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IN THE SUPREME COURT FOR THE STATE OF ALASKA

KATHRYN DODGE,

Appellant,

vs.

LT. GOVERNOR KEVIN MEYER, et al.,

Appellees,

vs.

BARTON LeBON and ALASKA REPUBLICAN PARTY,

Intervenors/Cross-Appellants.

Supreme Court No. S-17301/17311

Trial Court Case # 3AN-18-00001RA

APPELLANT'S REPLY BRIEF

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A. Odom's ballot should not have been counted because he was not qualified to vote in HD1, and Beconovich's ballot should have been counted because he was qualified to vote in HD1.[1]

In this case, one voter—Odom—was not qualified to vote in HD1 even though the Division's records still showed him as registered in the District; thus, his vote should not have been counted. In contrast, another voter—Beconovich—was qualified to vote in HD1 and had been registered there for more than a decade, but the Division changed his residency without his knowledge or approval; thus, his vote should have been counted.

Alaska law requires a person to be a resident of his house district for at least 30 days before an election to be qualified to vote in that district. The person must also be registered to vote there, also for 30 days.

In Alaska, a person is qualified to vote in his house district if he is a citizen of the U.S., is at least 18 years of age, and he

> (3) has been a resident of the state and of the house district in which the person seeks to vote for at least 30 days just before the election; and
> (4) has registered before the election as required under AS 15.07 and is not registered to vote in another jurisdiction.[2]

Indeed, as Dodge has previously noted, the requirement that a person must be a resident of his house district for at least 30 days before the election is also enshrined in the State

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[1] Appellant's Reply Brief is abbreviated in part because the parties had already briefed all the issues to the special master. Thus, portions of Appellant's Opening Brief "reply" to arguments advanced by the Division and/or Intervenor in their hearing briefs and replies. *See also* Appellant's Hearing Brief, filed on December 17, 2018, and her Reply Hearing Brief, filed on December 19, 2018.

[2] AS 15.05.010. *See* Dodge's Hearing Brief at 15-17.

Constitution.[3] These provisions form the basis of determining whether someone may cast a ballot in a race to choose the candidate who will serve as the voters' representative in the Alaska State House.[4]

In a recount appeal such as this, this Court determines whether ballots were lawfully cast and should be counted.[5] This may include a voter's qualifications, as well as whether a voter was properly registered or whether a voter provided the required information to vote an absentee or questioned ballot.[6]

In previous election disputes decided by this Court, it is clear that some cases required the master or the Court to weigh new evidence not previously presented to the Division, including affidavits,[7] superior court trial transcripts,[8] and unspecified "records" that "conclusively show[ed]" a voter was not a resident of the district in which he voted.[9]

In this instance, the Division has counted the vote of a person who is not a resident of House District 1 ("HD1"). Dr. Odom provided a sworn statement that he no longer

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3 *See* Alaska Constitution, Article V, sec. 1 ("A voter shall have been, immediately preceding the election, a thirty day resident of the election district in which he seeks to vote....").

4 AS 15.07.030 ("A person who has the qualifications of a voter as set out in AS 15.05.010(1)-(3)...is entitled to be registered as a voter in the precinct in which the person resides"). Conversely, a person who does not satisfy these subsections may not be registered and cannot vote in the applicable house district.

5 *See, e.g., Willis v. Thomas*, 600 P.2d 1079, 1081-82, 1087 (Alaska 1979); *Finkelstein v. Stout*, 774 P. 2d 786 (Alaska 1989) (partially overruled on other grounds). *See* AS 15.20.510.

6 *See, e.g., id.*

7 *See, e.g., Carr v. Thomas*, 586 P.2d 622, 624 (Alaska 1978); *Cissna v. Stout*, 931 P.2d 363, 365 n.4 (Alaska 1996).

8 *See, Willis*, 600 P. 2d at 1081; *Finkelstein*, 774 P. 2d 786.

9 *Fischer v. Stout*, 741 P.2d 217, 224 (Alaska 1987).

resides in HD1, and has not resided there since at least February 2018, nine months before the election.[10] Although the master refused to consider Odom's affidavit, the master stated that the affidavit was "a clear statement of intent by Odom that he is not a resident of House District 1."[11] In other words, the evidence established that Odom was not qualified to cast a vote in the HD1 race.

Consistent with the statutory and constitutional requirements, the vote of Odom should not have been counted, because Odom was not a qualified voter who resided in HD1 at the time of the election.[12]

Conversely, the Division refused to count the vote of a person who is and has been a resident of HD1 and was properly registered there until sometime in 2017, after the last election for State House. Robert Beconovich resides in HD1, and has resided there for more than a decade. Beconovich did not move or change his place of residence. Further, Beconovich did not notify the Division directly of any such change, because none had occurred. Rather, Beconovich merely filed an application with the Department of Revenue to receive a PFD. Since his place of residence did not have a mail receptacle, Beconovich used his office address as both his physical and mailing address on his PFD application. Based entirely on that PFD application, the Division's records were automatically altered to convert Beconovich's residency to his office address, which is outside of HD1. Because he was (and continues to be) a resident of HD1, Beconovich

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10 Ex. 1001.
11 Master's Report at 12-13.
12 *See* AS 15.05.010.

could not lawfully have registered (or re-registered) to vote in any district except HD1. Nonetheless, the Division changed his place of residence for purposes of voting, without Beconovich's knowledge or approval.

Plainly, Beconovich's vote should have been counted because he was a resident of HD1 at the time of the election (and for more than 30 days before it) and he did not submit a notice to the Division to transfer his registration or change it in any way.

Ironically, the Division uses the Initiative's broadening of the registration process to disallow Beconovich's vote and to disenfranchise him, despite the law's clear statement that it was designed for the opposite purpose: "the state should not introduce *needless bureaucratic requirements* that make it *more difficult* for qualified citizens *to exercise their right to vote*."[13] Yet the Division's position has precisely that disapproved effect here: the Division has created "needless bureaucratic requirements" to make it "more difficult" for a registered voter to vote in the district where he resides, and to deny that qualified voter his "right to vote." Thus, the Division's interpretation of the changes wrought by the Initiative turn the law on its head.

In addition, the Division's position ignores that the Initiative made no changes to the statutory provision regarding amendment or transfer of a voter's registration. When "requested by a voter," the Division "shall transfer [his] registration...from one house district to another...."[14] Here, Beconovich made no such request. To the contrary, Beconovich could not lawfully have done so because, to make such a request, "[t]he voter

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13 Initiative (emphasis added); *see* Attachment 2 to Appellant's Opening Brief.

14 AS 15.07.090(c).

must reside in [his] new house district for at least 30 days...."[15] Beconovich did not reside in a new house district, thus he could not request that the Division transfer his registration.[16] That the Division transferred his registration even though he did not request it, and it could not lawfully have been accomplished, demonstrates beyond doubt that the Division made an administrative error when it changed Beconovich's place of residence.

As this Court has observed: "In the absence of a clear expression of intent to change a legal residence the residence cannot be considered to have been changed."[17] Similarly, the Court has held that "[a] voter's franchise will not be withdrawn unless the voter's intent to have it withdrawn is clearly and unambiguously expressed."[18] The Court has consistently "refused to disenfranchise voters due to mistakes of election officials" and when confusing forms will cause an otherwise qualified elector to be disenfranchised.[19]

In this instance, the Division's position contradicts and even violates these well-established maxims of Alaska election law. Consistent with the Court's directives, the

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15 *Id.*

16 *See id.*

17 *Finkelstein*, 774 P. 2d at 788; *Fischer*, 741 P.2d at 224.

18 *Id.*; *see also Carr*, 586 P.2d at 626 ("Courts are reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own, and where any reasonable construction of the statute can be found which will avoid such a result, the courts should and will favor it.").

19 *Willis*, 600 P.2d at 1087 ("The errors in this instance were solely on the part of the election officials. The master concluded that the votes should be added to the vote totals. We concur."); *Fischer*, 741 P.2d at 223-224 ("As in *Willis*, the error with regard to Ms. Munoz's application was "solely on the part of the election officials." *Id.* Her vote should have been counted.").

vote of Robert Beconovich—a qualified voter and a resident of HD1—should have been counted.

B. Dodge rebutted the presumption that Knapp was qualified to vote in HD1; thus, her vote should not have been counted.

The Division incorrectly maintains that the presumption of validity attaching to a person's registered address is, effectively, unrebuttable. On the contrary, the presumption is just that—a presumption—intended for "administrative efficiency"[20]—it is not absolute. Here, Dodge may rebut that presumption and, with respect to Knapp, has successfully rebutted it.[21]

In certain instances, determining whether a voter is a "resident" of a district for purposes of AS 15.05.010(2) requires a court to probe beyond the applicant's claim of residency. The Court has looked beyond a voter's registered address to determine whether he in fact resided in the district in question and was therefore qualified to vote there.[22]

Administrative efficiency may justify a presumption that the Division's records are accurate,[23] but it cannot overcome the requisite qualifications that a voter must meet to be a qualified voter. Any other conclusion would elevate administrative convenience over the constitutional and statutory requirements establishing who may vote in an

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20 *See Cissna*, 931 P. 2d at 368-69, discussed below, and AS 15.05.020(8).

21 As shown above, Dodge has also successfully (and emphatically) rebutted the presumption as it relates to Odom.

22 *See, e.g., Fischer*, 741 P.2d at 222-24; *see also* Appellant's Hearing Brief at 22-25 and her Opening Brief at 2-4 and 12-15.

23 *Cissna*, 931 P. 2d at 369.

election.[24] This Court has emphasized the importance of these requirements, suggesting that the presumption must be rebuttable:

> Petitioner's interpretation of both statutes would permit a person to vote at a prior residence so long as that person had never reregistered to vote by signing a voting registration card listing a new residence. By this reasoning, it would not matter when the individual moved. Taken to its logical extreme, Cissna's interpretation allows someone who lived in a district for two months, but moved from that district to a permanent residence in another district twenty years ago, to vote in the election district in which he or she resided two decades earlier. Such an interpretation contradicts Article V, section 1 of the Alaska Constitution and would render meaningless the residency requirements set forth in AS 15.05.010.[25]

Yet the Division's position here elevates administrative convenience over any other considerations, including whether a voter is qualified to vote in the district. In this case, Dodge presented persuasive evidence prior to the recount that Knapp's address was in fact a commercial enterprise, a car repair shop, and did not appear to have an apartment or other residence associated with it.[26] At hearing, Dodge testified that when she called the establishment and asked for Knapp, she was informed by the person who answered that Knapp now lived in New Mexico.[27]

Appellant having successfully rebutted the presumption that Knapp was a resident of HD1, Knapp's vote should not have been counted.

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24 *See* Alaska Constitution, Article V, sec. 1 and AS 15.05.010.

25 *Cissna*, 931 P.2d at 368-69.

26 R. 24-36. *See also* Hearing Brief at 26-27. Dodge also presented evidence rebutting the presumption of Odom's residency prior to the recount. *See* R. 0052-0069. The Odom affidavit affirming that he was not a resident of HD1 was not available until after the recount.

27 Evidentiary Hearing.

C. The ballot with an oval "X-ed" or crossed out should have been counted for Dodge.

Finally, one voter filled in the "ovals" both for LeBon and Dodge, but X'ed out the one for LeBon. As Appellant previously showed, this clearly indicated an intent by the voter to cross out, retract or cancel his or her mark in LeBon's oval.[28]

Careful review of the ballot leads inescapably to this conclusion: (1) the ballot instructed the voter: "To vote, completely fill in the oval next to your choice, like this:", and showed a completely blackened oval;[29] (2) the voter completely filled in ovals (for one candidate) in each of the other three races on the ballot; (3) the voter completely filled in the oval for Dodge; (4) the voter completely filled in the ovals (signifying "Yes" or "No") for Ballot Measure 1, and three judges who were up for retention;[30] and (5) the voter X'ed or crossed out only a single oval, that of LeBon, leaving the vote for Dodge intact.

Accordingly, the ballot should have been counted for Dodge.

D. Conclusion

This case will determine the outcome of which candidate will represent House District 1 in Fairbanks. One critical issue is whether persons who do not appear to be

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28 *See* Appellant's Opening Brief at 29-32; *see also In re Primary Election Ballot Disputes 2004*, 857 A.2d 494, 503 (Me. 2004) ("Scribbling out, making an X, or making an asterisk over a marked vote indicator are all common methods used by voters to retract a cast vote"); and *Edgmon v. State*, 152 P.3d 1154, 1158 (Alaska 2007) ("A review of the entire ballot therefore suggests that the voter understood the rules and used a completely shaded oval—not a trace of an edge of the oval—to indicate a vote").

29 R. 003.

30 R. 004.

residents of the District should nevertheless have their votes counted, as the Division insists they must.

However, as to one (Odom), Dodge presented firm evidence—an affidavit—that establishes that Odom does not reside in HD1, and had not for at least nine months before the election. The Division refuses to accept this evidence, insisting that it may rely on the presumption afforded by its own records, despite this convincing evidence to the contrary.

As to a second voter (Knapp), Dodge presented evidence prior to the recount that the voter's listed residence was a commercial enterprise, with no apparent residential component. Subsequently, Dodge presented evidence to the master that the voter had, apparently, moved out of State. The Division likewise refused to accept this evidence, again insisting that it could (and would) rely on its own records.

There can be little doubt that Odom is not qualified to vote in HD1. And there is a strong supposition that Knapp is likewise not qualified to vote there. Both of these votes should be rejected.

On the other hand, Dodge presented undisputed evidence that Beconovich is a resident of HD1. Beconovich has lived in the District for more than a decade, was properly registered there for nearly as long, and has not moved out of the District. Beconovich did not request that the Division transfer his residence to a different district, and in fact he could not have, since he resides in HD1. Nonetheless, the Division de-registered Beconovich from HD1 because Beconovich filed an application for a PFD.

The Division should not be able to de-register and disenfranchise Beconovich due to a new, ambiguous and confusing process implemented by the Division after the enactment of the PFD Initiative. Indeed, the Division's position makes a mockery of the Initiative's stated intent, to make voter registration easier and to enfranchise more persons. In this case, it has precisely the opposite effect, by denying Beconovich his constitutional right to vote in the district in which he resides.

The Court should also direct the Division to count the X'ed out overvote as a vote for Dodge, and should reject all challenges raised by Intervenor.

Dated this 2nd day of January 2019.

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