

ARIZONA SUPREME COURT

MOISES SANCHEZ, a qualified
elector,

Appellant,

v.

KEVIN ROBINSON, candidate
and real party in interest; et al.,

Appellees.

No. CV-22-0196-AP/EL

Maricopa County

Superior Court

No. CV2022-009450

ANSWERING BRIEF OF DEFENDANT KEVIN ROBINSON

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INTRODUCTION

Following trial on August 1, 2022, the Maricopa County Superior Court found that Kevin Robinson is a resident of Phoenix City Council District 6 and is therefore qualified to run for office there. The record amply supports the trial court's factual findings. Plaintiff fails to identify, let alone apply, the correct standard of appellate review of a trial court factual findings (clear error). Indeed, he does not even dispute many of the court's key findings of fact. Instead, Plaintiff relies on a statute that governs residence *only* in the limited context of polling place voter challenges, ignoring the intensely factual nature of the question of residence in every other application under Arizona election law. Plaintiff also, for the first time on appeal, challenges the trial court's impartiality based on the independent civic activity of the trial judge's spouse. But Plaintiff fails to identify any cognizable ground for recusal, let alone "de novo" review on appeal, and has waived the argument anyway by not raising below. The trial court's decision must be affirmed.

BACKGROUND

Kevin Robinson is a candidate for Phoenix City Council in District 6. R. 22 at 1. The parties do not dispute that the residence requirement began when Mr. Robinson filed his nomination petition papers on July 7, 2022—just over three weeks before trial. *See* Phx. City Charter Ch. III, § 1(C) (candidate must be resident beginning “at the time of his nomination”); R. 26–27 (Mr. Robinson’s nomination petition packet filed July 7, 2022).

Nor is there is any dispute as to following findings of fact by the trial court: Mr. Robinson previously lived and worked in the District for many years. R. 22 at 3. He decided to run for office in the District in September 2021, and he entered into a one-year lease for a home in the District (the “Winston Drive property”) because, “he testified credibly, he ’was in it for the long haul.” *Id.* at 3–4. He pays \$2,750 in monthly rent. *Id.* at 3. His wife lives in Scottsdale (outside the District) because she must live within 30 minutes of the Mayo Clinic, where she is a physician. *Id.* at 3. Mr. Robinson is registered to vote at the Winston Drive address and has voted there in two recent elections. *Id.* at 4. He purchased renter’s insurance for the Winston Drive property, and the

address is listed on Mr. Robinson’s motor vehicle records and personal checks. He keeps a sleeping device, toiletries, food, and “quite a bit of men’s clothing” there. *Id.* While the lease was set to expire on September 30, 2022, he had expected to renew it, before the landlord cooperated with Plaintiff to bring this lawsuit. *Id.* at 4.

The trial court found that Mr. Robinson “testified credibly” that he intends to find another home in the District that, like a prior home he owned with his wife in the District, would allow her to be within 30 minutes of the Mayo Clinic. *Id.* The trial court concluded that, on the whole, “the greater weight of the evidence reflects that Robinson has moved to District 6 and intends (and intended, at the relevant time) to reside permanently in that District.” *Id.* at 5.

ARGUMENT

I. Standard of Review.

This Court “defer[s] to the trial court’s findings of fact unless they are clearly erroneous.” *Shooter v. Farmer*, 235 Ariz. 199, 200 ¶ 4 (2014); *see also* Ariz. R. Civ. P. 52(a)(6) (“Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the credibility of

witnesses.”). “The trial court, not this court, weighs the evidence and resolves any conflicting facts, expert opinions, and inferences therefrom.” *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 198 Ariz. 330, 340 ¶ 25 (2000).

A finding of fact is not clearly erroneous “if substantial evidence supports it, even in the presence of substantial conflicting evidence.” *In re Est. of Pouser*, 193 Ariz. 574, 580 ¶ 18 (1999). Evidence is substantial if it “would permit a reasonable person to reach the trial court’s result.” *Id.* at 579 ¶ 13.

This Court must therefore reject Plaintiff’s invitation to reweigh the evidence. So long as a reasonable person could reach the trial court’s result based on the evidence admitted at trial, this Court must affirm.

II. Substantial Evidence Supports the Trial Court’s Finding that Mr. Robinson Resides in the District.

A. Candidate Residence is Not Determined by the “Family Rule”

Plaintiff’s case hinges on his reading of the “family rule.” Here, the rule appears in Phoenix City Code § 12-214(g), which provides, in relevant part, that “[t]he place where a person’s family permanently resides is the person’s residence, unless the person is separated from

the person’s family.” An analogous provision appears in Arizona state statute. *See* A.R.S. § 16-593(A)(7) (“The place where a person’s family permanently resides is his residence, unless he is separated from his family . . .”).

At least in Arizona, however, the “family rule” governs the determination of residence only in the context of voter challenges at the polls. The Phoenix City Code’s version of the rule appears exclusively amid provisions governing such challenges. *See* Phoenix City Code §§ 12-210 (governing the appointment of challenges for each voting center), 12-211 to -212 (providing the grounds and procedure for challenging voters), 12-213 (requiring the reading of rules to challenged voter, among them the “rules of residence” in § 12-214), 12-216 (requiring record of each challenge). By its terms, Phoenix’s version of the rule is to be used only by “[t]he Election Board.” *Id.* § 12-214. An Election Board is the team of poll workers who staff each voting center. *Id.* § 12-501(a). Nowhere does the Code purport to apply the rule outside of voter challenges at election centers.

The same is true for the state version of the rule, which also appears exclusively amid provisions governing voter challenges at a

polling place. See A.R.S. §§ 16-590 to -594. Thus, Arizona courts have explicitly rejected the argument that the “family rule” should govern questions of residence outside the context of voter challenges. See *Parker v. City of Tucson*, 233 Ariz. 422, 436 ¶ 40 (App. 2013) (“Section 16–593 relates only to the scope of examination conducted by the election board pursuant to a challenge to an individual elector’s residence pursuant to A.R.S. §§ 16–591 and 16–592. It does not purport to create a list of factors a trial court must consider in determining a person’s residence.”).

B. The Trial Court Properly Found that Mr. Robinson Resides in the District.

Residence, for purposes of Arizona election law generally, is determined by physical presence plus intent to remain. A.R.S. § 16-101(B). Further, the validity of a voter’s registration, of which residence is an element, may be rebutted only by clear and convincing evidence. A.R.S. § 16-121.01(B); *McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 3 (1997). A person’s intent to remain is assessed “not only by his statements but also upon his conduct and the surrounding circumstances.” *O’Hern v. Bowling*, 109 Ariz. 90, 92 (1973). Courts look to factors such as whether the person, at the address for which

residence is claimed: pays rent, has a month-to-month (as opposed to longer-term) tenancy, visits or sleeps only occasionally, orders utility services in his name, keeps his personal belongings, receives mail, is registered to vote, has a bank account, and has a driver's license. *See id.* at 92; *Vizcaino*, 190 Ariz. at 3–4.

The trial court correctly found that Mr. Robinson meets nearly all these criteria. He pays rent, has a one-year lease, and purchased renter's insurance for the Winston Drive residence. R. 22 at 3–4. The trial court further found that:

Evidence indicates he receives at least some mail there, including his voter ID Card. Photographs reflect that Robinson keeps his required CPAP machine at the Winston Drive Residence. He also has toiletries, some food, and keeps quite a bit of men's clothing there. Robinson's address with the Department of Motor Vehicles is listed as the Winston Drive Residence. It is also the address on his personal checks.

Id. at 4. The Court also looked Mr. Robinson's long history in the district, concluding that Mr. Robinson had lived in District 6 for a number of years; that his "beat" as a police officer had been in District 6 for many years; and that Mr. Robinson had testified credibly that he "was in it for the long haul" when he executed the one-year lease for the Winston Residence. *Id.* at 4. None of these facts are contested, and they

amply support the conclusion that Mr. Robinson is a resident of the District. Of particular weight is the fact that Mr. Robinson is registered to vote at the Winston Drive property and has voted there twice. See *Kauzlarich v. Bd. of Trustees of Oak Creek Sch. Dist. No. 16*, 78 Ariz. 267, 270–71, 278 P.2d 888, 891 (1955) (“The law is well settled in this state that the statement in an affidavit of [voter] registration as to place of residence is not conclusive [but] must be construed as strong proof of the correctness of [someone’s] residence.”); *Jizmejian v. Jizmejian*, 16 Ariz. App. 270, 274 (1972) (looking to “exercise of political rights”).

Plaintiff maintains that Mr. Robinson’s spouse’s residence is a dispositive factor, citing to caselaw from Ohio and Indiana. But Arizona courts have already expressly held that the so-called “family rule” is not dispositive outside the context of voter challenges. *Parker*, 233 Ariz. at 436. And it would be illogical for the rule to govern here: Mr. Robinson’s residence—which substantial evidence supports is in District 6—could just as easily tie his spouse’s residence to District 6.

Ultimately, residence is determined by physical presence and intent to remain, as demonstrated by statements, conduct, and the surrounding circumstances, “using as indicia the habits of the person,

his business and domestic relations, declarations, exercise of political rights, community activities, payment of taxes, ownership of property and other pertinent objective facts ordinarily arising out of the existence of the requisite intent.” *Jizmejian*, 16 Ariz. App. at 274. The trial court took into account the many pieces of evidence indicating Mr. Robinson’s residency in the District, and ruled accordingly. Because the question on appeal is whether the trial court’s findings of fact are supported by substantial evidence, there is no basis for reversal.

II. The Trial Court Ruled Impartially.

Appellants belatedly raise as an issue that the trial judge’s spouse signed a petition sheet to put Mr. Robinson on the ballot. The issue is irrelevant, lacking in merit, and is not timely raised.

Courts have ruled that, when a party becomes aware of a basis to seek to disqualify a judge, it must act with “reasonable promptness” after the basis for disqualification is ascertained. *Preston v. United States*, 923 F.3d 731, 733 (9th Cir. 1991). Plaintiff alleges that he did not learn of this issue until August 4, after trial. But Mr. Robinson’s nomination petitions—which purportedly bear the signature of the trial judge’s spouse—have been a matter of public record since July 7 when

he filed them. R. 26–27. These records were disclosed as exhibits on Thursday July 28, 2022 - four days prior to the August 1 trial. And the Order to Appear for Trial before Judge Scott McCoy is dated July 15 – 18 days before the trial. R. 5. Thus, the appellants had **18 days prior to trial** to begin investigating Judge McCoy’s financial disclosures and his spouse’s civic activities, had they possessed a desire to do so. They did not, because that desire did not manifest itself until after they received an unfavorable ruling the night of August 2.

Further, even had Appellants raised the issue timely, they would have been unsuccessful. Appellants cite *Kay S. v. Mark S.*, 213 Ariz. 373, 142 P.3d 249 (App. 2006) as standing for the proposition that “where a reasonable perception that a judge’s ability to act impartially is impaired, the judge’s decision should be vacated if there exists a risk of injustice or of undermining the public confidence in the judicial process.” And while *Kay* does contain an iteration of that maxim, the reliability Appellant’s claim begins and ends there.

First, *Kay* involved entirely different factual circumstances leading the Court to question the judge’s impartiality. In that case, a party’s attorney in a family court case regularly acted as a judge pro

tempore in same division before which the parties appeared, and was known by that court's division staff as "their favorite judge pro-tempore," giving rise to a perception of "both professional association and special access" between the judge and one of the attorneys in the case. *Id.* at 373, 380 (App. 2006). Further, it was more than a mere appearance of impropriety that gave rise to the decision – in that case, the attorney's appearance on behalf of a party before the division in which the attorney acted as a judge pro-tempore was itself a violation of the Court rules of conduct for pro-tempore judges.

In that case, the possibility of a conflict and the ensuing appearance of impropriety ran directly from a party in the case to the judge; while here, the connection is much more remote. That case involved violation of a court rule of conduct; while here, Plaintiff fails to identify any rule that is violated by a judge's spouse having signed a nomination petition sheet months before the case was ever even initiated. The claim of possible partiality is without merit, distinguishable from the caselaw proffered to support it, and untimely raised – therefore it should be ignored. *See Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1241 (10th Cir.

2020) (“In present-day society we do not treat a married couple as single-minded on public issues.”).

CONCLUSION

The record supports the Court’s factual findings that Mr. Robinson resides and intends to remain in the district. That decision must be affirmed.

RESPECTFULLY SUBMITTED this 15th day of August, 2022.

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