

IN THE SUPREME COURT OF THE STATE OF HAWAII

MICHAEL P. DUPREE,) Case No. BOR-08-01
Petitioner/Appellant-Appellee,) (Agency Appeal)
vs.) APPEAL FROM FINDINGS OF FACT,
ROY T. HIRAGA, Clerk of the County of Maui, and SOLOMON P. KAHOOHALAHALA,) CONCLUSIONS OF LAW, AND DECISION OF THE BOARD OF REGISTRATION, COUNTY OF MAUI,) DATED NOVEMBER 1, 2008
Respondents/Appellees-Appellants.)

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Christi-Anne H. Kudo Chock
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STATE OF HAWAII

**APPLICATION TO TRANSFER OF
PETITIONER/APPELLANT-APPELLEE MICHAEL P. DUPREE**

DECLARATION OF CHRISTI-ANNE H. KUDO CHOCK

CERTIFICATE OF SERVICE

KENNETH R. KUPCHAK	1085-0
ROBERT H. THOMAS	4610-0
CHRISTI-ANNE H. KUDO CHOCK	8893-0

DAMON KEY LEONG KUPCHAK HASTERT
1600 Pauahi Tower
1003 Bishop Street
Honolulu, Hawaii 96813
www.hawaiilawyer.com
Telephone: (808) 531-8031
Facsimile: (808) 533-2242

Attorneys for Appellant-Appellee
MICHAEL P. DUPREE

FILED

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**APPLICATION TO TRANSFER OF
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I. REQUEST TO TRANSFER

Pursuant to Haw. R. App. P. 40.2 and Haw. Rev. Stat. § 602-58 (1993), Petitioner/Appellee Michael P. Dupree (Dupree) respectfully requests transfer of this appeal from the Intermediate Court of Appeals to the Supreme Court. Dupree also requests this Court hear the appeal as soon as possible, because the appeal has been perfected. Haw. Rev. Stat. § 11-52 (1993) (“When the appeal is perfected, the court *shall* hear the appeal as soon thereafter as may be reasonable.”).

II. STATEMENT OF RELEVANT FACTS AND PRIOR PROCEEDINGS¹

This is an appeal by Solomon P. Kahoothalahala (Kahoothalahala) and Roy T. Hiraga, Clerk of the County of Maui (Clerk) from a determination by the State Board of Registration, County of Maui (Board) that Kahoothalahala is a resident of Lahaina, Maui for purposes of voter registration under the residency requirements set forth in Haw. Rev. Stat. § 11-13 (1993).

In 2006, Kahoothalahala registered to vote in Lahaina, Maui, and thereby declared his sole residency in Lahaina. Record (R.) at 218. He is an employee of Maui Community College, R. at 147, and his wife is vice principal at Lahainaluna High School, in Lahaina. R. at 148.

1. This is a summary of the facts. For the complete statement of facts, *see* Answering Brief for the Appellee Michael P. Dupree (filed June 8, 2009).

On July 15, 2008, Kahoolahala attempted to register to vote as a Lanai resident and “filed an affidavit of voter registration with the belief and understanding that [he is] a legal resident of Lanai because of [his] permanent residence at 444 Fraser Avenue.” R. at 123. In September and October 2008, twelve registered voters residing in the Lanai residency area submitted letters *pro se* to the Clerk challenging Kahoolahala’s Lanai voter registration: “[g]enerally the writers of the Complaint Letters allege that candidate Sol P. Kahoolahala does not reside in the Lanai residency area.” R. at 3. *See* Haw. Rev. Stat. § 11-25(a) (1993) (giving standing to “any voter” to challenge another’s voter registration). The Lanai residents did not have an attorney, and the Clerk had the duty to independently investigate the allegations and make a determination of Kahoolahala’s residency. Haw. Rev. Stat. § 11-25(a) (1993).

On October 10, 2008, the Clerk concluded Kahoolahala qualified as a Lanai resident because (1) “physical presence or absence from a particular place is not the deciding factor in determining the residence of an individual;” and (2) “one’s state of mind determines one’s place of residence.” R. at 3-7 (citing Haw. Rev. Stat. § 11-13 (1993); Att’y Gen. Op. 86-10, 1986 WL 80018 (Mar. 21, 1986)). The Clerk did not determine where Kahoolahala’s “habitation is fixed” or where he has a physical presence, and did not consider it relevant where he actually lives. Additionally, while the Clerk acknowledged that for two years Kahoolahala’s “residence address of record” was elsewhere (presumably Lahaina), he did not consider that fact dispositive, or even relevant. R. at 185. Each of the twelve Lanai residents who challenged Kahoolahala’s residency were notified of the Clerk’s decision regarding “the voter registration status of Kahoolahala,” and informed of their right to appeal to the Board pursuant to Haw. Rev. Stat. § 11-26(b) (1993). R. at 40-51.

On October 21, 2008, Kahoolahala asked this Court to issue a writ of mandamus compelling the Clerk to vacate the ruling on the registration challenges, arguing the challenges were not challenges to his voter registration, but to his candidacy or qualifications, and the Clerk therefore had no jurisdiction. R. at 72-86. This Court denied the writ, holding “The October 10, 2008 ruling [by the Clerk] was not tantamount to a judgment in a primary election contest given pursuant to HRS § 11-173-5(b) (1993), but was a ruling only on a challenge to nomination papers and on a person’s voter registration status. Jurisdiction to render such ruling was with [the Clerk] pursuant to HRS §§ 12-8(b) (1993) and 11-25(a) (1993).” *Solomon P. Kahoolahala v. Roy T. Hiraga, County Clerk, County of Maui*, No. 29415 (Haw., Oct. 21, 2008).

Dupree, one of the twelve Lanai residents, timely filed a *pro se* appeal of the Clerk's ruling to the Board pursuant to Haw. Rev. Stat. § 11-25(a) (1993). R. at 40, 52. The Board heard testimony in support of the appeal and considered the evidence that Kahoolahala does not live on Lanai and lives and works on Maui. On November 1, 2008, it overruled the Clerk and determined “[f]or the purposes of this 2008 election, Kahoolahala is a resident of Lahaina, Maui, Hawaii.” R. at 153.

This appeal followed. The Clerk filed his Opening Brief on March 25, 2009. Kahoolahala requested and received two extensions of time to file his Opening Brief, which was eventually filed on May 18, 2009. Dupree filed his Answering Brief on June 8, 2009.

III. STATEMENT OF POINTS OF ERROR

Because he is the appellee, Dupree's Answering Brief does not contain a Statement of Points of Error. *See* Haw. R. App. P. 28(c). To comply with Haw. R. App. P. 40.2(c)(4), Dupree references (without agreeing with) the Statement of Points of Error in the Opening Briefs filed by the Appellants. *See* Clerk's Brief at 9-11 (Mar. 25, 2009); Kahoolahala Brief at 13-17 (May 18, 2009). Both the Clerk and Kahoolahala challenge Dupree's standing and the Board's jurisdiction, as well as the Board's conclusion that Kahoolahala was required to show physical presence on Lanai as well as the intent to make Lanai his residence. Both also challenge the Board's Findings of Fact that Kahoolahala has no physical presence on Lanai, but instead lives in Lahaina. Dupree's Answering Brief set forth two Questions Presented:

Physical presence. When a voter registers in Lahaina, he attests that Lahaina is the location of his “fixed habitation” and the place “he intends to return.” In order to gain a “new residence” the voter must have both a “physical presence” there and an intent to make the new location his residence. The first question is whether the Board was clearly erroneous when it found Kahoolahala registered as a resident of Lahaina in 2006, and lives and works there, and that he lacks a physical presence on Lanai.

Standing. Chapter 11 [Haw. Rev. Stat. ch. 11] allows “any registered voter” to challenge another's registration with the Clerk “for any cause,” and “the person ruled against” by the Clerk may appeal to the Board. The Board only ruled that Kahoolahala is not a resident of Lanai for registration purposes. The second question is whether in these circumstances, the voter who challenged Kahoolahala's residency had standing and whether the Board exceeded its jurisdiction in ruling on that issue.

Answering Brief at 2 (filed June 8, 2009).

IV. ARGUMENT

A. Transfer

Transfer of an appeal from the Intermediate Court of Appeals to this Court is mandatory if the appeal involves “a question of imperative or fundamental public importance,” and is discretionary if it involves “a question of first impression or a novel legal question.” Haw. Rev. Stat. § 602-58 (1993). *See also County of Hawaii v. C & J Coupe Family Ltd. P’ship*, 119 Haw. 352, 357 n.2, 198 P.3d 615, 619 n.2 (2008). Under either standard, this appeal should be transferred: whether an individual who is registered as a resident of one district may register in another district and vote in an election merely by declaring that he has an intent to make the new district his residence, is an issue of fundamental importance and a question of first impression.

For purposes of registration and voting, an individual may have “only one residence.” Haw. Rev. Stat. § 11-13 (1993). That statute also sets forth the standards for determining where that residence is, how it is acquired, how it is lost, and how a new residence is acquired. The major issue in this appeal is whether to establish or change residency under Haw. Rev. Stat. § 11-13 (1993), a person must have (1) a “fixed habitation,” “dwelling,” or “physical presence” in the district *and* (2) an intent to make that place her residence. The Clerk ruled Kahoothalahala qualified as a Lanai resident and refused to consider evidence of his lack of physical presence on Lanai because (1) “physical presence or absence from a particular place is not the deciding factor in determining the residence of an individual;” and (2) “one’s *state of mind* determines one’s place of residence.” R. at 3-7 (emphasis added). The Clerk also disregarded Kahoothalahala’s 2006 registration as a Lahaina resident, and the requirement in section 11-13(4) that in order for Kahoothalahala to change residency from Lahaina, he must have both the intention to acquire a new residence on Lanai, and a “physical presence” there. Instead, the Clerk concluded that Kahoothalahala’s professed intent to return to Lanai, standing alone, was enough to qualify him as a Lanai resident under section 11-13. The issue of whether intent alone is sufficient for a voter’s residency is a question of imperative or fundamental public importance because where a person resides is the only place she is entitled to vote, and it almost goes without saying that the right to vote is fundamental:

The fundamental interest to be protected here is that of the people . . . in choosing whomever they please to represent them[.] . . The right to vote is perhaps the most basic and fundamental of all the rights guaranteed by our democratic form of government. Implicit in that right is the right to have ones vote count and the right to have as nearly perfect an election

proceeding as can be provided. The result we reach must be consistent with these principles.

Akizaki v. Fong, 51 Haw. 354, 356, 461 P.2d 221, 222-23 (1969). Registering to vote is also critical, and the issue does not become moot after an election. *In re Sanchez*, 24 Haw. 21, 29 (Terr. 1917) (“The election laws of Hawaii provide for permanent registration and the application . . . for such registration and [the] right to the remedy herein sought is a continuing one and did not expire with the holding of the primary election[.]”). The state’s interest in preventing voter fraud such as registering in one district while living in another, is also fundamental. *See Haw. Rev. Stat. § 19-3.5* (providing that any person who “willfully makes any false statement of fact while under oath” as to their voter registration “shall be guilty of a class C felony”). While the Board overruled the Clerk, the several county clerks and boards of registration currently do not maintain a uniform approach to the issue and desperately are in need of this Court’s guidance.

Additionally, the issue in this case has never been addressed by Hawaii appellate courts. In ruling that Kahoolahala was a Lanai resident, the Clerk disregarded section 11-13(4)’s two requirements and only focused on Kahoolahala’s statements he intended to return to Lanai as the sole dispositive criteria for residency. With no rulings from this Court to guide him, the Clerk relied upon an advisory opinion letter by the Attorney General which presented different facts to conclude that “one’s state of mind determines one’s place of residence.” R. at 3-7. The Attorney General’s advisory opinion letters are merely advisory, and are not binding on courts and are not precedent. *Taniguchi v. Ass ’n of Apartment Owners of King Manor, Inc.*, 114 Haw. 37, 47, 155 P.3d 1138, 1148 (2007). Uniform guidance on this issue is needed from this Court.

B. Expedited Hearing

Section 11-52 provides for expedited hearing on an appeal to the Hawaii appellate courts from a decision by one of the Boards of Registration:

When the appeal is perfected, the court *shall* hear the appeal as soon thereafter as may be reasonable.

Haw. Rev. Stat. § 11-52 (1993) (emphasis added). *See Castle v. Bowler*, 8 Haw. 366, 369 (1892) (finding that an appeal is perfected where “[e]very requirement of the statute and of the rules of Court, as a condition of the appeal, has been performed”). This is part of the statutory scheme by which the legislature intended for appeals regarding questionable of voter registrations be heard quickly. *See Haw. Rev. Stat. §§ 11-51 – 11-54* (1993). For example, these sections provide for a ten day – rather than the

usual thirty day – time period in which to notice an appeal to the appellate court from a decision by the Board. Haw. Rev. Stat. § 11-51 (1993). This statute also prohibits the Board from considering motions for reconsideration, further reflecting the legislature’s determination that time is of the essence. *Id.* Section 11-53 requires the appellate court to notify the Board “immediately” of its decision, “and if the decision reverses the decision of the board, the board shall immediately order the register to be corrected to conform with the decision.” Haw. Rev. Stat. § 11-53 (1993). Finally, pending a decision on appeal, the challenged voter’s present and future votes are placed in sealed envelopes and not counted until the appellate court rules. Haw. Rev. Stat. § 11-54 (1993); *id.* § 11-25(c). Kahoothalahala’s vote has been so sequestered. R. at 153. Additionally, the appellate courts have the discretion under Haw. R. App. P. 2 to suspend the usual timing rules and expedite consideration of an appeal. *Cf. National City Bank v. Battisti*, 581 F.2d 565, 569 (6th Cir. Ohio 1977) (expediting an appeal under Fed. R. App. P. 2 because it “involve[s] important issues which reach far beyond the particular controversy between the petitioners and the Board”).

The appeal is perfected. The Clerk filed his Opening Brief on March 25, 2009. After two extensions, Kahoothalahala filed his Opening Brief on May 18, 2009. The first extension was a ministerial clerk’s extension, and Dupree opposed the second extension on the grounds that Appellant Kahoothalahala merely sought to further delay the proceeding without good cause. Prospective voters may register every day and they need to know the rules regarding which precinct they may register in. *See* Haw. Rev. Stat. § 11-24 (requiring the register of voters remain open throughout the year except for thirty days prior to the primary and general elections). Dupree filed his Answering Brief on June 8, 2009, three weeks before it was due, and the briefing will be completed shortly (Kahoothalahala has 14 days from service to file a reply brief). Consequently, Dupree requests the Court hear the appeal as soon as may be reasonable without further delay or extensions.

DATED: Honolulu, Hawaii, June 10, 2009.

DAMON KEY LEONG KUPCHAK HASTERT



KENNETH R. KUPCHAK
ROBERT H. THOMAS
CHRISTI-ANNE H. KUDO CHOCK

Attorneys for Appellant-Appellee
MICHAEL P. DUPREE