

NO. 29464

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

MICHAEL P. DUPREE,
Appellant-Appellee,

vs.

ROY T. HIRAGA, Clerk of the
County of Maui, and SOLOMON P.
KAHO'OHALAHALA,

Appellees-Appellants.

CASE NO. BOR-08-01
(Agency Appeal)

APPEAL FROM FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION OF THE BOARD OF
REGISTRATION, COUNTY OF MAUI,
DATED NOVEMBER 1, 2008

APPELLANT ROY T. HIRAGA'S REPLY BRIEF

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APPELLANT ROY T. HIRAGA'S REPLY BRIEF

COMES NOW, Appellee-Appellant ROY T. HIRAGA (hereafter referred to as the "County Clerk" or "the Clerk"), by and through his attorneys, BRIAN T. MOTO, Corporation Counsel, and JANE LOVELL, Deputy Corporation Counsel, and submits his Reply Brief pursuant to Rule 28(d) of the Hawaii Rules of Appellate Procedure as follows:

I. INTRODUCTION

In his answering brief, Appellee Dupree (hereafter, "Dupree") largely ignored contrary legal precedents and facts harmful to his cause. Dupree mentioned Hurley v. Knudsen, 30 Haw. 887, 1929 WL 3022 (Hawai`i Terr. 1929) only in passing and did not address the key holding of Powell v. Powell, 40 Haw. 625, 630, 1954 WL 7985 *3 (Hawaii Terr. 1954) [residence of a "single day" is sufficient to establish a legal domicile under Hawaii law, provided the requisite intent is present]. Dupree also misstated the basis of the County Clerk's decision, claiming that the Clerk had merely taken the affidavit of Appellant Solomon P. Kaho`ohalahala (hereafter, "Kaho`ohalahala") at face value, despite the Clerk's testimony that he had considered other evidence, as well. In citing to the testimony of witnesses McOmber and Pelisero, Dupree was selective, simply ignoring any testimony harmful to his position.

Dupree's answering brief also failed to give proper weight to Kaho`ohalahala's status as a state employee. In addition,

Dupree's answering brief misconstrued the October 21, 2008 ruling of the Hawaii Supreme Court in Kahoohalahala v. Hiraga, No. 29415.

A litigant cannot meet his burden of proof by ignoring controlling Hawaii precedent or by disregarding or misstating adverse facts. As the person initiating the proceeding, Dupree had the burden of proof, as well as the burden of persuasion. (HRS § 91-10(5); Haw. Admin. R. § 2-51-43(h); ROA 152, Conclusion of Law No. 13) He failed to meet that burden. Therefore, the Board of Registration erred in overturning the County Clerk's decision, and the Board's decision must be reversed.

II. ARGUMENT

A. Dupree Ignored Controlling Hawaii Precedent

Dupree's answering brief ignored Hawaii precedent directly relevant to the case at bar, Hurley v. Knudsen, 30 Haw. 887, 1929 WL 3022 (Hawai'i Terr. 1929). The answering brief also failed to mention that another important Hawaii case, Powell v. Powell, 40 Haw. 625, 630, 1954 WL 7985 *3 (Hawai'i Terr. 1954), supports the proposition that Kaho`ohalahala was not required to spend any particular length of time on Lanai in order to maintain or re-establish legal residence there, once his family had "welcomed him home." Powell held that length of residence is not a factor in acquiring a new domicile; even one day's residence is sufficient provided the appropriate intention is present. (Powell v. Powell, supra, 40 Haw. at 630, 1954 WL 7985 at *3 (emphasis added); see, in addition, Winans v. Winans, 205 Mass. 388, 391 (1910), cited with approval in Powell for the proposition that "[a]

day or an hour . . . will suffice for the acquisition of a domicile.")

Hurley v. Knudsen, supra established that an elected official need not reside exclusively in his district. In Knudsen, the respondent and his family had a home at Halemanu in the Waimea district of Kauai, but only occupied it on weekends and during school vacations. For convenience, Mr. Knudsen spent much of his time in the Koloa district, where he had business interests. Knudsen also owned a home in Honolulu. Knudsen had at various times been registered to vote in districts of Kauai other than Waimea, including in the Koloa district of Kauai.

On these facts, the Supreme Court of the Territory of Hawai`i concluded that Knudsen's legal residence was in Waimea. The Court noted that Knudsen had a "permanent and fixed abode" in Waimea with the concurrent "intention there to remain," (30 Haw. at 896, 1929 WL at *5) The Court found that factors such as Knudsen's registration as a voter in the Waimea district and his candidacy for office from that district corroborated Knudsen's express declaration of intention to reside in Waimea. (Id., 30 Haw. at 897, 1929 WL at * 5) The Court concluded that "[a] residence so maintained is not lost by a temporary absence of the party claiming it . . . in the pursuit of business, pleasure or education nor by the maintenance of a temporary home elsewhere." (Id.)

The same is true here. Although Kaho`ohalahala has a temporary home in Lahaina, acquired while he and his wife were both employed by the State of Hawaii, his affidavit, his brother's

affidavit, the testimony of Ellen Pelisero, his registration to vote in Lanai, and his candidacy for office from that district all corroborated his expressed declaration to reside in Lanai after July 2008 when he changed his voter registration from Lahaina to Lanai. His physical presence on Lanai, corroborated by the testimony of witnesses McOmber and Pelisero, even if only for "one day," coupled with his intent to reside there, satisfied the requirements of HRS § 11-13 in changing his legal residence from Lahaina back to Lanai. (See Powell v. Powell, 40 Haw. 625, 630, 1954 WL 7985 *3 (Hawai`i Terr. 1954))

B. Dupree's Answering Brief Ignored Key Elements of the County Clerk's Testimony

Although Dupree's answering brief argued that the County Clerk's decision was based solely and exclusively on Kahoohalahala's intent (see answering brief, pp. 1, 12, 14), that was not the case. In support of his decision to register Kaho`ohalahala as a Lanai voter, the County Clerk testified that he had reviewed and relied on Kaho`ohalahala's voter registration records, going back to 1982. (TR 10/31/08 at p. 35, ROA 276) In doing so, the Clerk noted that there were only two years of Kaho`ohalahala's extensive voting history when he was not registered as a Lanai voter, and during that time, he was a state employee. (TR 10/31/08 at p. 36, ROA 277) In addition, the County Clerk had available to him the affidavit of Kaho`ohalahala's brother, Gaylien Kaho`ohalahala, which stated that Solomon Kaho`ohalahala "presently resides at 444 Fraser Avenue and resided

there since the beginning of July, 2008." (ROA 37) In addition, the Gaylien Kaho`ohalahala affidavit recited that his family had "welcomed Sol's return home" to Lanai in July 2008. (Id.)

Thus, in making his decision, the Clerk had ample evidence to corroborate Kaho`ohalahala's expressed intent to make Lanai his legal residence.

C. Dupree Ignored Key Elements Of The Testimony Of Ron McOmber and Ellen Pelisero

Dupree's answering brief cited sparingly and selectively to the testimony given by two witnesses, Ron McOmber and Ellen Pelisero. In doing so, Dupree ignored key testimony of each of these witnesses that was harmful to his case.

McOmber was called as a witness by Dupree. While McOmber did testify that he had not seen Kaho`ohalahala "come back" to the island of Lanai, as stated on p. 6 of Dupree's answering brief, McOmber acknowledged that Kaho`ohalahala had been physically present on Lanai during the relevant time period after Kaho`ohalahala registered to vote there: "[h]is brother picks him up at the dock and, and drives him around, he does not have a car that I know of over there." (TR 10/31/08 at p. 31, ROA 272) In other words, while McOmber did not see Kaho`ohalahala "move in" to the Kaho`ohalahala family home in Lanai City, he did see Kaho`ohalahala arriving on Lanai by ferry, being picked up by his brother.

Ellen Pelisero testified about Kaho`ohalahala's expressed intentions with respect to his residence on the island of Lanai:

"he and his wife had talked as long . . . as I've known them, about remaining on Lanai for the rest of their lives, their children are there, their grandchildren are there . . . it was work related why he had to physically not be there all the time." (TR 10/31/08 at p. 42, ROA 283) Ms. Pelisero also testified that Kaho`ohalahala had returned to Lanai from Lahaina between the time that his state job for the Kaho`olawe Island Reserve Commission ended and his work for the state at Maui Community College began. (TR 10/31/08 at p. 45, ROA 286)

D. Dupree Ignored Kaho`ohalahala's Status As A State Employee

HRS § 11-13(5) provides that residence cannot be gained or lost while a person is employed in the service of the United States or the State of Hawaii: "A person does not gain or lose a residence solely by reason of the person's presence or absence **while employed in the service of the United States or of this State**" (HRS § 11-13(5), emphasis added) Dupree's answering brief dismissed the uncontroverted evidence in the record that Kaho`ohalahala's physical presence on the island of Maui at all relevant times was owing to his work as an employee of the State of Hawaii by arguing in essence that once Kaho`ohalahala changed his registration to Lahaina in 2006, he could not change it back to Lanai in 2008. (Answering brief at 17-18)

In his affidavit, Kaho`ohalahala affirmed that he was born and raised on the island of Lanai and retained his residence there "except for a brief period in which I was in the service of

the State of Hawai`i with the Kaho`olawe Island Reserve Commission." (ROA 38) At all times relevant to Appellee Dupree's challenge, Kaho`ohalahala was employed by the State of Hawaii as an instructor at Maui Community College. (Finding of Fact No. 10, ROA 147) His wife, Lynn Kaho`ohalahala, was likewise employed by the State of Hawaii as vice principal of Lahainaluna High School. (Finding of Fact No. 11, ROA 148)

The County Clerk was therefore correct in concluding that Kaho`ohalahala "did not lose his residency due to his absence from Lanai while he was employed in the service of the State." (ROA 6) Dupree's answering brief ignored the testimony of Pelisero, McOmber, and the affidavit of Gaylien Kaho`ohalahala, all of which established that Kaho`ohalahala had returned to Lanai after deciding to terminate his registration in Lahaina, and to register as a Lanai voter.

e. The Board Of Registration Erred, Notwithstanding The Ruling of the Hawaii Supreme Court In A Related Action

Dupree's answering brief argues that the Hawaii Supreme Court had previously ruled against Kaho`ohalahala on a jurisdictional challenge, and that he is precluded by the doctrine of res judicata from challenging the overbreadth of the Board of Registration's ruling as a result. (See answering brief at p. 21) Dupree's depiction of the Hawaii Supreme Court's action is not entirely accurate. The Supreme Court held that the County Clerk acted within his authority in ruling on a challenge to Kaho`ohalahala's nomination papers and on a challenge to his voter

registration: "The [Clerk's] October 10, 2008 ruling . . . was a ruling only on a challenge to nomination papers and on a person's voter registration status." Solomon P. Kaho`ohalahala v. Roy T. Hiraga, No. 29415 (October 21, 2008). In addition to ruling that Kaho`ohalahala was properly registered to vote in Lanai (ROA 7), the Clerk also ruled that the challenge to Kaho`ohalahala's election was filed too late, and was therefore invalid. (ROA 4) The Supreme Court decision cited on p. 21 of Dupree's answering brief does not preclude the County Clerk from arguing that the Board of Registration did not have any jurisdiction over election disputes. The Clerk was within his rights to contest those findings and conclusions of the Board of Registration that exceeded the Board's statutory authority.

For example, nothing in the Supreme Court's October 21, 2008 order precluded the Clerk from arguing that the Board of Registration was not empowered by statute to rule on whether a candidate for County office met the qualifications for office set out in the Charter of the County of Maui.¹ The Clerk was also justified in challenging the Board of Registration's jurisdiction to concludes that "[p]ursuant to the Maui County Charter Section 3-1, the [Maui County] Council shall be composed of nine members elected at large, and as it pertains to this case, one of whom

¹ On pages 13-14 of his opening brief, the County Clerk challenged the Board's finding that "Mr. Kaho`ohalahala is a candidate for the Maui County Council for the seat designated for the resident of the Island of Lana`i for the 2008 general election." (ROA 146, Finding of Fact No. 2)

shall be a resident of the island of Lana`i[]" (Conclusion of Law No. 4, ROA 150) and that "[p]ursuant to Maui County Charter Section 3-3, to be eligible for election or appointment to the [Maui County] [C]ouncil, a person must be . . . a resident in the area from which the person seeks to be elected." (Conclusion of Law No. 5, ROA 150) Nothing in the Supreme Court's order precluded the County Clerk from raising these arguments, and nothing in the Supreme Court's order conferred jurisdiction upon the Board of Registration to determine issues pertaining to Kaho`ohalahala's candidacy or election.

III. CONCLUSION

For the reasons stated above and in the Clerk of Court's opening brief, the decision of the Board of Registration should be overturned, and the ruling of the County Clerk that Solomon P. Kaho`ohalahala properly registered to vote in Lanai should be affirmed.

DATED: Wailuku, Maui, Hawaii, June 16, 2009.

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