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SCHOOL DISTRICT REORGANIZATION NEBRASKA'S CONTINUING PROBLEM

INTRODUCTION

A review of the school laws of the state is convincing that it is an object of the state to provide a simple and effectual method of re-arranging, reorganizing, and consolidating school districts for the purpose of discontinuing minor, unsatisfactory, and expensive school districts and to replace them with more economical, less numerous, and more desirable organizations as a means of securing an advanced and improved educational system.¹

Nebraska has long been known as a state having an excessively large number of school districts in proportion to both population and area.² Faced with this problem, Nebraska has enacted several laws concerned with the reorganization of school districts in order to advance and improve its educational system.

The purpose of this comment is to present a general review of the procedures available for the reorganization of school districts. This comment will encompass four major areas. Reorganization of School District Act, commonly referred to as the election method, will be discussed first. The second procedure, known as the petition method, considers reorganization initiated through petition by legal voters or school districts. The third area, which for purposes

¹ Halstead v. Rozmiarek, 167 Neb. 652, 657, 94 N.W.2d 37, 42 (1959).

² At present Nebraska contains 2,362 school districts. Under NEB. REV. STAT. § 79-102 (Reissue 1966) school districts are classified as follows:

"(1) Class I shall include any school district that maintains only elementary grades under the direction of a single school board;

(2) Class II shall include any school district embracing territory having a population of one thousand inhabitants or less that maintains both elementary and high school grades under the direction of a single school board;

(3) Class III shall include any school district embracing territory having a population of more than one thousand and less than fifty thousand inhabitants that maintains both elementary and high school grades under the direction of a single board of education;

(4) Class IV shall include any school district embracing territory having a population of more than fifty thousand and less than two hundred thousand inhabitants that maintains both elementary and high school grades under the direction of a single board of education;

(5) Class V shall include any school district embracing territory having a population of two hundred thousand or more that maintains both elementary grades and high school grades under the direction of a single board of education; and

(6) Class VI shall include any school district in this state that maintains only a high school."

of this comment will be denoted as Legislative Bill 892, considers Nebraska's most recent statutory enactment for purposes of reorganization of school districts. The last statute to be considered is not a method to reorganize school districts; however, any discussion of school district reorganization warrants its consideration. This statute is known as the Freeholder Petition.

REORGANIZATION OF SCHOOL DISTRICTS ACT

The 1949 Legislature, in an attempt to establish an act by which orderly and comprehensive county wide reorganization plans could be effected, passed what has been known as the Reorganization of School Districts Act.³

The Act provides for the establishment of a county committee in each county in the state. Also established is the State Committee for Reorganization of School Districts. The duty of the state committee is to advise and assist the county committees and to initiate reorganization plans for the county committees in an advisory capacity only. The current procedure is as follows:

I. COUNTY COMMITTEE

In the formulation of a plan for reorganization of school districts in the county, the county committee considers all suggestions and procedures submitted to it by the state committee. The Act also provides that certain criteria must be given consideration in preparation of the plan:⁴

- (1) *educational needs of the local communities;*
- (2) *possible economies in transportation and administrative costs;*
- (3) *future use of existing satisfactory school buildings, sites and playgrounds;*
- (4) *convenience and welfare of pupils;*
- (5) *disparities in assessed valuation per pupil among the several school districts;*
- (6) *equalization of educational opportunities of pupils;*
- (7) *other matters which may be judged relevant.*

The county committee must, before it formulates its final reor-

³ NEB. REV. STAT. § 79-426.01 to 79-426.19 (Reissue 1966). Prior to this Act the major law concerning school district reorganization had been passed in 1919. Neb. Laws c. 243, p. 1107-11 (1919). The main purpose of this Act was to encourage the elimination of small school districts in Nebraska. The current provisions of the Act have been the result of several major amendments since 1949.

⁴ NEB. REV. STAT. § 79-426.09 (Reissue 1966).

ganization plans, hold one or more public hearings. A record of all hearings must be kept by the county committee. Notice must be given at least ten days prior to such hearing by publication in a legal newspaper of general circulation in the county. After the hearings a final plan is drawn up and submitted to the state committee.

Where the reorganization plan involves a district under the jurisdiction of another county committee, the Act provides for a special committee to prepare and approve the plan.⁵ The special committee is composed of three members of each county committee affected. The plan of the special committee is submitted to the county committee having the largest number of pupils residing in the proposed joint district. After receiving the approval of the county committee, the plan is forwarded to the state committee.

The state committee must within thirty days consider the proposal and report to the county committee whether it has any recommendations for changes.

If the plan is approved by both committees it is submitted to the voters of the county at a special election. If recommendations are received from the state committee, the county committee must within thirty days determine whether or not to accept them. In considering the recommendations the county committee may hold additional public hearings.⁶ The final adopted plan is then submitted to the voters in a special election.

II. SPECIAL ELECTION

The county committee, within not less than thirty nor more than sixty days, must submit the final approved plan in a special election to the voters in districts whose boundaries are affected. Notice of the election is given by the county committee through a legal newspaper of general circulation in the county at least ten days prior to holding the election. The election is conducted by the county committee. The Act provides that

all districts of like class shall vote as a unit; *Provided*, that school districts of the first class within the boundaries of which are located an incorporated village or city shall constitute a separate voting unit; and school districts of the first class which do not have within their boundaries an incorporated village or city constitute a separate voting unit.⁷

⁵ NEB. REV. STAT. § 79-426.09 (Reissue 1966). The provision for joint committees has been upheld. *Frankforter v. Turner*, 175 Neb. 252, 121 N.W.2d 377 (1963).

⁶ NEB. REV. STAT. § 79-426.14 (Reissue 1966).

⁷ NEB. REV. STAT. § 79-426.15 (Reissue 1966).

A majority of all electors voting in each voting unit must approve of the plan. If the plan of reorganization is adopted, the county superintendent is to proceed to carry out the changes. He is also to classify the school districts according to size, location and population of the reorganized district.

In *Nickel v. School Board of Axtell*,⁸ the Act received its major constitutional tests. The court held that the legislature may delegate the authority given to the county committee and that proper guidance through reasonable limitations and standards has been provided in the act. Regarding notice of the election, it was held that the provisions in the act do not violate the requirements of due process of law. The court stated:

In regard to the sufficiency of the hearing and the notice thereof provided for by the Act, see *State ex rel. Tanner v. Warrick*, 106 Neb. 750, 184 N.W. 896. Therein we said: "The terms of the statute which provide for a hearing on the initial question of fixing the boundaries of consolidated districts by the redistricting committee furnish sufficient notice to all parties interested of the proposed boundaries of the district."⁹

Regarding the failure of the Act to provide for an appeal from the action of the county committee, the court held that the state statutes provide an adequate remedy.¹⁰ The court also held that the doctrine of estoppel would not apply where the county reorganization committee made misrepresentation of law, and not of fact. The constitutionality of the Act was again litigated in *School Dist. No. 49 v. School Dist. No. 65-R*.¹¹ The court upheld the absolute discretion of the state to establish the unit system of voting found in section fifteen of the Act, and reaffirmed its holdings in the *Nickel* case.

The court in *Arends v. Whitten*¹² held that the special election is governed by the general election laws and is subject to the provisions of NEB. REV. STAT. section 32-1001.¹³ The contention of the defendant in this case was that the special election was a school election and that it was included within the exception found in NEB. REV. STAT. section 32-106¹⁴ and therefore not subject to an elec-

⁸ 157 Neb. 813, 61 N.W.2d 566 (1953).

⁹ *Id.* at 826, 61 N.W.2d at 574.

¹⁰ NEB. REV. STAT. § 25-1901 (1943).

¹¹ 159 Neb. 262, 66 N.W.2d 561 (1954).

¹² 172 Neb. 297, 109 N.W.2d 363 (1961).

¹³ NEB. REV. STAT. § 32-1001 (Reissue 1958).

¹⁴ NEB. REV. STAT. § 32-106 (Reissue 1958). This statute states: "Election shall mean any primary, special, municipal, or general election, except school election, at which the electors of the state or of any sub-

tion contest. The court noted that the election is conducted by the county committee on reorganization rather than school district officials. The court also stated that the statutes¹⁵ governing absentee and disabled voting would generally receive a strict construction because absentee voting is not a right, but rather a mere privilege granted the elector.

The court reaffirmed in *Longe v. County of Wayne*¹⁶ the conclusion that the special election under the Act comes within the general election laws. In this case the plaintiff sought to bring proceedings in error under NEB. REV. STAT. section 25-1901¹⁷ to review the order realigning and adjusting boundaries made by three county superintendents. The court stated that the order of the superintendent under the Act to effect the changes approved by the electors was ministerial and not judicial in nature. The court then stated: "It is only when the tribunal acts judicially that a review by error proceedings is allowed under section 25-1901, R. R. S. 1943."¹⁸

There is no waiting period for resubmission of the proposed plan where a majority of each voting unit in a said election has not been in favor of the plan. A revised plan may be drawn, approved by both county and state committees and submitted to a vote under the procedure provided for.¹⁹

PETITION METHOD

NEB. REV. STAT. section 79-402²⁰ authorizes what is referred to as the petition procedure for the reorganization of school districts. The essence of this method is that upon petition of sixty per cent of the legal voters in each school district affected, the county superintendent is required to change the boundaries of any existing district or create a new district from other districts.²¹

division thereof choose by ballot public officials or decide any public questions and propositions lawfully submitted to them."

¹⁵ NEB. REV. STAT. § 32-801 to 32-813 (Reissue 1958). NEB. REV. STAT. § 32-809 (Supp. 1965).

¹⁶ 175 Neb. 245, 121 N.W.2d 196 (1963).

¹⁷ NEB. REV. STAT. § 25-1901 (1943).

¹⁸ 175 Neb. 245, 249, 121 N.W.2d 196, 198 (1963).

¹⁹ NEB. REV. STAT. § 79-426.16 (Reissue 1966). Note that under the provisions of L.B. 892 a proposal can be submitted only once during any calendar year.

²⁰ NEB. REV. STAT. § 79-402 (Reissue 1966).

²¹ The petition method has been in effect since 1881 in some form or another. Neb. Laws c. 78, subdivision I, § 4, p. 332 (1881). Prior to 1949 the county superintendent could create a new district from other ex-

The statute at present substantially provides:

I. PETITION

Each district which is affected by the proposal must have a petition signed by at least sixty per cent of the legal voters of each district. The petitions are submitted to the county committee for school district reorganization. The county committee reviews the petitions giving approval or disapproval and then submits the petitions to the state committee for school district reorganization. The state committee considers the petitions and approves or disapproves the proposal. The petitions are then returned to the county committee with the state committee's decision and recommendations.²² The county committee must then within fifteen days make a final determination approving or disapproving the proposal.

II. NOTICE—HEARING—DETERMINATION OF VALIDITY AND SUFFICIENCY

Upon return of the proposal from the state committee, the county committee must within fifteen days advertise and hold a public hearing. At this hearing the decisions and recommendations of both the committees are presented. The petitions are held for ten days after the hearing, then the county committee files the petitions with the county superintendent. The county superintendent must "within fifteen days, advertise and hold a hearing to determine the *validity and sufficiency* of the petitions." If it is

isting districts when presented with a petition signed by half of the legal voters in each of the districts affected. The amendments since 1949 have been numerous. Major additions have been: (1) provision for public hearings on the proposal; (2) intergration into procedure of county and state committees for reorganization of school districts; (3) provision for slowing down the procedure by establishment of time requirements for review of the proposal; (4) procedures for school boards to petition for a change or to petition for the acceptance of a change.

²² The county committee is that provided for under NEB. REV. STAT. § 79-426.01 (Reissue 1966). The state committee is provided for in NEB. REV. STAT. § 79-426.01 (Reissue 1966). The county committee board has forty days to review and the state committee has an additional forty days to review the petitions. Where petitions have proceeded to the point of obtaining approval from the state committee, this constitutes a waiver by the state board of education of dissolving the school district for not holding school for five years under NEB. REV. STAT. § 79-486 (Reissue 1966). The county superintendent may not proceed under the statute while the proposal under the petition method is still pending. *Bierman v. Campbell*, 175 Neb. 877, 124 N.W.2d 918 (1963). Where the proposal affects districts located in different counties the petitions are reviewed by a special committee provided in NEB. REV. STAT. § 79-426.09 (Reissue 1966).

determined that the petitions contain at least sixty per cent of the qualified legal voters of each district, the county superintendent carries out the changes within the proposal.²³

NEB. REV. STAT. section 79-404²⁴ requires that a list of legal voters of the district must be submitted along with the petition to the county superintendent. Electors are not entitled to be on the voters list unless they meet the tests of both NEB. REV. STAT. section 32-475²⁵ and NEB. REV. STAT. section 79-427²⁶ which set forth the requirements for voters in a specific school district. These qualifications are considered by the county superintendent in determining the "validity and sufficiency" of the petitions.

In *Harnapp v. Bigelow*²⁷ the court considered the effect of NEB. REV. STAT. section 32-475²⁸ on the qualifications for legal voters. The court held where a parent had transferred his child out of his district for school purposes for one year under section 79-478, that the parent was not a legal voter within the district transferred from while such transfer was in effect. The court was not concerned with and did not determine whether or not such individuals were entitled to vote on school district reorganization in the district to which they had been transferred. Are such individuals to be counted as qualified legal voters with regard to the petitions under Section 79-402?

The statutes which provide for temporary transfer specifically limit voting privileges.

The parents or guardians of the pupils so transferred shall have the right to vote in the district to which such pupils are transferred on all school matters except those of issuing bonds, levying a tax for building purposes, contracting for instruction, and closing the district. No parent or guardian of the pupils so transferred shall be eligible to hold office on the school board of the district to which

²³ The statute provides that if the proposal has been disapproved by both committees the petitions must contain at least sixty-five per cent of the qualified legal voters of each district. Where the proposal affects districts located in different counties notice and hearings are conducted by joint action of the county superintendents and approval must be obtained from both to carry out the changes.

²⁴ NEB. REV. STAT. § 79-404 (Reissue 1966).

²⁵ NEB. REV. STAT. § 32-475 (Reissue 1966). The date as of which the determination of qualified electors under NEB. REV. STAT. § 32-475 (Reissue 1960) must be determined is the date that the petitions are filed with the county superintendent. *Harnapp v. Bigelow*, 178 Neb. 440, 133 N.W.2d 611 (1965).

²⁶ NEB. REV. STAT. § 79-427 (Reissue 1966).

²⁷ 178 Neb. 440, 133 N.W.2d 611 (1965).

²⁸ NEB. REV. STAT. § 32-475 (Supp. 1965).

the transfer was made.²⁹

It is thus noted that parents or guardians cannot vote in any elections to close the district. In order to create new districts under Section 79-402 it is necessary that at least some of the existing districts be dissolved, discontinued or *closed*. Strong argument can thus be raised that such persons are not qualified, legal voters to sign a petition which specifically requests the closing or dissolving of a district.³⁰

The most recent case concerning who may petition under the statute is *Languis v. DeBoer*.³¹ The statute provides in part:

Provided, changes affecting Class III, IV, V and VI school districts and districts in which are located cities and incorporated villages may be made upon the petition of the school board or the board of education of the district or districts affected; *provided further*, that when a Class I or Class II school district petitions the school board or the board of education of a Class I or Class II school district to merge in whole or in part with such district, said petition of the petitioning district may be accepted upon the petition of the school board or the board of education of the accepting district; *and provided further*, that when a Class I school district petitions the school board or the board of education of a Class I school district with a six-man board to merge with such district, said petition of the petitioning district may be accepted upon the petition of the school board or the board of education of the accepting district.³²

The question presented was whether school boards could petition each other under the petition method. In other words, can there be "board to board petitions?" As to the first provision the court held that board to board petitions are allowable for changes concerning Class III, IV, V and VI school districts and Class I and II school districts which have cities and incorporated villages within their boundaries. As to the second and third provisions the court held:

The second and third provisos cover Class I or II school districts in

²⁹ NEB. REV. STAT. § 79-483 (Reissue 1966).

³⁰ Such individuals are only in the district for educational purposes for their children during the time that their children are in the first eight grades and thus should have no effect upon any permanent or long reaching decisions that are to be made by the electorate. A contrary interpretation would allow in some of the smaller districts the transfer of sufficient land to the district on a temporary basis so that the parents thus involved would be in a position of control as to the dissolution of the district.

³¹ 181 Neb. 32, 146 N.W.2d 750 (1966). A list of legal voters is unnecessary where there is a board to board petition.

³² NEB. REV. STAT. § 79-402 (Supp. 1965).

which no cities or villages are located, and in them the proviso is restricted to the acceptance of petitions.³³

When the county superintendent reviews board petitions for validity and sufficiency, it must be shown that a majority of the board authorized the petition. The legal voters of the district are represented by the school board, therefore it is not necessary to submit a list of the legal voters of the district with the petition to the county superintendent.³⁴

The statute was silent prior to 1953 regarding the right of a petitioner to withdraw his name from the petition, but withdrawal was held permissible at any time before the petition had been acted upon by the county superintendent.³⁵ In 1953 the section was amended to provide that the petitioner could not withdraw his name after the filing of the petition with the county superintendent.³⁶ The question appears to be treated in its entirety by the 1963 amendment which provided:

A signing petitioner shall be permitted to withdraw his name therefrom and a legal voter shall be permitted to add his name thereto at any time prior to the end of the ten day period when the county committee files such petitions with the county superintendent.³⁷

An appeal may be taken from the action of a county superintendent by an adversely affected party.³⁸ This right to appeal was affirmed in a 1963 amendment to NEB. REV. STAT. section 79-402,³⁹ but that enactment did not specify the method of appeal to be followed. However, the 1963 legislature also enacted a statute providing:

When the Legislature enacts a law providing for an appeal without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions. Trial in the district court shall be de novo upon the issues made up by the pleadings in the district court. Appeals from the district court to the Supreme Court shall be taken in the same manner provided by law for ap-

³³ 181 Neb. at 35, 146 N.W.2d at 752.

³⁴ Olsen v. Grosshans, 160 Neb. 543, 71 N.W.2d 90 (1955).

³⁵ Glenn v. Bennett, 156 Neb. 258, 55 N.W.2d 677 (1952). Larson v. Morrison, 155 Neb. 309, 51 N.W.2d 626 (1952).

³⁶ Retzlaff v. Synovec, 178 Neb. 147, 132 N.W.2d 314 (1965).

³⁷ NEB. REV. STAT. § 79-402 (Reissue 1966).

³⁸ School Dist. No. 49 v. Kreidler, 165 Neb. 761, 87 N.W.2d 429 (1958). Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N.W.2d 599 (1960). Cacek v. Munson, 160 Neb. 187, 69 N.W.2d 692 (1955). Dovel v. School Dist. No. 23, 166 Neb. 548, 90 N.W.2d 58 (1958).

³⁹ NEB. REV. STAT. § 79-402 (Reissue 1966).

peals to the Supreme Court in civil cases and shall be heard de novo on the record.⁴⁰

This question of appeal procedure is settled by the case of *Moser v. Turner*.⁴¹ There the proceedings in the lower court had been brought as a proceeding in error, and the defendant contended that the appeal was the only review permitted. The court said:

There is nothing in section 79-402, R.S. Supp., 1965, or in section 25-1937, R.R.S. 1943, which purports to take away the right to proceed in error under section 25-1901, R.R.S. 1943. Any person adversely affected by the changes made by a county superintendent pursuant to section 79-402, R.S. Supp., 1965, may proceed by appeal or by error pursuant to section 25-1901, R.R.S. 1943.⁴²

Thus a person adversely affected by the changes made by the county superintendent is not limited in the form of review he may seek.⁴³

The school district is not a proper party to proceedings concerning its boundaries.⁴⁴ The case of *Halstead v. Rozmiarek*⁴⁵ clearly points out the position that the court has taken in regard to this matter:

[I]t may be appropriately said that notwithstanding the statute provides that a school district is a body corporate, possesses the usual powers of a corporation for public purposes, and may sue and be sued, it is the firmly established law of this state that a school district may not maintain an action involving a change in the boundaries of a school district.⁴⁶

LEGISLATIVE BILL 892

L.B. 892 was enacted in 1965.⁴⁷ It affords Class I and II school

⁴⁰ NEB. REV. STAT. § 25-1937 (Supp. 1965).

⁴¹ 180 Neb. 635, 144 N.W.2d 192 (1966).

⁴² *Id.* at 639-40, 144 N.W.2d 195. Where both error and appeal proceedings are employed, the trial judge should consolidate the actions and try the consolidated case on appeal. *Languis v. DeBoer*, 181 Neb. 32, 146 N.W.2d 750 (1966).

⁴³ NEB. REV. STAT. § 25-1901 (Reissue 1964). Where the district court substitutes its action for the action of the county superintendent by reversing his order, that from the effective date of the district court decree, which is not appealed, the action directed by the district court decree becomes effective as though entered by the county superintendent and not appealed. *State ex rel. Vanango Rural High School Dist. v. Ziegler*, 173 Neb. 758, 115 N.W.2d 142 (1962).

⁴⁴ *Clausen v. School Dist. No. 33*, 164 Neb. 78, 81 N.W.2d 822 (1957); *Bierman v. Campbell*, 175 Neb. 877, 124 N.W.2d 918 (1963); *Board of Education v. Winne*, 177 Neb. 431, 129 N.W.2d 255 (1964).

⁴⁵ 167 Neb. 652, 94 N.W.2d 37 (1959).

⁴⁶ *Id.* at 660, 94 N.W.2d at 43.

⁴⁷ NEB. REV. STAT. §§ 79-426.23 to 79-426.26 (Reissue 1966). Discussion

districts an alternative method of reorganization to those found under the petition and Reorganization Act methods.⁴⁸

The purpose of L.B. 892 is to provide for a Class I or II school district, except a Class I school district which is partly or wholly within a Class VI school district, to petition to dissolve and attach to a Class II, III, IV or V school district. The petition when approved then requires the school board to hold an election. If a majority of the voters approve the proposal and all requirements are met, the merger is consummated. The main requirements under this method are:

I. PETITION

The local voters of any Class I or II school district, except a Class I school district which is partly or wholly within a Class VI school district, may petition to dissolve and merge with an existing Class II, III, IV or V school district. The petition must contain signatures of at least twenty five per cent of the legal voters of the petitioning district. The petition and an affidavit listing all legal voters of the district are filed with the county superintendent of the county in which the greater part of the petitioning district is located. The county superintendent must determine that all the signatures are sufficient.

The petition is then submitted to the county committee for the reorganization of school districts which has jurisdiction over the district. The school district to be merged with must also submit to the county committee a statement that a majority of the members of their school board or board of education approve of the proposal. The proposal is approved or disapproved by the county committee and then submitted to the state committee for reorganization of school districts.⁴⁹ The state committee approves or disapproves the proposal and returns it to the county committee.⁵⁰

of this method includes amendments made by L.B. 585 & L.B. 747, 77th Neb. Leg. Sess. (1967).

⁴⁸ The hearing held by the Committee on Education prior to passage of L.B. 892, 76th Neb. Leg. Sess. (1965), cites several reasons for its passage. The manner in which the petition method has been used sometimes created dissension within the community. County committees under the election method have not in general been successful in carrying out concrete and beneficial reorganization plans. It also would appear that the liberal requirements under the freeholder petition leads to depopulation in Class I and II school districts necessitating a restrictions of their activities. MINUTES, COMMITTEE ON EDUCATION, May 4, 1965.

⁴⁹ The county committee must submit the proposal to the state committee within forty days after receipt of the petition.

⁵⁰ The state committee must return the petition within forty days after receipt of the petition from the county committee.

The county committee then makes its final decision taking into consideration the action of the state committee. The county committee then files the petition and a statement as to the action taken by both committees with the county superintendent.⁵¹

II. ELECTION

If one or both of the committees approve the proposal in the petition, the county superintendent then notifies the school board⁵² of the Class I or II school district.⁵³ The school board must then "set a date for a special election for the purpose of submitting the proposal to the legal voters of the district" within fifteen days. The election is conducted by the school board.

It is important that the legislature in its directions regarding the election used the phrase *set a date for* rather than *hold*. This indicates that the election must be set and notice given within fifteen days but that the election need not be held within the fifteen days. An interesting point to note is that nowhere is there a provision as to the time within which the election is to be held.

Prior to 1967 this method of reorganization contained no provision for notice of the election. The procedure for notice has been clearly set forth in an amendment in L.B. 585, 77th Neb. Leg. Sess. (1967), which states:

At least twenty days' notice of such election shall be given by publication twice in a newspaper of general circulation in the district, the latest publication to be not more than one week before the election. If there be no such newspaper, notice shall be given by posting it on the door of the schoolhouse and at least four other public places throughout the district.⁵⁴

III. NOTICE—HEARING—APPROVAL OF ELECTION

If a majority of the legal voters approve the proposal, the school board notifies the county superintendent. He in turn notifies the school board or board of education of the Class II, III, IV or V school district affected. They must in turn certify to

⁵¹ The county committee has fifteen days after the petition is returned to make a final decision and ten days to file its decision with the county superintendent.

⁵² This must be done within ten days after receipt.

⁵³ NEB. REV. STAT. § 79-426.24 (Reissue 1966) provides in part: "If both the county committee and the state committee disapprove the proposal no further action shall be taken in regard to it and it shall not be resubmitted in substance for a period of six months from the date it was filed with the county superintendent."

⁵⁴ L.B. 585, 77th Neb. Leg. Sess. (1967).

the county superintendent that a majority of the board officially approves of the proposal. The county superintendent then gives notice of and holds a public hearing to determine if all the requirements are met. After all the requirements have been complied with, the county superintendent carries out the changes.

Under the petition method if the required number of petitioners sign the petition the county superintendent is required to effect the proposal. It is the petition which gives the county superintendent the authority to act. On the other hand, L.B. 892 uses the petition only to establish authority to conduct an election. It is the election which gives the county superintendent the authority to carry out the proposal.

FREEHOLDER PETITION

The freeholders petition method is governed by NEB. REV. STAT. section 79-403.⁵⁵ This procedure is not a method to reorganize school districts, but it becomes important when considered with regard to its effect on future reorganization.⁵⁶

The purpose of the freeholder petition is to allow a person to have his land detached from the school district in which it is

⁵⁵ NEB. REV. STAT. § 79-403 (Reissue 1966). The present procedure is the result of several amendments. Prior to 1949 the freeholder petition requirements were: (1) the freeholder must own land; (2) the land must adjoin the district to be attached to; (3) children of school age must reside on the land to be attached; (4) the land to be attached had to be more than two miles from the school house in its present district and at least one half mile closer to the school house in the adjoining district; (5) to effect the change requested the board must deem it just and proper and for the best interest of the petitioner. Neb. Laws c. 117, § 1, p. 451 (1909). In 1951 it was amended to provide: (1) a method to measure distance requirements; (2) for notice of filing petition and public hearing by board. Neb. Laws c. 276, § 3, p. 928-29 (1951). In 1955 it was amended to provide: (1) an alternate requirement under section one, subsection 4, for ownership of land in district to be attached to; (2) for transfer across county lines; (3) provision for appeal. Neb. Laws c. 315, § 4, p. 974-75 (1955). Major amendments in 1961 were: (1) definition of freeholder extended; (2) the distance requirement was changed to being one half mile nearer the school house or a school bus route of the adjoining district. Neb. Laws c. 397, § 1, p. 1207 (1961). Section two, providing for transfer of land from a nonaccredited high school district to an accredited high school district, was added in its entirety in 1963. Neb. Laws c. 476, § 1, p. 1530 (1963).

⁵⁶ Extensive use of a freeholder petition may force reorganization by the transfer of the land to other districts. Petitioner's interest in his primary district will be lessened and his support given to reorganization of the district transferred from may decrease also.

situated and have it annexed to another district, thus allowing school children residing on the land to attend school in the latter district. The main requirements under section one of the statute are:

I. FREEHOLDER

Any freeholder who meets the requirements set out in the statute may initiate a petition.⁵⁷ The petition is submitted to a board composed of the county superintendent, county clerk and the county treasurer.

II. PETITION

The petition must allege, in addition to a description of the land to be set off and the reasons for the proposed change:

- a. *that the freeholder meets the requirements of one who can petition;*
- b. *that the land is located in a district that adjoins the district to which it is to be attached;*
- c. *that the territory proposed to be attached has children of school age residing thereon with their parents or guardians;*
- d. *that any one of the following facts can be established:*
 - (1) **that freeholder is more than two miles from the school house in their own district and one-half mile nearer to the school house of the adjoining district;**
or
 - (2) **that freeholder is more than two miles from the school bus route in their own district and one-half mile nearer to the school bus route of the adjoining district;**
or
 - (3) **that the route to the school house in the adjoining district is more practical and over hard surface roads for at least half its distance, provided, however:**
 - (a) **that the distance to the school house in the adjoining district shall not exceed the distance to the petitioner's school house by more than six miles; or that**
 - (b) **where the distance to the school house in the adjoining district exceeds the distance to the petitioner's school house by more than six miles the petitioner must have personally paid tuition for one or more of**

⁵⁷ The statute provides in part: "Any freeholder or freeholders, persons in possession or constructive possession as vendee pursuant to a contract of sale of the fee, holder of school land lease under section 72-232, or entrant upon government land who has not yet received a patent thereof may file a petition"

their children to attend school in the other school district over a period of two or more consecutive years;

or

- (4) that petitioners reside in a Class I or II school district and own (or lease) not less than eighty acres of land in an adjoining Class II, III, IV or V school district to which they wish to transfer additional land.

It is recognized that subsection (d) as set forth is subject to many possible constructions. The construction submitted for (d) (1) and (d) (2) appears to have been established by the court in *Rebman v. School District No. 1*⁵⁸ and *Hinze v. School District No. 34*.⁵⁹ The statute reads in part;

that they are each more than two miles from the schoolhouse in their own district, and at least one half mile nearer to the schoolhouse or a school bus route of the adjoining district . . .⁶⁰

The issue raised in both *Rebman* and *Hinze* was whether the petitioner could measure the distance from his land to the school house in his own district and compare that to the distance from his land to the bus route of the adjoining district to meet the distance requirements. Admittedly the language of the statute was subject to that interpretation. In both cases the court held that where both districts maintain bus routes and the petitioner's land is closer to the school house in his own district, that the school bus route of the adjoining district must be one-half mile closer to the petitioner's land than the bus route in his own district to meet the requirement. It would seem that this holding is sound, because if held otherwise, it would allow the breakdown of school districts at the will of the petitioner. Competition between adjoining districts as to bus routes would be encouraged beyond the point of reasonableness.

The construction for (d) (3) was established in the recent case of *Johnson v. School District of Wakefield*.⁶¹ The language of the statute under consideration there stated;

or that the route to the schoolhouse in the adjoining district is more practicable and, for at least half its distance, over hard-surfaced roads; *Provided*, that the distance to the schoolhouse in the adjoining district shall not exceed the distance to the schoolhouse in their own district by more than six miles or that they have personally paid tuition for one or more of their children to attend school in the other district over a period of two or more consecutive

⁵⁸ 178 Neb. 313, 133 N.W.2d 384 (1965).

⁵⁹ 179 Neb. 69, 136 N.W.2d 434 (1965).

⁶⁰ NEB. REV. STAT. § 79-403 (Reissue 1966).

⁶¹ 181 Neb. 372, 148 N.W.2d 592 (1967).

years⁶²

The contention in *Johnson* was that the tuition provision was a substantive part of the statute and an independent ground for transfer. The court, in reviewing the legislative history of the statute, held that the payment of tuition was not intended to be a separate ground for transfer but rather was an alternative provision to be applied and met when the distance to the schoolhouse in the petitioner's district is more than six miles. The court thus considered the tuition provision to be a proviso modifying the provision directly preceding it. It is interesting to note however that the freeholder petition method, as it existed prior to amendment L.B. 691 in 1963, provided two methods under sub-paragraph (d); one by distance and the other by ownership of land.⁶³ The original amendment to this section, contained in L.B. 691, was introduced by Senator McGinley. When the amendment is examined, it seems plausible that it was intended to be a separate and distinct method of changing the district in which particular land is located. The amendment made by L.B. 691, providing for transfer on the basis of having paid tuition for two or more years, was introduced by Senator Warner as an amendment to L.B. 691. It appears from Senator Warner's brief statements in the argument before the legislature that this was also intended as a separate basis for transfer of property.

III. ACTION OF THE BOARD

Notice of the filing of the petition with the board and the public hearing to be held must be given at least ten days before such hearing. The board after the hearing *may*, where they deem it "just and proper and for the best interest of the petitioner," change the boundaries and attach the land. Where the petitioner requests transfer across county lines the petition must be addressed jointly to the county superintendents and the boards will sit jointly.

The question which arises immediately is what criteria the board must use in its determination of what is "just and proper" and in the best interest of the petitioner in deciding whether the changes sought shall be carried out. *Roy v. Bladen School Dist.*⁶⁴ set forth the criteria by stating it is the educational rather

⁶² NEB. REV. STAT. § 79-403 (Supp. 1963). In 1965 the legislature deleted the words "Provided, that" and substituted the word "and" for the deleted material. NEB. REV. STAT. § 79-403 (Reissue 1966).

⁶³ The Supreme Court of Nebraska recognized this construction in *McDonald v. Rentfrow*, 176 Neb. 796, 127 N.W.2d 480 (1964).

⁶⁴ 165 Neb. 170, 84 N.W.2d 119 (1957). There the court said: "[W]e

than the noneducational interests that are sought to be promoted. It must be noted that the statute says that the board *may*, rather than *shall*, determine whether the land described should be attached to the adjoining district. In this connection the court pointed out in *Roy* that the word "may" when used in statutes, unless it would defeat the object of the statute, is not mandatory but rather discretionary and permissive. Therefore, the board must consider all the ramifications of the proposal within the petition. Once the petition is filed they sit as a quasi-judicial body and must make a determination that is just and proper under the circumstances. It must be a factual determination as to whether the transfer would be in the best interest of all concerned.

Appeal may be taken from the action or nonaction of the board. The appeal method used is that followed in appealing decisions of the county board regarding claims against the county.⁶⁵

IV. PETITIONING OUT OF A NONACCREDITED HIGH SCHOOL DISTRICT

Section two of the freeholder petition method provides for transfer from a nonaccredited high school district. The same definition of a freeholder as found in section one is used. The board to which the petition is directed is the same as found in section one. The petition must show:

- a. the territory proposed to be attached has children of high school age residing thereon with their parents or guardians;
- b. the land described therein is located in a *non-accredited* high school district, and is to be attached to an *accredited* high school district;
- c. that such petition is approved by a majority of the members of the school board or board of education of the district to which such land shall be attached.

All the procedures that are set out under section one apply to section two except that where all of the provisions of section two are met the board *shall* change the boundaries.

The argument can be advanced that the "just and proper" requirement of section one of the statute is met whenever the requested transfer is from a nonaccredited district to an accredited

conclude that the Legislature did not intend, in this modern highway and transportation age, to enact a statute concerned with schools, distances, and education of pupils for the sole purpose of making convenient allocations of land to school districts based upon individual preferences or secular business reasons of owners having nothing to do with educational efficiency." *Id.*

⁶⁵ *Id.* The court concluded that the board exercises a quasi-judicial power, equitable in character, and that on appeal to the district court the action was triable de novo as in any other original equitable action.

district. In other words, the board does not have to decide whether the transfer is just and proper.⁶⁶ In *DeJonge v. School District of Bloomington*,⁶⁷ which established the constitutionality of section two, the court decided that the public interest had been determined by the legislature in weighing the advantages of an accredited high school over one not accredited, and these determinations are not a part of the required proof to be considered by the board.

CONCLUSION

The small school district continues in many areas to thrive in Nebraska long after the conditions which called it into being have disappeared. Numerous proposals relative to changes in the school laws are presented each session of the legislature. While Nebraska's reorganization statutes have not brought total reorganization they are the framework within which the Nebraska lawyer must work. It must be remembered that each school district possesses its own problems and characteristics and that each method of reorganization has its advantages and disadvantages; thus, careful consideration must be given to each method before a particular procedure of reorganization is adopted.

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⁶⁶ *Pribil v. French*, 179 Neb. 602, 139 N.W.2d 356 (1966), held that a transfer from an accredited district to a nonaccredited high school district was not within the intent of the legislature.

⁶⁷ 179 Neb. 539, 139 N.W.2d 296 (1966). The court held in addition that the requirements under § 1 of the statute as to distance between petitioner's house and the school house and bus route of the district being attached to are not incorporated in § 2.