

Approved April 29, 1988  
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Representative Robert S. Wunsch at  
Chairperson

1:00 ~~a.m.~~p.m. on April 27, 1988 in room 313-S of the Capitol.

All members were present except:  
Representatives Bideau, Jenkins, Peterson, Roy and Wagnon, who were excused

Committee staff present:

Jerry Donaldson, Legislative Research Department  
Mike Heim, Legislative Research Department  
Jill Wolters, Revisor of Statutes Office  
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

Brandon L. Myers, Kansas Commission on Civil Rights  
W. A. Burnett, Director, Human Relations Department, Salina; President, Kansas Human Relations  
Commission  
Meryl Dye, Director, Human Relations Commission, Hutchinson  
Allegra M. White, Legislative Chairperson, Kansas Human Relations Assoc., Lawrence  
Jim Kaup, Kansas League of Municipalities.

Bill Paprota, Kansas Bar Association  
Lou Allen, Assistant Attorney General  
Dan Rice, Legal Counsel, Secretary of State's Office

Hearing on S.B. 410 -- Civil procedure, local human relations commissions, enforcement of  
orders

Brandon L. Myers testified the Kansas Commission on Civil Rights generally supports the intent of this bill and urges its passage. He submitted an amendment to Section 1, by changing the language on lines 42 and 43 to read, "commission's director, may secure enforcement of any final order of such commission, in accordance with the act for judicial review and civil enforcement of agency actions, in amounts not to exceed any limitations prescribed in the Kansas act against discrimination". He also proposed a new section 2 that is designed to give local Human Relations Commissions rights to enforce their subpoenas and compel individuals to testify in their proceedings, (see Attachment I).

W. A. Burnett stated the Salina Human Relations Commission found that they could not enforce their order in District Court because of an Attorney General Opinion #86-90, which stated that local Human Relations Commissions lack standing in District Court. (see Attachment II).

Meryl Dye testified that S.B. 410 provides the statutory basis for the transformation of Human Relations Commissions and departments into effective law enforcement agencies. She recommended S.B. 410, as amended, be passed by the Committee.

Allegra M. White testified a victim of discrimination may file suit in District Court for the enforcement of orders, however, complainants rarely have funds to pursue such action. She recommended passage of S.B. 410, as amended, (see Attachment III).

Jim Kaup stated the League of Municipalities was in favor of this bill, as amended.

The prepared testimony of Don Morris, Commissioner, Salina Human Relations Commission was distributed to the Committee, (see Attachment IV). His testimony stated that this bill allows Human Relations Commissions the opportunity to seek specific performance of awards through the district court.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,  
room 313-S, Statehouse, at 1:00 ~~xxx~~/p.m. on April 27, 1988.

Representative Sebelius moved to adopt the balloon version of S.B. 410.  
Representative Adams seconded the motion. The motion passed.

Representative Sebelius moved and Representative Adam seconded to report S.B. 410, as amended, favorable for passage. The motion passed.

Hearing on S.B. 698 -- Uniform premartial agreement act

Bill Paprota distributed copies of the Uniform Premarital Agreement Act to the Committee, (see Attachment V). He recommended S.B. 698 be amended to read the same as the Uniform Premarital Agreement Act. Omitted from S.B. 698 was the provision allowing modification or elimination of spousal support. If the modification or elimination of spousal support caused one party of the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility, was also omitted.

The hearing on S.B. 698 was closed.

Representative Douville moved and Representative Vancrum seconded to amend S.B. 698 to conform to the Uniform Premarital Agreement Act as recommended by Bill Paprota. The motion passed.

A motion was made by Representative O'Neal to report S.B. 698, as amended, favorable for passage. Representative Kennard seconded the motion. The motion passed.

Hearing on S.B. 696 -- Charitable organizations and solicitations act, providing powers and duties of the Secretary of State and the Attorney General with respect thereto

Lou Allen testified S.B. 696 replaces the Kansas Charitable Solicitation Act. This bill modifies and increases the powers and authorities of the Attorney General to allow for more effective investigation and prosecution for violations of the act, (see Attachment VI). She distributed a fiscal note for S.B. 696 in the amount of \$46,845, (see Attachment VII).

Dan Rice testified the Secretary of State supports S.B. 696 because it corrects several administrative and constitutional defects with the current act and it will provide the Attorney General with more information for enforcement purposes, (see Attachment VIII).

Representative Solbach moved and Representative Crowell seconded to report S.B. 696 favorable for passage. The motion passed.

The Committee meeting was adjourned at 2:15 p.m.

TESTIMONY OF BRANDON  
L. MYERS ON BEHALF OF  
THE KANSAS COMMISSION ON  
CIVIL RIGHTS IN SUPPORT  
OF S.B. 410 BEFORE  
THE HOUSE JUDICIARY  
COMMITTEE, APRIL 27, 1988

The Commission generally supports the intent of this bill and urges its passage. (There may, of course, possibly be amendments, but as long as they are consistent with the basic purpose of the bill, our position would remain the same.)

Certain City Human Relations Commissions/Departments who administer their city's antidiscrimination ordinances are currently without power to enforce their remedial orders where discrimination in violation of the ordinances has been proven. Neither can they procure enforcement of their administrative subpoenas issued to enable them to investigate discrimination complaints filed with them. The reason for this is that the city ordinances often have been patterned after the state antidiscrimination statute (K.S.A. 44-1001, et seq., Kansas Act Against Discrimination) which makes the state agency's (KCCR's) orders and subpoenas enforceable by state district courts. The City ordinances which have adopted comparable provisions are highly questionable, insofar as the Cities have thereby attempted to confer jurisdiction and responsibility upon a state court to enforce the City agency's orders and subpoenas. Only the State of Kansas can confer such jurisdiction. Senate Bill 410 is intended to confer such jurisdiction upon State District Courts.

This issue was brought to the forefront by a situation arising out of Salina which resulted in Attorney General opinion No. 86-90 (copy attached hereto).

Without Senate Bill 410, the City HRC's in question probably have no powers to enforce their orders and cannot enforce their ordinances as they are expected to do. Even if a Complainant might on their own seek enforcement of such a remedial order, the Complainant is effectively left in the lurch by an agency which is powerless to enforce its own orders. Plus, since the city agency cannot enforce its subpoenas, it may not be able to investigate so as to reach a point where a remedial order even can be issued. City HRC's need these powers to be effective. Cases they can effectively handle may lessen the burden of cases upon the State agency (KCCR) which is heavily burdened with cases.

The only apparent alternative to either allowing HRC's no enforcement powers or allowing enforcement through State District Courts is to have the cities restructure their ordinances so as to allow enforcement through their municipal courts. Since most municipal courts exist primarily to deal with traffic and criminal matters, it would be somewhat anachronistic and probably quite burdensome to expect these types of courts to deal with often complex civil matters involved in discrimination cases. It seems much more logical to simply have the state (by adopting S. B. 410) confer such jurisdiction upon the state district courts who routinely have been dealing with such comparable matters under the Kansas Act Against Discrimination (KAAD) for many

years.

In summary, S. B. 410 is a well-intentioned bill, addressing an area of need and merits consideration and passage.

We attach hereto a copy of the bill as amended in the Senate together with some "balloons" which set forth some additional revisions which we suggest the committee consider (unless adoption of said amendments would have the result of slowing the bill down and insuring its failure this session). The syntax of the amended bill, as is, in Section 1., could be clearer, and that is the purpose of the "balloons" on page 1.

On page two we propose to add a new Section 2., and renumber the current Section 2. to Section 3. The proposed new Section 2. is a near recitation of K.S.A. 44-1004 (5), which is the subpoena enforcement section of the KAAD, and is designed to also give local Human Relations Commissions rights to enforce their subpoenas and compel individuals to testify in their proceedings in precisely the same manner as the KCCR can do. Without such authority, they may be unable to investigate complaints and unable to conduct public hearings, so that they can issue a final order regarding a complaint. In short, in some cases without this power, they would not need the powers proposed elsewhere in the bill, simply because they will be unable to effectuate any final public hearing order to enforce.

If these revisions will not doom the bill to defeat (merely because of, for instance, printing delays) we would suggest their inclusion and passage in that format.



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

June 17, 1986

MAIN PHONE (913) 296-2215  
CONSUMER PROTECTION 296-3781

ATTORNEY GENERAL OPINION NO. 86- 90

Greg A. Bengtson  
City Attorney  
129 S. 8th, P.O. Box 380  
Salina, Kansas 67402-0380

Re: Constitution of the State of Kansas--  
Corporations--Cities' Powers of Home Rule

Synopsis: An ordinance which authorizes a local human relations commission to award compensatory and punitive damages in a discrimination case is incidental to effectuation of a public purpose, i.e. the elimination of discrimination within a community, and constitutes a valid exercise of city home rule powers. While a local human relations commission lacks standing in district court to enforce such an award, a victim of discrimination may file suit for enforcement in district court. Cited herein: K.S.A. 1985 Supp. 44-1005; K.S.A. 44-1011; 60-217; K.S.A. 1985 Supp. 60-2101(d); Kan. Const., Art. 12, §5.

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Dear Mr. Bengtson:

You request our opinion concerning enforcement of an order of the Salina Human Relations Commission which awards monetary damages in a discrimination case. You indicate that Salina Code Section 13-58(13) confers authority on the Human Relations Commission to award such damages, and that in a recent case the Commission made such an award to the complainant. However, the respondent has refused to comply

with the order, and you pose several questions concerning enforcement of it.

You first ask whether the Salina Human Relations Commission can pursue a lawsuit in Saline County District Court seeking to enforce the order. In this regard, we note that it is a well settled principle that municipalities may, in the exercise of their home rule power as provided by Kan. Const., Art. 12, §5, establish human relations agencies. Hutchinson Human Relations Comm. v. Midland Credit Management, Inc., 213 Kan. 308, 313 (1973). State provisions, establishing the Kansas Commission on Civil Rights (K.C.C.R.) which in effect are parallel to many local civil rights ordinances, are not preemptive. 213 Kan. at 315. It is also clear that a local commission may bring an action in district court for specific performance of a conciliation agreement. H.H.R.C. v. Midland, supra.

However, while K.S.A. 1985 Supp. 60-2101(d) confers authority on district courts to hear appeals of final orders made by municipal agencies, and K.S.A. 44-1011 confers authority on the K.C.C.R. to file suit in district court to enforce its final orders [including awards of damages for pain, suffering and humiliation not exceeding \$2000 (see K.S.A. 1985 Supp. 44-1005(d))], no statute confers standing on a local human relations agency to file suit to enforce an award of monetary damages entered by the agency in a discrimination case. In this regard, K.S.A. 60-217 provides that every action shall be prosecuted in the name of the real party in interest, and the Kansas Supreme Court has indicated that a local commission does not have standing to file suit for monetary damages:

"We do not view the Commission as being an aggrieved person in the context of this case, or in the sense of having suffered an injury or wrong compensable in dollars. It is difficult for us to conjure up a basis for monetary damages so far as the Commission is concerned, and its counsel was unable, at oral argument, to assist us greatly in this respect."  
H.H.R.C. v. Midland, supra at 316.

Accordingly, it is our opinion that a local human relations commission lacks standing to enforce an award of monetary damages which it has entered in favor of a complainant in a discrimination case.

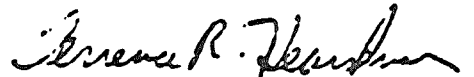
You next ask whether amendment of the Salina Code to include a provision similar to K.S.A. 44-1011 would provide a means of enforcement of the Human Relations Commission Order. In this regard, it is our opinion that the rules of standing prescribed by K.S.A. 60-217 may be modified only by enactments of the state legislature; cities, even in the exercise of their extensive home rule powers, lack authority to legislate on the subject of standing in district court, as such is not a matter of local concern within the meaning of Article 12, Section 5 of the Kansas Constitution.

Your final question is "whether Salina Code Section 13-58(13) authorizing the Salina Human Relations Commission to award compensatory and punitive damages represents an enforceable exercise of home rule powers." In response, we note that while the Kansas Supreme Court has not spoken on this issue, it has been addressed by Professor Barkley Clark in the comprehensive article State Control of Local Government in Kansas: Special Legislation and Home Rule, 20 Kan. L. Rev. 631, 676. In that article, Professor Clark indicates that the "local affairs and government" language of the home rule amendment could be invoked to limit some municipal attempts to enact "private law" (i.e. ordinances which regulate private legal relationships). However, he also states that if an ordinance's "impact on 'private' law is merely incidental to effectuation of a public purpose, it might well stand." Id. In our judgment, an ordinance which authorizes a local human relations commission to award compensatory and punitive damages in a discrimination case is incidental to effectuation of a public purpose, i.e. the elimination of discrimination within a community, and constitutes a valid exercise of city home rule powers. However, as indicated above, in the event the respondent refuses to comply with an order awarding damages (and does not appeal the order to district court), the rules of standing require that the complainant, not the local human relations commission, enforce the award in district court.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
Assistant Attorney General



may secure enforcement of any final order of such commission

in amounts not to exceed any limitations prescribed in the Kansas act against discrimination.

*As Amended by Senate Committee*

Session of 1987

## SENATE BILL No. 410

By Committee on Federal and State Affairs

3-30

0018 AN ACT concerning civil procedure; relating to enforcement of  
0019 orders of local human relations commissions.

0020 *Be it enacted by the Legislature of the State of Kansas:*

0021 Section 1. (a) A local human relations commission autho-  
0022 rized by ordinance to award compensatory and punitive dam-  
0023 ages, ~~in amounts not to exceed any limitations prescribed in the~~  
0024 ~~Kansas act against discrimination~~, in a discrimination case, may  
0025 secure enforcement of any final order of such commission by the  
0026 district court of the county where the unlawful discriminatory  
0027 practice occurred, through mandamus or injunction in appro-  
0028 priate cases, or by action to compel the specific performance of  
0029 the order. Such proceedings shall be initiated by the filing of a  
0030 petition in such court, together with a transcript of the record  
0031 upon the hearing before such commission, and issuance and  
0032 service of a copy of such petition as in civil actions. The court  
0033 shall have power to grant such temporary relief or restraining  
0034 order as it deems just and proper, and to make and enter upon the  
0035 pleadings, testimony and proceedings an order or decree, en-  
0036 forcing, modifying, and enforcing, as so modified, or setting  
0037 aside in whole or in part, the order of such commission.

0038 (b) The jurisdiction of the district court of the proper county  
0039 shall be exclusive and its final order or decree shall be subject to  
0040 review in the same manner as other appeals from the district  
0041 court in civil cases, or where authorized by ordinance, the  
0042 commission's director, in accordance with the act for judicial  
0043 review and civil enforcement of agency actions, The evidence  
0044 presented to the commission or director, together with the com-  
0045 mission's or director's findings and the order issued thereon.

0046 shall be certified by the commission or director to the district  
0047 court as the commission's or director's return. No order of the  
0048 commission or director shall be superseded or stayed during the  
0049 proceeding on review unless the district court so directs.

0050 (b) (1) Any action of the commission or director is subject to  
0051 review in accordance with the act for judicial review and civil  
0052 enforcement of agency actions except: (A) Determination by the  
0053 commission or director that no probable cause exists for credit-  
0054 ing the allegations of a complaint brought before such commis-  
0055 sion or director; (B) the commission or director, in addition to  
0056 those persons specified by K.S.A. 77-611 and amendments  
0057 thereto, shall have standing to bring an action for review; and  
0058 (C) on review, the court shall hear the action by trial de novo  
0059 with or without a jury in accordance with the provisions of  
0060 K.S.A. 60-238 and amendments thereto, and the court, in the  
0061 court's discretion, may permit any party or the commission or  
0062 director to submit additional evidence on any issue. The review  
0063 shall be heard and determined by the court as expeditiously as  
0064 possible. After hearing, the court may affirm the adjudication. If  
0065 the adjudication by the commission or director is not affirmed,  
0066 the court may set aside or modify the adjudication, in whole or  
0067 in part, or may remand the proceedings to the commission or  
0068 director for further disposition in accordance with the order of  
0069 the court.

0070 (2) The commission's or director's copy of the testimony shall  
0071 be available at all reasonable times to all parties for examination  
0072 without cost, and for the purpose of judicial review of the order.  
0073 The review shall be heard on the record without requirement of  
0074 printing.

0075 (3) The commission or director shall be deemed a party to the  
0076 review of any order by the court.

0077 Sec. 2. This act shall take effect and be in force from and  
0078 after its publication in the statute book.

Sec. 2. In case of the refusal of any person to comply with any subpoena issued by a local human relations commission, or to testify to any matter regarding which such person may be lawfully questioned the district court of any county may, upon application of the local human relations commission, order such person to comply with such subpoena and to testify to the extent such person could be so compelled pursuant to the provisions of K.S.A. 44-1004 (5) of the Kansas act against discrimination; and failure to obey the Court's order shall be punishable by the Court as contempt.

Sec. 3

Sec. 2.

TESTIMONY OF W.A. BURNETT  
SENATE BILL #410

Senate Bill #410 will allow local human relations commissions judicial review and civil enforcement of commission actions after a Finding. The Salina Human Relations Commission found that they could not enforce their Order in District Court because of an Attorney General Opinion #86-90, which stated that local Human Relations Commissions lack standing in District Court.

In September, 1987, the Kansas League of Municipalities voted unanimously to support Senate Bill 410. As you may or may not know, there are 523 cities who are members of the Kansas League of Municipalities. To keep from repeating or reinventing the wheel, what you have already heard, I will try to show you how important Senate Bill 410 is in addressing discrimination on the local level. Our local ordinance is patterned after the Federal and State statutes. We, as local agencies are provided the same training and have the same administrative procedures that only differ according to our own localities. But federal and state civil rights agencies have in place a mechanism to enforce their orders and eliminate discriminatory practices. Those procedures make their statutes workable. Local agencies do not have a mechanism in place to enforce their orders. That is why we are here. We are here to petition the legislature to give local Human Relations agencies an effective tool to do their jobs. It is not only unfair to local commissions not to have a mechanism to file their orders into District Court but it is unfair to the citizens of Kansas who are protected under our laws. For example, a person who feels that they have been discriminated against and proceed to file their charge with a local human relations agency to address their concern is also left out of the process. That person has no other alternative after the charge is addressed by the local commission because res judicata, a doctrine that does not allow a charged party to be investigated for the same charge twice. But if the

*Attachment II*

TESTIMONY OF W.A. BURNETT

Page Two

April 27, 1988

charged party does not agree with the local findings, they can petition the District Court for a final determination. I do not think and you will agree this is not equal opportunity for those involved. I know you as representatives of the State share these views and represent all of the citizens of Kansas and not just a segment of the community. There are others who support our effort who have possibly contacted you and other representatives in support of Senate Bill 410. Just to name a few: Phillip Randolph Institution, Wichita, Kansas, Haskell Indian Junior College, Dean of Student Affairs, Kansas Chapter, National Organization of Women, National Interreligious Commission on Civil Rights, Kansas League of Women Voters, National Association of Advancement of Colored People, Kansas Committee on Hispanic Affairs, Housing Information Center, and American G.I. Forum. There are many more. Our laws protect everyone regardless of race, color, sex, religion, national origin, age, handicapped and marital status. Kansas has always been a leader in the area of civil and human rights and has set a high standard of equality for the citizens of Kansas. We have fallen behind other states who have local human relations agencies because they have given these agencies the tools to address citizen concerns. I know you will do the same to keep Kansas number one in addressing civil and human rights and equality.

**TESTIMONY OF ALLEGRA M. WHITE  
LEGISLATIVE CHAIRPERSON  
KANSAS HUMAN RELATIONS ASSOCIATION  
BEFORE THE HOUSE JUDICIARY COMMITTEE**

I am Allegra White, Human Relations Specialist, from Lawrence, Kansas, and Legislative Chairperson of the Kansas Human Relations Association. I am appearing today in support of Senate Bill 410, as amended, on behalf of the Kansas Human Relations Association and also on behalf of the Lawrence Human Relations Commission and its administrative arm - the Human Relations/Human Resources Department. I bring greetings from the Kansas Human Relations Association, and its other officers, President Will Burnett, Director of the Salina Human Relations Commission and Human Relations Department; First Vice President Lila Fritschen, Human Relations Commissioner from Hutchinson, Kansas; Second Vice President Rehelio (Ray) Samuel, Director of the Lawrence Human Relations Commission and Human Relations/Human Resources Department; Secretary Doris Ponds, Human Relations Commissioner, Arkansas City; and Treasurer Joseph Stewart, Human Relations Commissioner, Salina.

The Kansas Human Relations Association is made up of municipal and county agencies that have been given the authority to enforce human and civil rights, plus other groups and individuals who are interested in furthering human and civil rights for all persons throughout Kansas. Sixteen agencies are represented in our membership, in addition to numerous individuals. Among the cities in Kansas that have Human Relations Commissions are: Winfield, Hutchinson, Leavenworth, Olathe, Manhattan, Emporia, Topeka, Wichita, Arkansas City, Kansas City, Lawrence, Salina, and Parsons. Other cities are apparently considering formation of Human Relations Commissions.

The reason we have come to you to request legislation to grant standing for Human Relations Commissions in District Court to enforce their orders is because, according to Attorney General

*Attachment III*

Opinion No. 86-90, issued by Robert Stephan on June 17, 1986, local Human Relations Commissions lack standing in District Court to enforce their orders. While the same opinion stated that a victim of discrimination may file suit for such orders to be enforced by the District Court, complainants rarely have funds to pursue such action.

Therefore, unless Human Relations Commissions are granted standing in District Court, they may become "paper tigers," with no real power to enforce their orders when those who have been found to have violated our local nondiscrimination ordinances unfortunately choose to ignore orders which are intended to prevent discriminatory acts from remaining unabated and make the victims of discrimination whole. Please be aware that due process is provided for all parties in local nondiscrimination ordinances and as a result of that due process, very few orders are issued by Human Relations Commissions or their directors. Most complaints which are found to have Probable Cause to credit allegations of discrimination are resolved through conciliation and persuasion. That speaks well, not only for local Human Relations Commissions and their staffs, but also those found in violation of local human relations/nondiscrimination ordinances. Unfortunately, a few violators become recalcitrant and, while they do not choose to exercise their right to appeal the orders, they occasionally do choose to ignore those orders. When Human Relations Commissions do not have standing in District Court to enforce their orders, the victims of discrimination cannot be made whole. In the cause of human and civil rights for every individual, we urge you to recommend passage, by the House, of Senate Bill 410.

I will be happy to answer any questions you may have to the best of my ability.

Attachments: Attorney General Opinion No. 86-90  
List of persons supporting S.B. 410 at Senate  
Judiciary Subcommittee Hearing



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

June 17, 1986

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

ATTORNEY GENERAL OPINION NO. 86- 90

Greg A. Bengtson  
City Attorney  
129 S. 8th, P.O. Box 380  
Salina, Kansas 67402-0380

Re: Constitution of the State of Kansas--  
Corporations--Cities' Powers of Home Rule

Synopsis: An ordinance which authorizes a local human relations commission to award compensatory and punitive damages in a discrimination case is incidental to effectuation of a public purpose, i.e. the elimination of discrimination within a community, and constitutes a valid exercise of city home rule powers. While a local human relations commission lacks standing in district court to enforce such an award, a victim of discrimination may file suit for enforcement in district court. Cited herein: K.S.A. 1985 Supp. 44-1005; K.S.A. 44-1011; 60-217; K.S.A. 1985 Supp. 60-2101(d); Kan. Const., Art. 12, §5.

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However, while K.S.A. 1985 Supp. 60-2101(d) confers authority on district courts to hear appeals of final orders made by municipal agencies, and K.S.A. 44-1011 confers authority on the K.C.C.R. to file suit in district court to enforce its final orders [including awards of damages for pain, suffering and humiliation not exceeding \$2000 (see K.S.A. 1985 Supp. 44-1005(d))], no statute confers standing on a local human relations agency to file suit to enforce an award of monetary damages entered by the agency in a discrimination case. In this regard, K.S.A. 60-217 provides that every action shall be prosecuted in the name of the real party in interest, and the Kansas Supreme Court has indicated that a local commission does not have standing to file suit for monetary damages:

"We do not view the Commission as being an aggrieved person in the context of this case, or in the sense of having suffered an injury or wrong compensable in dollars. It is difficult for us to conjure up a basis for monetary damages so far as the Commission is concerned, and its counsel was unable, at oral argument, to assist us greatly in this respect."  
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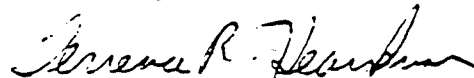
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Very truly yours,

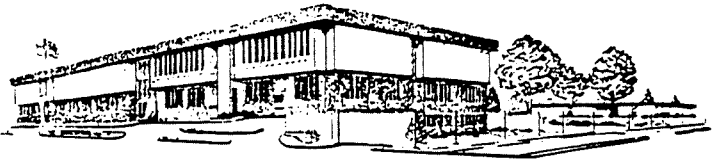


ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
Assistant Attorney General

# CITY OF SALINA



GREG A. BENGTON, CITY ATTORNEY  
129 S. 8TH P.O. BOX 380  
SALINA, KANSAS 67402-0380  
AREA CODE 913 823-6325

March 26, 1986

Honorable Robert B. Stephen  
Attorney General  
State Office Building  
Topeka, Kansas 66625



Dear Mr. Stephen:

In 1966 the Board of Commissioners of the City of Salina, under its home rule powers, created a Human Relations Commission and a Human Relations Department for the stated purpose of eliminating and preventing discrimination in the areas of employment, public accommodations, and housing. A copy of Chapter 13 of the Salina Code entitled "Equal Opportunity and Affirmative Action" is enclosed for your reference.

The ordinance follows very closely the state law relating to the Kansas Commission on Civil Rights. Historically most complaints filed with the Salina Human Relations Commission have resulted in the parties reaching a conciliatory agreement. In those cases where a public hearing was necessary, the respondents have routinely complied with the order issued by the review panel.

This request for an Attorney General's opinion stems from a situation where the respondent has chosen to disregard the order of the Salina Human Relations Commission. Enclosed for your reference is a copy of that order in the case of Vermillion vs. Magic Mirror Figure Salon, Inc. The respondent, Magic Mirror Figure Salon, Inc., is an Oklahoma corporation registered to do business in Kansas.

Salina Code Sec. 13-58(15) provides that failure to comply with any order issued by the reviewing panel shall be cause for the Commission to request the City Attorney to undertake and proceed with appropriate legal action. In advising the Commission regarding available options our research has left us with the questions outlined below. Your opinion on these matters will be greatly appreciated.

Honorable Robert B. Stephen  
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(1). Whether the Salina Human Relations Commission can pursue a lawsuit in the Saline County District Court seeking to enforce its own order awarding damages to the complainant.

Our research on this question has led us to related matters, but not to any statute or case directly addressing the issue. Clearly, the Kansas Commission on Civil Rights by express statutory provision in K.S.A. 44-1011 may seek enforcement of any final order of that commission by the District Court in the county where the unlawful discriminatory practice has occurred. To our knowledge, no such statutory authorization for enforcement of the local commission's order exists. While K.S.A. 60-2101(d) provides for appeal from the action of the local human relations commission, neither party in this particular case appealed from the order of the local commission.

In turning to Kansas case law, Hutchinson Human Relations Comm. vs. Midland Credit Management, Inc., 213 Kan. 308 (1973), presents a situation where the local human relations commission initiated an action seeking specific performance of a conciliation agreement against the respondent in one of its own cases. On one hand, the Court lends support to the concept that the local commission should be able to bring about enforcement of an exercise of its authority under a local ordinance. At page 320 of the opinion the Court provides:

"Under the ordinance the Commission is empowered to negotiate conciliation agreements. This authority is exercised in the interest of the public peace and good order of the community and the safety and general welfare of the community and all its residents. We find no impediment to the enforcement of such an agreement by the commission in the best interest of the public which it serves, and we so held."

At the same time, however, the Court casts some doubt on the ability of the local commission to seek enforcement of its own order. In the case the Hutchinson Human Relations Commission requested damages in lieu of specific performance of the conciliation agreement. The Court indicates at page 316 of the opinion that:

"We do not view the Commission as being an aggrieved person in the context of this case, or in the sense of having suffered an injury or wrong commensurable in dollars. It

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is difficult for us to conjure up a basis for monetary damages so far as the Commission is concerned, and its counsel was unable in oral argument to assist us greatly in this respect."

While the Salina Commission does not contemplate seeking recovery of damages payable to itself, we are concerned that the Salina County District Court will likewise not view the Commission as an aggrieved person in the context of the case and thus determine the Commission to be without standing to bring the action to enforce its own order.

(2). If you conclude that the Salina Human Relations Commission cannot pursue such a lawsuit in the District Court, would amendment of the Salina Code to include a provision similar to K.S.A. 44-1011 provide a means of enforcement of the Commission's order through the District Court?

Our research has not revealed a specific answer to this question. Our current impressions are based in general principals regarding the extent of a municipality's authority in relation to matters of state law.

We are aware of at least one city in Kansas that has by ordinance provided for access to the district court for enforcement of orders of its local commission. We are concerned that state law will dictate whether or not the local commission can utilize an action in the district court to seek enforcement of the local commission's order. It seems difficult to expect the district court to respond to the attempt of a municipality to dictate matters of district court jurisdiction.

(3). Whether Salina Code Sec. 13-58(13) authorizing the Salina Human Relations Commission to award compensatory and punitive damages represents an enforceable exercise of home rule powers.

We are familiar with the case of Woods vs. Midwest Conveyor Co., 231 Kan. 763 (1982) and the subsequent amendment of K.S.A. 44-1005 allowing the KCCR to make an award of damages for pain, suffering and humiliation up to the sum of \$2,000. We have reviewed Article 12, Sec. 5 of the Kansas Constitution regarding cities' powers of home rule and the related case law, along with the Kansas constitutional and statutory provisions regarding the state court system. We are concerned that Salina's ordinance may go beyond the City's authority in an area preempted by state law.

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Again, your attention to these issues facing the Salina Human Relations Commission is greatly appreciated. If you desire any further information in reaching your opinion, please let us know.

Sincerely,

CITY OF SALINA, KANSAS

Greg A. Bengtson  
City Attorney

GAB/dg

bc: Rufus Nye  
Will Burnett  
Robert German

LIST OF THOSE APPEARING IN SUPPORT  
OF S.B. 410 AT MARCH 22, 1988, HEARING  
BEFORE A SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE

Speakers and the groups they represented were (in alphabetical order):

Will A. Burnett, President, Kansas Human Relations Association, and Director, Salina Human Relations Commission and Human Relations Department

Kaye A. Crawford, Salina Community Housing Resource Board, and Investigator, Salina Human Relations Commission and Human Relations Department

Meryl Dye, Director, Hutchinson Human Relations Commission and Human Relations Department

Joanne Hurst, Director, Kansas Commission on Civil Rights

Donald Morris, Commissioner, Salina Human Relations Commission

Donna L. Whiteman, State Representative, and Commissioner, Hutchinson Human Relations Commission

Others present were (in alphabetical order):

Ron Elliott, Commissioner, Salina Human Relations Commission

Sharon Holthusen, Assistant Director, Topeka Human Relations Commission and Human Relations Department

Lisa Kelly, Housing Coordinator, Salina Human Relations Commission and Human Relations Department

Jack Mahoney, Commissioner, Salina Human Relations Commission

Cornell Mayfield, Director, Manhattan Human Resources Board and Human Resources Department

Royce L. Miller, Director, Topeka Human Relations Commission and Human Relations Department

\*Rehelio A. Samuel, Second Vice President, Kansas Human Relations Association, and Executive Director, Lawrence Human Relations Commission and Human Relations/Human Resources Department

Allegra M. White, Legislative Chairperson, Kansas Human Relations Association, and Human Relations Specialist, Lawrence Human Relations/Human Resources Department

\* Mr. Samuel also appeared before the Committee of the whole on March 25, 1988, in support of S.B. 410.

I speak on behalf of SB #410. My name is Don Morris and I'm a Commissioner on the Salina Human Relations Commission. In July of 1985 I sat on a panel with 2 other Commissioners and we heard, at public hearing, a case of possible job discrimination. The Panel, after hearing testimony, agreed that discrimination did in fact occur and as a result, awarded damages for loss of wages and financial obligations, as well as damages for pain and suffering. I can only assure you that due process was of prime importance. Those who are involved with the task of insuring rights of individuals are perhaps, most aware of and understanding of the rights of others, and will be more open and sympathetic to the arguments defending the actions of those respondents. In this case, the respondent choose not to attend and apparently with good reason. We found, after a finding of guilty, that the Salina Human Relations Commission could not enforce its decision, and ~~in~~ fact, the only thing we could do was to charge the respondent with a violation of a City Ordinance, the maximum fine for which was only \$500.00. I suggest to you that for \$500.00, people will discriminate. Quite frankly, this bill is a result of those findings which said in effect, that yes, you the respondent did discriminate and you are liable for damages, but we have no way of compelling you to comply with or be responsible for your actions. This Bill allows Human Relations Commissions the opportunity to seek specific performance of awards through the district court. The Court would be empowered to enforce or modify the awards based upon the review of the facts of the case. If due process was

*Attachment IV*

was not evident, the court could modify or set aside the action of the Public Hearing. It is important for due process to be served. It is important for human rights to be preserved. This Bill, in my opinion, serves both causes. I urge your support and thank you for your consideration.

  
Donald E. Morris



# UNIFORM PREMARITAL AGREEMENT ACT

*Drafted by the*

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

*and by it*

APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES

*at its*

ANNUAL CONFERENCE  
MEETING IN ITS NINETY-SECOND YEAR  
IN BOCA RATON, FLORIDA  
JULY 22 - 29, 1983



WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association  
Las Vegas, Nevada, February 13, 1984

*Attachment V*

# UNIFORM PREMARITAL AGREEMENT ACT

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Premarital Agreement Act was as follows:

BION M. GREGORY, 3021 State Capitol, Sacramento, CA 95814, *Chairman*

WILLIAM S. ARNOLD, P. O. Drawer A, Crossett, AR 71635

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JACK I. HORTON, 3021 State Capitol, Sacramento, CA 95814, *Reporter*

M. KING HILL, JR., Sixth Floor, 100 Light Street, Baltimore, MD 21202, *President (Member Ex Officio)*

CARLYLE C. RING, JR., 710 Ring Building, Washington, DC 20036, *Chairman, Executive Committee*

WILLIAM J. PIERCE, University of Michigan, School of Law, Ann Arbor, MI 48109, *Executive Director*

ROBERT H. CORNELL, 25th Floor, 50 California Street, San Francisco, CA 94111, *Chairman, Division B (Member Ex Officio)*

## Review Committee

JACK DAVIES, William Mitchell College of Law, 875 Summit Avenue, St. Paul, MN 55105, *Chairman*

ROBERT P. FULLERTON, District Court, Second Judicial District, City & County Building, Denver, CO 80202

RICHARD V. WELLMAN, University of Georgia, School of Law, Athens, GA 30602

## Advisor to Special Committee on Uniform Premarital Agreement Act

MARJORIE A. O'CONNELL, *American Bar Association*

Copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS  
645 North Michigan Avenue, Suite 510  
Chicago, Illinois 60611

# UNIFORM PREMARITAL AGREEMENT ACT

## PREFATORY NOTE

The number of marriages between persons previously married and the number of marriages between persons each of whom is intending to continue to pursue a career is steadily increasing. For these and other reasons, it is becoming more and more common for persons contemplating marriage to seek to resolve by agreement certain issues presented by the forthcoming marriage. However, despite a lengthy legal history for these premarital agreements, there is a substantial uncertainty as to the enforceability of all, or a portion, of the provisions of these agreements and a significant lack of uniformity of treatment of these agreements among the states. The problems caused by this uncertainty and non-uniformity are greatly exacerbated by the mobility of our population. Nevertheless, this uncertainty and nonuniformity seem reflective not so much of basic policy differences between the states but rather a result of spasmodic, reflexive response to varying factual circumstances at different times. Accordingly, uniform legislation conforming to modern social policy which provides both certainty and sufficient flexibility to accommodate different circumstances would appear to be both a significant improvement and a goal realistically capable of achievement.

This Act is intended to be relatively limited in scope. Section 1 defines a "premarital agreement" as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." Section 2 requires that a premarital agreement be in writing and signed by both parties. Section 4 provides that a premarital agreement becomes effective upon the marriage of the parties. These sections establish significant parameters. That is, the Act does not deal with agreements between persons who live together but who do not contemplate marriage or who do not marry. Nor does the Act provide for postnuptial or separation agreements or with oral agreements.

On the other hand, agreements which are embraced by the act are permitted to deal with a wide variety of matters and Section 3 provides an *illustrative* list of those matters, including spousal support, which may properly be dealt with in a premarital agreement.

Section 6 is the key operative section of the Act and sets forth the conditions under which a premarital agreement is not enforceable. An agreement is not enforceable if the party against whom enforcement is sought proves that (a) he or she did not execute the agreement voluntarily or that (b) the agreement was unconscionable when it was executed and, before execution of the agreement, he or she (1) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party, (2) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, and (3) did not have, or reasonably could not have had, an adequate knowledge of the property and financial obligations of the other party.

Even if these conditions are not proven, if a provision of a premarital agreement modifies or eliminates spousal support, and that modification or elimination would cause a party to be eligible for support under a program of public assistance at the time of separation, marital dissolution, or death, a court is authorized to order the other party to provide support to the extent necessary to avoid that eligibility.

These sections form the heart of the Act; the remaining sections deal with more tangential issues. Section 5 prescribes the manner in which a premarital agreement may be amended or revoked; Section 7 provides for very limited enforcement where a marriage is subsequently determined to be void; and Section 8 tolls any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement during the parties' marriage.

## UNIFORM PREMARITAL AGREEMENT ACT

Sec.		Sec.	
1.	Definitions.	8.	Limitation of Actions.
2.	Formalities.	9.	Application and Construction.
3.	Content.	10.	Short Title.
4.	Effect of Marriage.	11.	Severability.
5.	Amendment, Revocation.	12.	Time of Taking Effect.
6.	Enforcement.	13.	Repeal.
7.	Enforcement: Void Marriage.		

### § 1. Definitions

As used in this Act:

(1) "Premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.

(2) "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

#### COMMENT

The definition of "premarital agreement" set forth in subsection (1) is limited to an agreement between prospective spouses made in contemplation of and to be effective upon marriage. Agreements between persons living together but not contemplating marriage (see *Marvin v. Marvin*, 18 Cal.3d 660 (1976), judgment after trial modified, 122 Cal.App.3d 871 (1981)) and post-nuptial or separation agreements are outside the scope of this Act. Formal requirements are prescribed by Section

2. An illustrative list of matters which may be included in an agreement is set forth in Section 3.

Subsection (2) is designed to embrace all forms of property and interests therein. These may include rights in a professional license or practice, employee benefit plans, pension and retirement accounts, and so on. The reference to income or earnings includes both income from property and earnings from personal services.

### § 2. Formalities

A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration.

#### COMMENT

This section restates the common requirement that a premarital agreement be reduced to writing and signed by both parties (see *Ariz.Rev.Stats.* § 25-201; *Ark.Stats.* § 55-310; *Cal.Civ.C.* § 5134; 13 *Dela.Code* 1974 § 301; *Idaho Code* § 32-917; *Ann.Laws Mass.* ch 209, § 25; *Minn.Stats.Ann.* § 519.11; *Montana Rev.C.* § 36-123; *New Mex. Stats.Ann.* 1978 40-2-4; *Ore.Rev.Stats.* § 108.140; *Vernon's Texas Codes Ann.* § 5.44; *Vermont Stats. Ann.* Title 12, § 181). Many states also require other formalities, including notarization or an acknowledgement (see, e.g., *Arizona*, *Arkansas*, *California*, *Idaho*, *Montana*, *New Mexico*) but may then permit the formal statutory requirement to be avoided or satisfied subsequent to execution (see *In re*

*Marriage of Cleveland*, 76 Cal.App.3d 357 (1977) (premarital agreement never acknowledged but "proved" by sworn testimony of parties in dissolution proceeding)). This act dispenses with all formal requirements except a writing signed by both parties. Although the section is framed in the singular, the agreement may consist of one or more documents intended to be part of the agreement and executed as required by this section.

Section 2 also restates what appears to be the almost universal rule regarding the marriage as consideration for a premarital agreement (see, e.g., *Ga. Code* § 20-303; *Barnhill v. Barnhill*, 386 So.2d 749 (Ala.Civ.App.1980); *Estate of Gillilan v. Estate of Gillilan*, 406 N.E.2d 981 (Ind.App.1980);

## PREMARITAL AGREEMENT ACT

Friedlander v. Friedlander, 494 P.2d 208 (Wash.1972); but cf. Wilson v. Wilson, 170 A.2d 679, 685 (Me.1961)). The primary importance of this rule has been to provide a degree of mutuality of benefits to support the enforceability of a premarital agreement. A marriage is a prerequisite for the effectiveness of a premarital agreement under this act (see Section 4). This requires that there be a ceremonial marriage. Even if this marriage is subsequently determined to have been void, Section 7 may provide limits of enforceability of an agreement entered into in contemplation of that marriage. Consideration as such is not required and the standards for enforceability are established by Sections 6 and 7. Nevertheless, this provision is retained here as a desirable, if not essential, restatement of the law. On the other hand, the fact that marriage

is deemed to be consideration for the purpose of this act does not change the rules applicable in other areas of law (see, e.g., 26 U.S.C.A. §§ 2043 (release of certain marital rights not treated as consideration for federal estate tax, 2512; Merrill v. Fahs, 324 U.S. 308, rehearing denied 324 U.S. 888 (release of marital rights in premarital agreement not adequate and full consideration for purposes of federal gift tax)).

Finally, a premarital agreement is a contract. As required for any other contract, the parties must have the capacity to contract in order to enter into a binding agreement. Those persons who lack the capacity to contract but who under other provisions of law are permitted to enter into a binding agreement may enter into a premarital agreement under those other provisions of law.

### § 3. Content

- (a) Parties to a premarital agreement may contract with respect to:
- (1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
  - (2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
  - (3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
  - (4) the modification or elimination of spousal support;
  - (5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
  - (6) the ownership rights in and disposition of the death benefit from a life insurance policy;
  - (7) the choice of law governing the construction of the agreement; and
  - (8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.
- (b) The right of a child to support may not be adversely affected by a premarital agreement.

### COMMENT

Section 3 permits the parties to contract in a premarital agreement with respect to any matter listed and any other matter not in violation of public policy or any statute imposing a criminal penalty. The matters are intended to be illustrative, not exclusive. Paragraph (4) of subsection (a) specifically authorizes the parties to deal with spousal support obligations. There is a split in authority among the states as to whether a premarital agreement

may control the issue of spousal support. Some few states do not permit a premarital agreement to control this issue (see, e.g., In re Marriage of Winegard, 278 N.W.2d 505 (Iowa 1979); Fricke v. Fricke, 42 N.W.2d 500 (Wis.1950)). However, the better view and growing trend is to permit a premarital agreement to govern this matter if the agreement and the circumstances of its execution satisfy certain standards (see, e.g., Newman v.

## PREMARITAL AGREEMENT ACT

Newman, 653 P.2d 728 (Colo.Sup.Ct. 1982); Parniawski v. Parniawski, 359 A.2d 719 (Conn.1976); Volid v. Volid, 286 N.E.2d 42 (Ill.1972); Osborne v. Osborne, 428 N.E.2d 810 (Mass.1981); Hudson v. Hudson, 350 P.2d 596 (Okla.1960); Unander v. Unander, 506 P.2d 719 (Ore.1973) (see Sections 7 and 8).

Paragraph (8) of subsection (a) makes clear that the parties may also contract with respect to other matters,

including personal rights and obligations, not in violation of public policy or a criminal statute. Hence, subject to this limitation, an agreement may provide for such matters as the choice of abode, the freedom to pursue career opportunities, the upbringing of children, and so on. However, subsection (b) of this section makes clear that an agreement may not adversely affect what would otherwise be the obligation of a party to a child.

### § 4. Effect of Marriage

A premarital agreement becomes effective upon marriage.

#### COMMENT

This section establishes a marriage as a prerequisite for the effectiveness of a premarital agreement. As a consequence, the act does not provide for a situation where persons live together without marrying. In that situation,

the parties must look to the other law of the jurisdiction (see *Marvin v. Marvin*, 18 Cal.3d 660 (1976); judgment after trial modified, 122 Cal.App.3d 871 (1981)).

### § 5. Amendment, Revocation

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration.

#### COMMENT

This section requires the same formalities of execution for an amendment or revocation of a premarital agreement as are required for its original execution (cf. *Estate of Gillilan v. Es-*

*tate of Gillilan*, 406 N.E.2d 981 (Ind. App.1980) (agreement may be altered by subsequent agreement but not simply by inconsistent acts).

### § 6. Enforcement

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

- (1) that party did not execute the agreement voluntarily; or
- (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
  - (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
  - (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
  - (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

## PREMARITAL AGREEMENT ACT

(b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

### COMMENT

This section sets forth the conditions which must be proven to avoid the enforcement of a premarital agreement. If prospective spouses enter into a premarital agreement and their subsequent marriage is determined to be void, the enforceability of the agreement is governed by Section 7.

The conditions stated under subsection (a) are comparable to concepts which are expressed in the statutory and decisional law of many jurisdictions. Enforcement based on disclosure and voluntary execution is perhaps most common (see, e.g., Ark. Stats. § 55-309; Minn.Stats. Ann. § 519.11; *In re Kaufmann's Estate*, 171 A.2d 48 (Pa.1961) (alternate holding)). However, knowledge or reason to know, together with voluntary execution, may also be sufficient (see, e.g., Tenn.Code Ann. § 36-606; *Barnhill v. Barnhill*, 386 So.2d 479 (Ala.Civ. App.1980); *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla.1962); *Coward and Coward*, 582 P.2d 834 (Or.App. 1978); but see *Matter of Estate of Lebsock*, 618 P.2d 683 (Colo.App. 1980)) and so may a voluntary, knowing waiver (see *Hafner v. Hafner*, 295 N.W.2d 567 (Minn.1980)). In each of these situations, it should be underscored that execution must have been voluntary (see *Lutgert v. Lutgert*, 338 So.2d 1111 (Fla.1976); see also 13 Dela.Code 1974 § 301 (10 day waiting period)). Finally, a premarital agreement is enforceable if enforcement would not have been unconscionable at the time the agreement was executed (cf. *Hartz v. Hartz*, 234 A.2d 865 (Md.1967) (premarital agreement upheld if no disclosure but agreement was fair and equitable under the circumstances)).

The test of "unconscionability" is drawn from Section 306 of the Uniform Marriage and Divorce Act (UMDA) (see *Ferry v. Ferry*, 586 S.W.2d 782 (Mo.1979); see also *Newman v. Newman*, 653 P.2d 728 (Colo. Sup.Ct.1982) (maintenance provisions of premarital agreement tested for unconscionability at time of marriage termination)). The following discussion

set forth in the Commissioner's Note to Section 306 of the UMDA is equally appropriate here:

"Subsection (b) undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable. The standard of unconscionability is used in commercial law, where its meaning includes protection against one-sidedness, oppression, or unfair surprise (see section 2-302, Uniform Commercial Code), and in contract law, *Scott v. U. S.*, 12 Wall (U.S.) 443 (1870) ('contract . . . unreasonable and unconscionable but not void for fraud'); *Stiefler v. McCullough*, 174 N.E. 823, 97 Ind. App. 123 (1931); *Terre Haute Cooperaage v. Branscome*, 35 So.2d 537, 203 Miss. 493 (1948); *Carter v. Boone County Trust Co.*, 92 S.W. 2d 647, 338 Mo. 629 (1936). It has been used in cases respecting divorce settlements or awards, *Bell v. Bell*, 371 P.2d 773, 150 Colo. 174 (1962) ('this division of property is manifestly unfair, inequitable and unconscionable'). Hence the act does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to the financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.

"In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party. If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court at the hearing."

## PREMARITAL AGREEMENT ACT

(Commissioner's Note, Sec. 306, Uniform Marriage and Divorce Act.)

Nothing in Section 6 makes the absence of assistance of independent legal counsel a condition for the unenforceability of a premarital agreement. However, lack of that assistance may well be a factor in determining whether the conditions stated in Section 6 may have existed (see, e. g., *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla.1962)).

Even if the conditions stated in subsection (a) are not proven, if a provision of a premarital agreement modifies or eliminates spousal support, subsection (b) authorizes a court to provide very limited relief to a party who would otherwise be eligible for public welfare (see, e. g., *Osborne v. Osborne*, 428 N.E.2d 810 (Mass.1981) (dictum); *Unander v. Unander*, 506 P.2d 719 (Ore.1973) (dictum)).

No special provision is made for enforcement of provisions of a premarital agreement relating to personal rights and obligations. However, a premarital agreement is a contract and these provisions may be enforced to the extent that they are enforceable are under otherwise applicable law (see *Avitzur v. Avitzur*, 459 N.Y.S.2d 572 (Ct. App.)).

Section 6 is framed in a manner to require the party who alleges that a

premarital agreement is not enforceable to bear the burden of proof as to that allegation. The statutory law conflicts on the issue of where the burden of proof lies (contrast Ark. Stats. § 55-313; 31 Minn.Stats. Ann. § 519.11 with Vernon's Texas Codes Ann. § 5.45). Similarly, some courts have placed the burden on the attacking spouse to prove the invalidity of the agreement. *Linker v. Linker*, 470 P.2d 921 (Colo.1970); *Matter of Estate of Benker*, 296 N.W.2d 167 (Mich.App.1980); *In re Kauffmann's Estate*, 171 A.2d 48 (Pa.1961). Some have placed the burden upon those relying upon the agreement to prove its validity. *Hartz v. Hartz*, 234 A.2d 865 (Md.1967). Finally, several have adopted a middle ground by stating that a premarital agreement is presumptively valid but if a disproportionate disposition is made for the wife, the husband bears the burden of proof of showing adequate disclosure. (*Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla.1962); *Christians v. Christians*, 44 N.W.2d 431 (Iowa 1950); *In re Neis' Estate*, 225 P.2d 110 (Kans. 1950); *Truitt v. Truitt's Adm'r*, 162 S.W.2d 31 (Ky.1942); *In re Estate of Strickland*, 149 N.W.2d 344 (Neb. 1967); *Kosik v. George*, 452 P.2d 560 (Or.1969); *Friedlander v. Friedlander*, 494 P.2d 208 (Wash.1972)).

### § 7. Enforcement: Void Marriage

If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result.

### COMMENT

Under this section a void marriage does not completely invalidate a premarital agreement but does substantially limit its enforceability. Where parties have married and lived together for a substantial period of time and one or both have relied on the exist-

ence of a premarital agreement, the failure to enforce the agreement may well be inequitable. This section, accordingly, provides the court discretion to enforce the agreement to the extent necessary to avoid the inequitable result (see Annot., 46 A.L.R.3d 1403).

### § 8. Limitation of Actions

Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.



## PREMARITAL AGREEMENT ACT

### COMMENT

In order to avoid the potentially disruptive effect of compelling litigation between the spouses in order to escape the running of an applicable statute of limitations, Section 8 tolls any applicable statute during the marriage of the parties (contrast *Dykema v. Dykema*, 412 N.E.2d 13 (Ill.App.1980) (statute

of limitations not tolled where fraud not adequately pleaded, hence premarital agreement enforced at death)). However, a party is not completely free to sit on his or her rights because the section does preserve certain equitable defenses.

### § 9. Application and Construction

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

### COMMENT

Section 9 is a standard provision in all Uniform Acts.

### § 10. Short Title

This [Act] may be cited as the Uniform Premarital Agreement Act.

This is the customary "short title" legislative practice of the state pre-clause, which may be placed in that order in the bill for enactment as the scribes.

### § 11. Severability

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

### COMMENT

Section 11 is a standard provision included in certain Uniform Acts.

### § 12. Time of Taking Effect

This [Act] takes effect \_\_\_\_\_ and applies to any premarital agreement executed on or after that date.

### § 13. Repeal

The following acts and parts of acts are repealed:

- (a)
- (b)
- (c)

THE UNIFORM PREMARITAL AGREEMENT ACT (UPAA)  
QUESTIONS AND ANSWERS

1. What is a premarital agreement?

Under the terms of the Uniform Premarital Agreement Act (UPAA), a premarital agreement is defined as an "agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." The act does not cover agreements between cohabiting individuals or agreements made during marriage. A premarital agreement must be in writing to be enforceable.

2. What matters may be covered in a premarital agreement?

Under UPAA, a couple may contract not only in regard to the disposition of property and the waiving or modification of spousal support, but to "any other matter, including their personal rights and obligations, not in violation of public policy or any statute imposing a criminal penalty..."

For example, a couple might agree that each party contribute to the family's finances in direct proportion to his or her income. Or they might agree that the wife will work while the husband finishes medical school and that upon his graduation he will support her through law school. Division of labor in the household can be spelled out, including division of child care responsibilities.

3. Why is the Uniform Premarital Agreement Act (UPAA) needed?

Both case law and statutes have eroded the old common law restrictions on premarital agreements in most jurisdictions. Courts have regularly found premarital agreements, that contemplate financial settlements at divorce, valid in the last decade and a half, overturning the old common-law restrictions on such contracts. Unfortunately, the development of the law from state to state has been ragged, so that no person can be sure that agreements valid in one state will be fully enforceable in another. UPAA would ensure clear standards in every state if all the states, the District of Columbia, and Puerto Rico would adopt it. It would establish that such agreements may be made for any lawful purpose. It would ensure fair standards of enforcement, as well. These are the needs UPAA meets.

The purpose of UPAA is to provide needed uniformity in terms of content and certainty of enforcement throughout the country. Another goal is to offer sufficient flexibility to marital partners in modern marriages. UPAA addresses the changing patterns of marriage (couples are marrying later and may enter first marriages with substantial individual assets); the altered economic role of women (more and more women are pursuing individual career goals after marriage); and the increased mobility of our population (a couple may marry in New York, move to Arizona or Florida, and own property in Connecticut and Texas).

4. Are premarital agreements a new idea?

While the idea may seem novel or even revolutionary, there's really nothing new about premarital agreements -- in ancient times the Hebrews used a written marriage contract to specify the economic terms of divorce -- and all the states of the U.S. have long recognized the validity of premarital agreements designed to waive or limit a spouse's right to inherit from the other spouse after death. But only in recent years have courts begun to drop their longstanding resistance to premarital agreements that contemplate possible divorce.

5. Why have many states which formerly invalidated such contracts begun to uphold the right of couples to make premarital agreements?

Historically, premarital agreements authorized by statute were solely to waive or limit a spouse's right to inherit from the other spouse. Yet most states consistently refused to honor premarital agreements that established rights to property and maintenance in divorce actions, on the grounds that it was against public policy to "encourage" divorce by letting couples "hedge their bets" with such agreements. The notion that such agreements encourage divorce has largely been set aside as erroneous and without substance. Courts now recognize that such agreements may help avoid strife that can injure marriage, and that they don't cause people to divorce each other. Premarital agreements encourage people to plan for their futures in a prudent manner -- if they encourage any kind of behavior at all. It is hard to regard such encouragement as bad public policy.

6. Isn't the premarital agreement a useful tool only for the wealthy?

Premarital agreements can be valuable for everyone. Partners who wish to protect the assets they accumulated before marriage, potential spouses pursuing separate careers outside the home, and homemakers as well can benefit from premarital agreements. They are not for a single income group, but for anyone who wants to crystallize his or her rights in a marriage. More and more people of ordinary means are turning to them every day.

7. What effect will the Uniform Premarital Agreement Act have on divorce settlements?

If there is a written premarital agreement that is not subject to attack on the grounds that it was obtained by fraud, or that it was unconscionable when entered, it will be enforced in a divorce proceeding in any state or jurisdiction that has adopted UPAA. To whatever extent it settles economic or other issues between marital partners, its terms will govern.

There are two significant instances in which a court may ignore a premarital agreement. An agreement that adversely affects the right of a child to support is invalid, and will not be enforced. An agreement that throws a spouse on public welfare by denying support to that spouse may be modified by the court to provide support.

8. Can a premarital agreement dictate the upbringing of children?

Spouses may agree to such matters. But any such agreement will be subject to a "best interests of the child" test in any litigation as a matter of public policy. Laws for the protection of children cannot be bypassed by agreement.

A Few Facts About  
THE UNIFORM PREMARITAL AGREEMENT ACT

PURPOSE: Providing a framework for complete and enforceable premarital agreements.

ORIGIN: Completed by the Uniform Law Commissioners in 1983.

ENDORSED BY: American Bar Association

STATE  
ADOPTIONS:

Arkansas	North Dakota
California	Oregon
Hawaii	Rhode Island
Maine	Texas
Montana	Virginia
North Carolina	

1988  
INTRODUCTIONS:

District of Columbia  
Kansas  
Minnesota  
Oklahoma  
Washington

SPEAKER? These persons are available to provide testimony or give presentations on the Premarital Agreement Act.

Bion M. Gregory  
3021 State Capitol  
Sacramento, CA  
95814

Jeanyse R. Snow  
P.O. Box 508  
Astoria, OR  
97103

For information on arranging a speaker contact  
John McCabe or Katie Robinson at (312) 915-0195.

TESTIMONY OF LOU ALLEN  
ASSISTANT ATTORNEY GENERAL, CONSUMER PROTECTION DIVISION

BEFORE THE HOUSE JUDICIARY COMMITTEE  
HEARING ON S.B. 696

April 27, 1988

Mr. Chairman & Members of the Committee:

I am here this morning to convey Attorney General Stephan's strong support for Senate Bill 696. This bill repeals and replaces the Kansas Charitable Solicitation Act.

Senate Bill 696 modifies and increases the powers and authorities of the Attorney General to allow for more effective investigation and prosecution for violations of the act.

There has been a noticeable increase in the last several years of charitable organizations soliciting contributions from Kansans. Some of the most recent fundraising drives have utilized the technique of sending goods not ordered by the potential contributor with an invoice. Telephone appeals are more prevalent, and such solicitors may request donations by credit card. Many charitable organizations solicit contributions by direct mail appeals. Some utilize contests

*Attachment VI*

and sweepstakes to get contributions. With these appeals for contributions have come an increase in deceptive and unconscionable acts and practices. Passage of this bill would allow the Attorney General to recover damages sustained by contributors for such deceptive and unconscionable acts and practices in the same way as the Attorney General may now recover damages under the Consumer Protection Act.

Recent complaints the Attorney General has received regarding charitable solicitations have included:

-- An organization soliciting to protect social security benefits, but which actually only provides contributors with forms available from the federal government;

-- An unknown heart disease organization soliciting through a deceptive sweepstakes offer;

-- An organization which alleges to benefit cancer research which utilized the same professional fundraiser and sweepstakes as the heart disease organization;

-- An alleged social security lobbying organization which uses a solicitation appearing to be an official government document;

-- An alleged professional fundraiser who raises funds in the name of missing children while pocketing most of the profits.

These are but a few of the organizations on which we receive information. None of the above have bothered to register with the Secretary of State prior to soliciting.

Because charitable solicitations frequently do not constitute consumer transactions, the only action often available is to revoke a solicitor's registration with the Secretary of State, if they bothered to register in the first place. Such a remedy obviously is ineffective.

Passage of this bill will not harm well-intentioned legitimate charities. On the contrary, it would be of great benefit to them by providing the Attorney General with the enforcement tools to combat those organizations which deceive contributors.

The Attorney General does want you to be cognizant of the fact that we believe this bill would have a fiscal impact on the Attorney General's Office. To carry out the duties under the bill, it would require a full-time attorney to enforce charitable laws. We have attached our fiscal note to our written testimony. We believe this is a small price to pay for the benefit derived from taking enforcement action against deceptive solicitors of funds.

In summary, the Attorney General supports Senate Bill 696 and urges its passage as a means of providing the enforcement options necessary to deter unconscionable and deceptive solicitations for alleged charitable contributions.



# Cancer Fund OF AMERICA



A. Francolini  
145 Cassidy Pl.  
Staten Island, NY 10301




Dear A. Francolini,

This letter will serve as your legal notification that the three individuals named in the Cash Disbursement Box below are Grand Finalists in the \$5000.00 Cash Bonanza Sweepstakes.

One of the individuals named below is the Third Round Grand Finalist and is a guaranteed winner of a \$1000.00 certified bank check.

The other two individuals are guaranteed 4th Round Grand Finalists and their prize checks will be mailed to them on or about December 30, 1988.

CASH DISBURSEMENT BOX	★ ★ ★
	IDAN GORDON
	A. FRANCOLINI
	L B DOMINGUEZ

If your name does not appear in the Cash Disbursement Box above, please disregard this Notice.

over, please

PLEASE DETACH HERE AND RETURN CLAIM COUPON BELOW.


## OFFICIAL CASH CLAIM COUPON

A. Francolini  
145 Cassidy Pl.  
Staten Island, NY 10301

LL

WARNING: Do not lose.  
This Coupon has a certified cash value, if the addressee's name appears in the Cash Disbursement Box.

23DSS

CASH DISBURSEMENT BOX	★ ★ ★
	IDAN GORDON
	A. FRANCOLINI
	L B DOMINGUEZ

← If your name appears in the Cash Disbursement Box at the left, you are a cash winner in the \$5000.00 Cash Bonanza Sweepstakes

To claim your prize, please enclose (check one)

/\_/\_ a personal check or cash in the amount of \$7 or more to help fund our cancer patient assistance and cancer education programs;

/\_/\_ a personal check with the word VOID written across it.

Your prize check will be mailed to you on or about December 30, 1988.

# SOCIAL SECURITY PROTECTION BUREAU

RECEIVED WASHINGTON DC 20069

KANSAS  
ATTORNEY GENERAL

APR 26 9 15 AM '88

15RSC




H. R. Coday  
R. 2  
Pomona, KS 66076

Dear H. R. Coday,

This letter will serve as your legal notification that the three individuals named in the Cash Disbursement Box below are Grand Finalists in the \$5000.00 Cash Bonanza Sweepstakes.

One of the individuals named below is the Third Round Grand Finalist and is a guaranteed winner of a \$1000.00 certified bank check.

The other two individuals are guaranteed 4th Round Grand Finalists and their prize checks will be mailed to them on or about December 30, 1988.

<p>CASH DISBURSEMENT BOX</p>  <p>2 002 6537300225</p>	<p>★★★</p> <p>E G ESCHNER</p> <p>H. R. CODAY</p> <p>ROBERT E MASCH</p>
---	--

If your name does not appear in the Cash Disbursement Box, please disregard this Notice.



If your name does appear in the Cash Disbursement Box, you must return the Official Cash Claim Voucher below in the enclosed pre-addressed envelope along with your check for \$7 to enroll as a member of the Social Security Protection Bureau OR a blank check with the word VOID written across it.

Follow these instructions and on or about December 30, 1988 a bank check will be drafted and sent to you by return mail. Remember, you must send a check to claim your prize.

This massive \$5,000.00 Cash Bonanza Giveaway is sponsored by the Social Security Protection Bureau, an organization dedicated to protecting your Social Security retirement benefits.

Right now you may stand to collect as much as \$90,000 in Social Security benefits for your first 10 years of retirement. That's why you need the Social Security Protection Bureau to help you  
**PLEASE DETACH HERE AND RETURN CLAIM COUPON BELOW.**

## OFFICIAL CASH CLAIM COUPON

<p>CASH DISBURSEMENT BOX</p>  <p>2 002 6537300225</p>	<p>★★★</p> <p>E G ESCHNER</p> <p>H. R. CODAY</p> <p>ROBERT E MASCH</p>	<p>LN</p> 
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If your name appears in the Cash Disbursement Box at the left, you are a cash winner in the \$5000.00 Cash Bonanza Sweepstakes.

H. R. Coday  
R. 2  
Pomona, KS 66076

15RSC

- To claim your prize, please enclose (check one):
- a personal check or cash in the amount of \$7 or more to become a member of the Social Security Protection Bureau. Send me my membership kit. My Social Security number is //////////  
Please emboss this number on my plastic Social Security Card.
- a personal check with the word VOID written across it.

**WARNING: Do not lose.** This Coupon has a certified cash value, if the addressee's name appears in the Cash Disbursement Box.

Your check will be mailed to you on or about December 30, 1988.



AMERICAN  
HEART DISEASE PREVENTION  
FOUNDATION



251SS

Ms. Claire E. Kahler  
2106 Belmont St.  
Garden City, KS 67846




Dear Ms. Claire E. Kahler,

This letter will serve as your legal notification that the three individuals named in the Cash Disbursement Box below are Grand Finalists in the \$5000.00 Cash Bonanza Sweepstakes.

One of the individuals named below is the Third Round Grand Finalist and is a guaranteed winner of a \$1000.00 certified bank check.

The other two individuals are guaranteed 4th Round Grand Finalists and their prize checks will be mailed to them on or about December 30, 1988.

CASH DISBURSEMENT BOX		★ ★ ★	
		RUTH V ROSSOW	
		CLAIRE E. KAHLER	
		V SKUBIK	

If your name does not appear in the Cash Disbursement Box above, please disregard this Notice.

over, please

PLEASE DETACH HERE AND RETURN CLAIM COUPON BELOW.


**OFFICIAL CASH CLAIM COUPON**

Ms. Claire E. Kahler  
2106 Belmont St.  
Garden City, KS 67846

LO

WARNING: Do not lose.  
This Coupon has a certified cash value, if the addressee's name appears in the Cash Disbursement Box.

251SS

CASH DISBURSEMENT BOX		★ ★ ★	
		RUTH V ROSSOW	
		CLAIRE E. KAHLER	
		V SKUBIK	

← If your name appears in the Cash Disbursement Box at the left, you are a cash winner in the \$5000.00 Cash Bonanza Sweepstakes.

To claim your prize, please enclose (check one)

- / a personal check or cash in the amount of \$7 or more to help in the fight against heart disease;
- / a personal check with the word VOID written across it.

Your prize check will be mailed to you on or about December 30, 1988.

The Honorable Robert Frey, Chairperson  
Committee on Judiciary  
Senate Chamber  
Third Floor, Statehouse

Dear Senator Frey:

SUBJECT: Fiscal Note for Senate Bill No. 696 by Committee on Judiciary

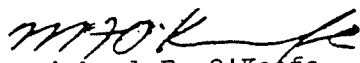
In accordance with K.S.A. 75-3715a, the following fiscal note concerning Senate Bill No. 696 is respectfully submitted to your committee.

Senate Bill No. 696 creates a system for the regulation of organizations and individuals soliciting charitable contributions. The bill repeals the current charitable solicitations act. Enforcement would be under the jurisdiction of the Attorney General as it is under current law.

This act shall take effect from and after January 1, 1989 and its publication in the statute book.

The Attorney General indicates that currently one attorney in Consumer Protection now spends approximately 1/8 to 1/4 time on charitable solicitation and charitable trusts matters. The Attorney General has indicated that passage of Senate Bill No. 696 in conjunction with related legislation would result in the need for one additional full time attorney. The costs for the attorney and other operating expenses including equipment, investigation and prosecution support would total approximately \$46,845.

In summary, enactment of Senate Bill No. 696 in conjunction with related legislation could result in additional State General Fund expenditures of \$46,845 above the amounts contained in the FY 1989 Governor's Report on the Budget.

  
Michael F. O'Keefe  
Director of the Budget

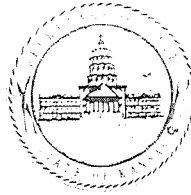
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cc: Honorable Robert Stephan, Attorney General  
Honorable Bill Graves, Secretary of State

2918

*Attachment VII*

Bill Graves  
Secretary of State



2nd Floor, State Capitol  
Topeka, KS 66612-1594  
(913) 296-2236

## STATE OF KANSAS

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE  
ON SB 696

BY: DANTON B. RICE - LEGAL COUNSEL

Senate bill 696 will rewrite the current charitable solicitations act to correct several administrative and constitutional defects. The bill was drafted with the assistance of the Attorney General's office and is modeled extensively on the current act.

One of the most important changes contained in the bill is the inclusion for the first time of a definition of the term "solicitation." The term will be defined as a request or appeal for anything of value for a charitable purpose. Excluded from the definition are grants of funds received by organizations from members or affiliates and unsolicited contributions.

Additional changes have been made to the registration procedures for organizations that are required to file under the act. The annual registration statement will include significantly more useful information and will expire on the last day of the sixth month following the fiscal year end of a corporation. The current statute requires an initial filing and subsequent annual reports.

The Secretary of State supports SB 696 because it corrects several administrative and constitutional defects with the current act and it will provide the Attorney General with more information for enforcement purposes.

*Attachment VIII*