter of Levens*, 237 Kan. 614, 617 (1985) (citing 29 C.J.S., Elections § 214(1)). Admittedly this rule pertains to the conduct of elections and not necessarily the requirements of candidacy. However, this distinction was not addressed by the Kansas Supreme Court in its ruling in *Taylor v. Kobach*, 300 Kan. 731, 735 (2014), where applicability of substantial compliance analysis to the withdrawal of a nominee was briefed by the parties but not reached by Court, which resolved the dispute on other grounds.

In the context of an election contest, the Kansas Supreme Court has held that substantial compliance is sufficient under Kansas law. See *Lambeth v. Levens*, 237 Kan. 614, 702 P.2d 320 (1985); *Thomason v. Stout*, 267 Kan. 234, 978 P.2d 918 (1999). In *Lambeth*, the losing candidate alleged that there had been various irregularities in the casting and counting of absentee ballots. *Lambeth*, 237 Kan. at 615-16. Similarly, in *Thomason*, the losing candidate complained that approximately one dozen voters had received an inaccurate ballot listing the wrong county commissioner's race. *Thomason v. Stout*, 267 Kan. at 235. Recognizing its limited authority to pass on the validity of elections and its appropriate reluctance "to override the clear intent and

purpose of the electorate," the Court held that "[a]n election should not be declared a nullity if on any reasonable basis such a result can be avoided." *Lambeth*, 237 Kan. at 621.

More generally, in *State v. Martinez*, 290 Kan. 992, 998-99, 236 P.3d 481, 488-89 (2010), the Supreme Court held that substantial compliance with a statutory directive will generally suffice only if the legislature has included a specific provision to that effect in the statute. Moreover, even when the Court has endorsed a more relaxed compliance requirement in circumstances far different than those presented here, it has focused on the intent behind the statute. *See Cure v. Board of County Comm'rs of Hodgeman County*, 263 Kan. 779, 787, 952 P.2d 920, 925 (1998) (approving of substantial compliance standard in election contest based on the "purpose of the statute").

Should the court find it necessary to reach the substantial compliance issue, the Attorney General suggests the court consider 1) the general intent of the statute regarding withdrawal of nominees, 2) whether the doctor intended to sign the medical certification and accomplished that by a manner other than a writing affixed to the certification by his own hand (the plain text of the statute states "signed by a medical doctor," not "signed by the hand of a medical doctor") and 3) whether substantial compliance may be found because there was a good-faith attempt to sign before the deadline and any defect in that signature was cured by the actual signature of the doctor after the deadline (while signing entirely after the deadline would plainly be noncompliance, merely curing a potential defect in an otherwise timely signature could constitute substantial compliance).

IV. CONCLUSION

For the reasons stated above, the Attorney General submits that if the Court reaches the two questions above and finds the appropriate facts, the answer to both legal questions would be

yes. In that event, the "signature of a medical doctor" requirement of K.S.A. 2019 Supp. 25-306b would have been satisfied by the Petitioner.

The Attorney General further urges that the Court expedite its ruling because the State is required to transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter not later than 45 days before the election pursuant to the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C.A. § 20302. As applied to the upcoming 2020 general election, the UOCAVA deadline is September 19, 2020.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that notice was sent via the electronic filing system to all parties electronically registered with the Court on the date indicated by the electronic file stamp.

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