

FILED

04/03/2023

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 23-0115

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 23-0115

DARLA DOWNS,

Contestant and Appellee,

v.

FRANK PIOCOS,

Contestee and Appellant.

FILED

APR 03 2023

Bowen Greenwood
Clerk of Supreme Court
State of Montana

APPELLANT'S OPENING BRIEF

On Appeal from the Fifteenth Judicial District Court,
Roosevelt County, Montana Cause No. DV 2023-4
Honorable Katherine Bidegaray, Presiding

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STATEMENT OF THE ISSUE

1. Whether the district court erred in determining that Contestee was not a resident of Roosevelt County and therefore ineligible to be a candidate for County Attorney for Roosevelt County.

STATEMENT OF THE CASE

On November 8, 2022, Contestee was elected County Attorney for Roosevelt County, State of Montana. (D.C. Doc. 12, Page 2, Line 20, Transcript Page 25, Lines 11-13) On January 20, 2023, Contestant filed a complaint in district court challenging Contestee's eligibility to be County Attorney for Roosevelt County based solely on residency grounds. (D.C. Docs. 1 and 12) On February 3, 2023, a hearing was held pursuant to §§ 13-36-206 and 13-36-207, MCA. On the same date, the District Court issued its Findings of Facts, Conclusions of Law, and Order Voiding Election. The District Court determined that Contestee was not a resident of Roosevelt County and therefore he was ineligible to be County Attorney for Roosevelt County. (D.C. Doc. 12, Page 5, Lines 1-3 and Page 5, Line 21) In its findings of facts and conclusions of law, the district court failed to determine Contestee's county of residence. (D.C. Doc. 12) This appeal followed.

STATEMENT OF THE FACTS

The facts of this case are mainly undisputed. On November 8, 2022, Contestee was elected County Attorney for Roosevelt County. He ran unopposed. (D.C. Doc. 10 and Transcript: Page 17, Lines 14-15, Page 22, Lines 15-17, Page

25, Lines 11-13) On January 20, 2023, Contestant filed a complaint in district court challenging Contestee's eligibility to be a candidate for county attorney based solely on residency grounds. (D.C. Docs. 1 and 12)

On February 3, 2023, hearing was held and both the Contestant and Contestee appeared and testified. (D.C. Doc.12, Page 2, Lines 14-15) Contestee testified that at the time of the election; he was the Roosevelt County Attorney. (Transcript Page 18, Lines 7-9, Page 22, Lines 3-4); that he banked, shopped and was registered to vote in Roosevelt County; that his mechanic and chiropractor were also in Roosevelt County. (Transcript Page 24, Lines 9-16) Contestee also testified that he owned rental property in Saint Marie. (Transcript Page 28) Contestee also testified that his house and girlfriend were in Billings. However, once the deadline to file for county attorney passed and Contestee realized he would be running unopposed he made arrangements to sell his house in Billings. (Transcript Page 22, Lines 15-21) Contestee eventually sold his house in Billings in July of 2022. (Transcript Page 22, Lines 18-25) In addition, Contestee testified that he sold his house in Billings and applied for mortgages with the intent to purchase a house in Roosevelt County. (Transcript Page 22, Lines 17-25, Page 23, Lines 2-25, and Page 33, Lines 13-15)

The district court determined that Contestee was not a resident of Roosevelt County and voided the election. (D.C. Doc. 12, Page 5, Lines 1-3, 21) The district

court did not determine Contestee's county of residence. (D.C. Doc. 12) However, the district court did state at the hearing, "I agree that the fact you have rentals in St. Marie doesn't make you a resident of Valley County." (Transcript Page 27, Lines 18-20)

On February 3, 2023, the district court found that Contestee was not a Roosevelt County resident and therefore ineligible to be Roosevelt County Attorney. The district court also voided the election. (D.C. Doc. 12) This timely appeal followed.

STANDARD OF REVIEW

The Court reviews a district court's conclusions of law to determine whether they are correct. *State v. Fyant*, 323 Mont. 408, ¶ 7, 104 P.3d 434, ¶ 7. The Court reviews findings of fact under the clearly erroneous standard pursuant to M. R. Civ. P. 52(a)(6). The Court uses a three-part test to determine if a finding is clearly erroneous. *Interstate Prod. Credit Assn. v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). First, the Court examines the record to determine if the findings are supported by substantial evidence. *DeSaye*, 250 Mont. at 323, 820 P.2d at 1287. Second, the Court considers whether the trial court has misapprehended the effect of the evidence. *DeSaye*, 250 Mont. at 323, 820 P.2d at 1287. Third, if both of these tests are satisfied, the Court may still conclude that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, a

review of the record leaves the court with the definite and firm conviction that a mistake has been committed.” *DeSaye*, 250 Mont. at 323, 820 P.2d at 1287.

SUMMARY OF ARGUMENT

1. The district court erred in determining that Contestee was not a resident of Roosevelt County and therefore was not eligible to be a candidate for County Attorney for Roosevelt County.

ARGUMENT

- I. At the time of the election, Contestee was a resident of Roosevelt County. Therefore, he was eligible to be a candidate for County Attorney for Roosevelt County.

The definition of “qualified elector” is set forth in Article IV, Section 2 of the Montana Constitution:

Section 2. Qualified elector. Any citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector unless he is serving a sentence for a felony in a penal institution or is of unsound mind, as determined by a court. Art. IV, Sect. 2, Montana Constitution.

““Elector” means an individual qualified to vote under state law.” § 13-1-101(18), MCA.

Eligibility for county office is set forth in Section 7-4-2201, MCA. Section 7-4-2201, MCA, states: “A person is not eligible for a county office who at the time of election is not: (1) of the voting age required by the Montana constitution; (2) a citizen of the state; and (3)(a) an elector of the county in which the duties of the office are to be exercised...” § 7-4-2201, MCA. Contestee met all the

requirements under Section 7-4-2201, MCA, and therefore eligible for county office.

This now brings us to the sole residency issue raised by Contestant and addressed by the district court under Section 13-1-111(c), MCA. The definitions of “resident”, “residency” and “residence” are not defined in Title 7, Title 13, or any other statute dealing with voter registration, voting, or running for public office in Montana. These words are not even defined in the “Definitions” section under § 13-1-101, MCA. The lack of definitions regarding residency along with applicable Montana case law did not preclude Contestee from claiming Roosevelt County as his residency for the purposes of registering to vote, voting, and running for office in Roosevelt County.

In determining residence within Montana certain statutory rules are set forth in Section 1-1-215, MCA. *Lima School Dist. No. 12 v. Simonsen*, 210 Mont. 100, 110-111, 683 P.2d 471, 476(1984). (Hereinafter referred to as “*Lima*.”) It is important to remember, as it relates to statutory construction and interpretation, that it is not for the district court “to insert what has been omitted or omit what has been inserted.” § 1-2-101, MCA. Under the plain and unambiguous language of Section 1-1-215, MCA the district court is to determine residency. § 1-1-215, MCA. Not exclude it.

Section 1-1-215, MCA, provides that certain rules are to be observed in determining the place of residence. *Lima* at 110-111. In relevant part that rule states: "There may be only one residence. If a person claims a residence within Montana for any purpose, then that location is the person's residence for all purposes unless there is a specific statutory exception." § 1-1-215(2), MCA. "The residence can be changed only by the union of act and intent." § 1-1-215(7), MCA. Subsequent case law has held that these rules are only guidelines for interpretation and not a definition. Every case must stand upon its own facts and each decision will be the result of a more or less arbitrary application of the rules of law to the facts presented." *Lima School Dist. No. 12 v. Simonsen*, 210 Mont. 100, 110-111, 683 P.2d 471, 476 (1984) (citing multiple cases). In *Lima*, the determination of residency was based upon the facts of the case, the elector's intent, and the general guidelines set forth under Section 1-1-215, MCA rather than "the mere application of mechanical rules." *Lima* at 110-111. In accordance with Section 1-1-215, MCA and *Lima*, the district court was required to determine Contestee's residence based upon the facts, Contestee's intent and apply Section 1-1-215, MCA. In this case, the district court, in its conclusions of law, mentioned the applicable subsections of § 1-1-215, M.C.A. But did not apply them in determining Contestee's residency. Rather, the district court simply quoted parts of Section 1-1-215, MCA, and ruled out Roosevelt County. (D.C. Doc. 12, Pages 1-3) It appears that the district court

also ruled out Valley County as well. At the hearing the district court judge stated, “I agree that the fact you have rentals in St. Marie doesn’t make you a resident of Valley County.” (Transcript: Page 27, Lines 18-20) However, this was not referenced in either the findings of facts or conclusions of law. (D.C. Doc. 12)

In its conclusions of law, the district court failed to apply the factors set forth in *Lima* and the applicable subsections set forth in Section 1-1-215, MCA to determine Contestee’s residence. This legal analysis is required under both Section 1-1-215, MCA and the Montana Supreme Court’s ruling in *Lima*. Therefore, the district court’s conclusions of law were incorrect.

Section 1-1-215(2), MCA specifically states: “There may be only one residence. If a person claims a residence within Montana for any purpose, then that location is the person's residence for all purposes . . .” § 1-1-215(2), MCA. Contestee, as a Montana citizen, has one residence. § 1-1-215(2), MCA. The district court did not determine this one residence. (Emphasis added.) Under §1-1-215(2), M.C.A., if Contestee claimed Roosevelt County, which he did, as his residence within Montana, then Roosevelt County is Contestee’s residence for all purposes including registering to vote, voting, and running for public office. Contestee argues that a court’s determination of residency must be based upon the subjective intent of the candidate, based upon objective facts, rather than the

opinion of an aggrieved voter or political opponent. To do otherwise would open the floodgates to residency challenges.

There is nothing in the record, that Contestee declared or intended any other county to be his residence. On the contrary, Contestee by selling his house in Billings and rental properties in Valley County showed that he did not have the requisite intent to make Yellowstone County or Valley County his residence. Additionally, there is nothing in the record that Contestee was registered to vote any other State or county at the time of the election. By registering to vote in Roosevelt County Contestee forfeited any election franchise in any other county. The union of Contestee's acts and intents establish that his residence for candidacy, registration, and voting purposes was Roosevelt County at the time of the election.

Montana courts have recognized that intentions and declarations alone do not control the determination of residence. *Lima* at 110 citing *Veseth v. Veseth* (1966), 147 Mont. 169, 410 P.2d 930. However, in this case, there is more than mere intent and declaration. There were actual acts. Contestee worked in Roosevelt County, was registered to vote in Roosevelt County, banked in Roosevelt County, ran for office in Roosevelt County and both his mechanic and chiropractor were in Roosevelt County. (D.C. Doc. 10 and Transcript: Page 24, Lines 9-13) It is clear from the record that Contestee certainly had more ties to Roosevelt County than any other county. Through his union of acts and intent Contestee made Roosevelt

County his residence. See, § 1-1-215(7), MCA. At the time of election, Contestee did not have the requisite union of acts and intent to call either Yellowstone County or Valley County his residence. Therefore, Contestee could not register to vote, vote, or run for office in either Yellowstone or Valley County.

The district court was required to examine the facts of the case and determine Contestee's residence. The district court failed to do so. In its findings of facts, the district court failed to apply the facts of this case, including Contestee's declaration and intent, in determining Contestee's residence. This is required under both the Montana Supreme Court's ruling in *Lima* and Section 1-1-215, MCA. The district court clearly misapprehended the effect of the evidence in this case.

It is clear from the record that both Contestant and the district court confused residence with domicile. Depending on the definition, a Montanan can have many domiciles. But under both Sections 1-1-215(2) and 13-1-113, MCA, a Montanan may only have one residence. See, §§ 1-1-215(2) and 13-1-113, MCA. In addition, there is no case law related to Titles 7 and 13 that states that residence and domicile must be the same. Such a law would disenfranchise college students, members of the military, travelling workers, etc. and would create serious equal protection and voting rights issues. Under the district court's narrow statutory interpretation, a potential candidate, with no ties to a county or legislative district, could simply sleep in a county or other legislative district prior to the election to

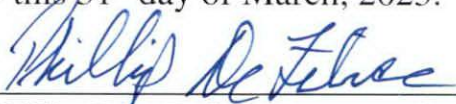
establish residency and become an elector and thus a candidate for office. Flawed statutory analysis, as well as, mechanical application, lead to flawed results. Which is what happened in this case.

CONCLUSION

In its findings of facts, the district court failed to include the facts of the case, including Contestee's intent and lack of intent, in determining Contestee's residence. As such, the findings of facts were clearly erroneous. The conclusions of law were incorrect as the district court failed to apply the applicable subsections of § 1-1-215, M.C.A. and the factors set forth in *Lima* to determine Contestee's residence.

Based upon the record and the foregoing, Contestee, at the time of the election, was a resident of Roosevelt County. Therefore, he was eligible to be a candidate for County Attorney of Roosevelt County. As such, the election should not have been voided and Contestee should not have been removed from office. The district court's ruling affected Appellant's substantial rights and therefore must be reversed. Appellant must be reinstated as County Attorney for Roosevelt County forthwith.

RESPECTFULLY SUBMITTED this 31st day of March, 2023.




Phillip J. DeFelice, Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that Appellant’s Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word or Windows is 2,364, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature and any appendices.

Dated this 31st day of March, 2023.



Phillip J. DeFelice, Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and accurate copy of the foregoing Appellant’s Opening Brief by placing same in the U.S. mails, postage pre-paid, and addressed to the following:

Darla Downs
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Dated this 31st day of March, 2023.



Phillip J. DeFelice, Attorney for Appellant