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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2018-CV-000285

Court: Shawnee County District Court

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Case Title: State of Kansas ex rel Derek Schmidt Atty General vs. Kris Kobach - Secretary of State

Type:

SO ORDERED.

/s/ Honorable Teresa L Watson, District Court Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE

STATE OF KANSAS, ex rel.
DEREK SCHMIDT, ATTORNEY GENERAL,

Petitioner

Case No. 2018-CV-285

KRIS KOBACH, SECRETARY OF STATE,

Respondent

ANDY MASKIN,

Intervenor

MEMORANDUM DECISION AND ORDER

This matter is before the Court on a petition for declaratory judgment filed by Petitioner State of Kansas *ex rel.* Derek Schmidt, Attorney General of the State of Kansas. Respondent is Kris Kobach, Secretary of State of the State of Kansas. By prior order of the Court, Andy Maskin, a self-represented individual at the time, was allowed to intervene. Maskin has since obtained counsel. This matter was fully briefed and was argued to the Court on May 21, 2018. The Court has read and considered all documents filed with the Clerk as of the date of this opinion. The Court is ready to rule.

The nature of declaratory judgment.

This is an action brought under K.S.A. 60-1701 seeking a judgment declaring that candidates for the offices of Governor and Lieutenant Governor of the State of Kansas must be Kansas residents. "Courts of record within their respective jurisdictions shall have power to declare the rights, status, and other legal relations whether or not further relief is, or could be sought." K.S.A. 60-1701. Any such declaration by the Court has the force and effect of a final judgment. *Id.* "This act is remedial in nature and its purpose is to settle and provide relief from uncertainty and insecurity with respect to disputed rights, status and other legal relations and should be liberally construed and administered to achieve that purpose." K.S.A. 60-1713.

The issue presented for declaratory judgment is not moot.

Only a few facts are necessary to the determination of this matter. These few facts are of such a nature that the Court may take judicial notice of them, see K.S.A. 60-409, or they are not disputed by the parties. Neither Maskin nor his running mate is a Kansas resident. Maskin submitted the necessary paperwork and paid a fee required to allow him and his running mate to appear on the primary ballot as candidates for the office of Governor and Lieutenant Governor of Kansas. On May 15, 2018, the State Objections Board met and, under the auspices of K.S.A. 2017 Supp. 25-308(c), voted 2-1 to sustain an objection to Maskin's candidacy. Detailing the grounds for the objection and the reasons for the Board's decision sustaining the objection is not necessary to this analysis. Here, all parties contend in unison that the decision of the State Objections Board does not render the instant matter moot.

Kansas courts do not decide moot questions or render advisory opinions. *Skillett v. Sierra,* 30 Kan. App. 2d 1041, 1046, 53 P.3d 1234 (2002). But a case will not be dismissed as moot "unless it is clearly and convincingly shown that the actual controversy has ended and the

only judgment that could be entered would be ineffectual for any purpose and an idle act insofar as rights involved in the case are concerned." *State ex rel. Slusher v. City of Leavenworth,* 285 Kan. 438, 454, 172 P.3d 1154 (2007).

The State Objections Board's decision to exclude Maskin and his running mate from the primary ballot does not end the controversy. First, it does not end the controversy as to Maskin. While K.S.A. 2017 Supp. 25-308(c) says that the decision of the Board is final, the statute also refers to an opportunity for relief through an action in mandamus. See K.S.A. 2017 Supp. 25-308(f) ("All mandamus proceedings to compel an officer to certify and place upon the ballot any name or names . . . must be commenced not less than 45 days before the election."). Maskin has not filed a petition for writ of mandamus, though it appears to be an avenue open to anyone wishing to compel an officer to place his or her name on the ballot.

Second, it does not end the controversy as to other potential nonresident candidates for Governor and Lieutenant Governor. For these offices, the candidate filing deadline is noon on Friday, June 1, 2018. The parties acknowledge that other nonresidents have taken preliminary steps to become candidates for Governor and Lieutenant Governor, including appointment of campaign treasurers. It is certainly possible that other nonresident candidates will file the necessary paperwork and fee in an effort to be placed on the primary ballot prior to the June 1 deadline. It is likewise possible that these nonresident candidates would face a challenge to their candidacies.

Further, the mootness doctrine is a court-made doctrine and is not jurisdictional. Thus, it is amenable to exceptions. *State v. Montgomery,* 295 Kan. 837, Syl. ¶ 2, 286 P.3d 866 (2012). One exception is when an otherwise moot issue is capable of repetition and raises questions of public importance. *Id.* at 841. Whether Kansas law requires candidates for the offices of

Governor and Lieutenant Governor to be Kansas residents is a matter of public importance, and it is an issue likely to come up again in this election cycle. For the reasons set forth above, the Court concludes that the issue presented for declaratory judgment is not moot, and it will be considered on the merits.

Analysis of the issue.

Article 1, Section 1 of the Kansas Constitution states that the Governor, Lieutenant Governor, Secretary of State, and Attorney General "shall have such qualifications as are provided by law." This Court's task is to examine Kansas law and determine whether candidates for the offices of Governor and Lieutenant Governor must be Kansas residents.

Resolution of this issue requires interpretation of statutes. The primary purpose of statutory interpretation is to give effect to the intent of the Legislature. *State ex rel. Schmidt v. City of Wichita,* 303 Kan. 650, 659, 367 P.3d 282 (2016). The first step of statutory interpretation is to attempt to determine the legislative intent by looking to the words of the statute, giving common words their ordinary meanings. *Ullery v. Othick,* 304 Kan. 405, 409, 372 P.3d 1135 (2016). "If the legislature's intent is not clear from the statutory language, a court moves to the second analytical step by applying the canons of construction or examining legislative history." *Brennan v. Kansas Insurance Guaranty Ass'n,* 293 Kan. 446, 450, 264 P.3d 102 (2011). "Statutory provisions that are clear when read separately may become ambiguous when read together, invoking employment of canons of construction, legislative history, or other background considerations to divine the legislature's intent. A conflict between two statutory provisions is an example of such ambiguity in a statutory scheme." (Internal citations omitted.) *Hays v. Ruther,* 298 Kan. 402, 406, 313 P.3d 782 (2013).

The Attorney General asserts, and the parties generally agree, that no single Kansas statute plainly requires candidates for Governor and Lieutenant Governor to be Kansas residents. The Attorney General argues that, despite the absence of such a statute, a host of other laws read together demonstrate the residency requirement.

The Court first looks to statutes that apply to statewide offices in general. K.S.A. 25-4001 says: "The governor, lieutenant governor, secretary of state, attorney general, state treasurer and commissioner of insurance shall be elected for terms of four (4) years, to begin on the second Monday of January next after their election, and until their successors are elected and qualified." K.S.A. 25-101a specifies what day the election of these officers must take place.

K.S.A. 25-4002 says: "Except as otherwise provided in this act, election laws applicable to *other state officers elected from the state as a whole* shall apply to the nomination and election of the governor and lieutenant governor, secretary of state and attorney general." (Emphasis added.) The Secretary of State argues that the reference to other state officers "elected from the state as a whole" means that candidates for statewide office must be Kansas residents.

Next, the Court looks to statutes that apply to candidates for the offices of Governor and Lieutenant Governor. First, K.S.A. 2017 Supp. 25-4004 sets out two ways for such a candidate to appear on the primary ballot: by nomination petition under K.S.A. 2017 Supp. 25-4005, or by declaration of intent and payment of a fee under K.S.A. 2017 Supp. 25-4006.

K.S.A. 2017 Supp. 25-4005 requires that nomination petitions "shall be in substantially the following form" which includes the following language:

> "I, the undersigned, an elector of the county of _____, and state of Kansas, and a duly registered voter and a member of the _____ party, hereby nominate _____ (Here insert name and city) and state of Kansas as a candidate for the office of governor, and running with such candidate _____ (Here insert name and city) and state of Kansas as a candidate for the office of lieutenant governor . . . ."

The Attorney General asserts that K.S.A. 2017 Supp. 25-4005 establishes a Kansas residency requirement because it contains a blank to fill in the candidates' names and cities of residence, but specifies "state of Kansas" immediately after the blank. In other words, for purposes of a nomination petition, there is no blank to fill for the candidates' state of residence – that information is supplied by the form set out in K.S.A. 2017 Supp. 25-4005, and the state specified is "state of Kansas." It assumes that the candidates seeking to use the nomination petition must be Kansas residents. Neither the Secretary of State nor Maskin disagree with this reading of the statute.

Further, K.S.A. 2017 Supp. 25-303(b) provides that independent (non-party affiliated) nominations for Governor and Lieutenant Governor may be made by nomination petition. K.S.A. 2017 Supp. 25-4005 requires that nomination petitions "shall be in substantially the following form" which, as quoted above, has no blank to fill for the candidates' state of residence. Rather, the form set forth in the statute fills in the state of residence – Kansas.

K.S.A. 2017 Supp. 25-4006 addresses candidacy by declaration of intent and payment of a filing fee. It says:

> "The provisions of K.S.A. 25-206, and amendments thereto, shall not apply to the offices of governor and lieutenant governor. When candidates for governor and lieutenant governor in lieu of nomination petitions shall file a joint declaration of intention to become candidates for such offices the accompanying fee shall be a sum equal to the total of 1% of one year's salary for governor and 1% of one year's salary for lieutenant governor, as determined by the secretary of state. Amounts received under this section shall be remitted to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the state general fund.
>
> Such declaration shall be prescribed by the secretary of state, and shall be attested before the secretary of state or a deputy secretary of state."

The statute does not mention a residency requirement, nor does it prescribe a form for the joint declaration of intention. If read literally and in isolation from each other, K.S.A. 2017 Supp. 25-4005 and K.S.A. 2017 Supp. 25-4006 would set up two different sets of qualifications for candidates for the same office depending on what method was used to seek a place on the ballot. The Attorney General argues that the apparent conflict between these two statutes gives rise to an ambiguity in the law, which requires the Court to turn to the canons of statutory construction to determine legislative intent. The Court agrees.

Two canons of construction are useful here. First, "[i]n construing statutes and determining legislative intent, several provisions of an act or acts, *in pari materia*, must be construed together with a view of reconciling and bringing them into workable harmony if possible." *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas,* 275 Kan. 763, Syl. ¶ 2, 69 P.3d 1087 (2003). This Court has a duty "to reconcile the different provisions so as to make them consistent, harmonious, and sensible." *Id.* Second, the Court must construe statutes to avoid unreasonable or absurd results. *Johnson v. Kansas Employment Sec. Bd. of Review,* 50 Kan. App. 2d 606, 613, 330 P.3d 1128 (2014). Both of these rules are expressions of common sense, which the Court must apply to the issue at hand. *Wigington v. Mid-Continent Royalty Co.*, 130 Kan. 785, 790, 288 P. 749 (1930).

The Attorney General and Secretary of State point the Court to a series of other statutes that, when read *in pari materia*, provide context and clues regarding legislative intent to require candidates for Governor and Lieutenant Governor to be Kansas residents. The Court has considered all of these statutes, and others, but only the most persuasive ones are discussed here.

K.S.A. 25-613, which addresses the form of official ballots, provides: "To the names of pairs of candidates running for governor and lieutenant governor shall be added the name of the

city in which or near which each resides." The fact that the ballot must include the city, but not the state, where the candidates reside seems to indicate that the Legislature intended that candidates for Governor and Lieutenant Governor reside in Kansas.

This is consistent with K.S.A. 25-617, which prescribes the format for the official general election ballot in statewide races by providing a sample ballot. The sample ballot for Governor and Lieutenant Governor lists the first and last name of the candidate pair along with the name of the city of residence of each. The statute does not require that the ballot indicate a state of residence, and the sample ballot set forth in the statute does not contain such a reference. Again, the lack of a reference to the state in which a candidate lives suggests that candidates for Governor and Lieutenant Governor must be Kansas residents.

Also persuasive is K.S.A. 2017 Supp. 25-306b. It says, in pertinent part, that no person nominated by any means for national, state, county or township office may withdraw after the primary election except in case of severe medical hardship or if "the nominee certifies to the secretary of state that the nominee does not reside in the state of Kansas." K.S.A. 2017 Supp. 25-306b(a) and (b)(1). This suggests that loss of residency is a disqualifying factor triggering the extraordinary measure of allowing a candidate to withdraw after winning the primary.

The Attorney General argues that the absence of a candidate residency requirement could lead to unreasonable or absurd results. In construing statutes, the Court may consider the effect of various suggested interpretations of the law. *Brown v. USD 333*, 261 Kan. 134, 142, 928 P.2d 57 (1996). "Statutes must be construed with reason, considering the practicalities of the subject matter. A statute should never be given a construction that leads to uncertainty, injustice or confusion, if possible to construe it otherwise." (Internal citations omitted.) *Goodspeed v. Skinner*, 9 Kan. App. 2d 557, 559–60, 682 P.2d 686 (1984).

By way of example, the Attorney General points to the Governors of Kansas Hometown Heritage Act, K.S.A. 75-5071 *et seq.,* which authorizes the Secretary of the Kansas Department of Transportation ("KDOT") to install roadway signs in the hometowns of Kansas Governors. The Act defines "governor's hometown" to mean "the city or unincorporated community listed in the election records of the secretary of state as the residence of a successful candidate for governor at the state of Kansas the first time such candidate was elected governor." K.S.A. 75-5072(a)(2). The Attorney General argues that since KDOT cannot unilaterally install signs in other states, the Legislature must have contemplated that candidates for Governor be Kansas residents. It would be unreasonable to think otherwise.

In another example, the Attorney General suggests that, absent a candidate residency requirement, the Governor of another state could become a candidate for Governor of Kansas. If elected, that person could serve as Governor of two states at the same time. This is a highly unlikely hypothetical that may have other underlying flaws, but it illustrates a basic point. The more sensible interpretation of Kansas law is that candidates for Governor and Lieutenant Governor must be Kansas residents.

The parties generally agree that most, if not all, other states explicitly require that candidates for Governor be residents of the state in which they seek election. As one court explained, this ensures that "the chief executive officer . . . is exposed to the problems, needs, and desires of the people whom he is to govern, and it also gives the people . . . a chance to observe him and gain firsthand knowledge about his habits and character." *Chimento v. Stark*, 353 F. Supp. 1211, 1217 (D.N.H.), *aff'd* 414 U.S. 802 (1973).

Further, the parties generally agree that no purported candidate for Kansas Governor prior to Maskin has been other than a Kansas resident. The Attorney General argues that this

amounts to a "custom and practice" that supports the notion of an existing residency requirement. Maskin, on the other hand, asserts:

> "Forty-nine other states specify in their constitutions and by statute specific qualifications to run for Governor. The extent to which Kansas hasn't (until now, applicable in 2022) may be an oversight, or perhaps it was left open by pioneers because they knew good citizens with leadership skills can come from all over our great nation."

While pioneer purpose is one explanation for the lack of an explicit candidate residency requirement in Kansas law, it is not a likely one. No party cites any authority for the proposition that Kansas' early lawmakers deliberately omitted a candidate residency requirement for the office of Governor for any reason, including that they wanted to recruit governing talent from outside the fledgling state. Courts must not strain to find meaning "through a process of imaginative hypothesizing;" rather, a common sense approach is the better path. *State v. Wilson,* 267 Kan. 550, 557, 987 P.2d 1060 (1999). Accepting Maskin's theory requires considerable speculation. Common sense, and a reading of other Kansas statutes *in pari materia*, suggests that the lack of an explicit candidate residency requirement was simply an oversight.

2018 House Bill 2539.

Finally, Maskin asserts that existing Kansas law does not contain a residency requirement for candidates by reference to 2018 House Bill 2539. This bill was adopted by the Kansas Legislature during the 2018 session and was signed by the Governor on May 18, 2018. The Court takes judicial notice of its contents and the public record of its legislative history. Maskin argues that the recent passage of HB 2539 and its residency requirement "only serves to highlight that no such restriction exists presently, and that the remedy is legislation rather than judicial ruling."

HB 2539, among other things, amends K.S.A. 25-101a as follows:

> "Section 1. On and after January 1, 2019, K.S.A. 25-101a is hereby amended to read as follows: 25-101a. *(a)* On the Tuesday succeeding the first Monday in November in 1978, and each four years thereafter, there shall be elected a governor and lieutenant governor running together, a secretary of state, an attorney general, a state treasurer and a state commissioner of insurance.
>
> *(b) Every candidate for the office of secretary of state, attorney general, state treasurer or state commissioner of insurance shall be a qualified elector of the state of Kansas by the deadline for filing for such office as provided in K.S.A. 25-205, and amendments thereto.*
>
> ***(c) Every candidate for the office of governor and lieutenant governor shall be a qualified elector and shall be 25 years of age or older by the deadline for filing for such office as provided in K.S.A. 25-205, and amendments thereto.***
>
> *(d) Every candidate for the office of attorney general must be licensed to practice law within the state of Kansas."* (Bold emphasis added.)

"Qualified elector" is defined as "[e]very citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote." Kan. Const. Art. 5 §1.

"Ordinarily, courts presume the legislature intends to make a substantive change when it revises an existing law, but this presumption's strength, weakness, or validity changes according to the circumstances. When an original statute is ambiguous, the legislative purpose may be to clarify the statute's ambiguities, not to change the law." *Brennan,* 293 Kan. at 458, citing *Trees Oil Co. v. Kansas Corporation Com'n,* 279 Kan. 209, 229, 105 P.3d 1269 (2005). "A statutory amendment may provide insight into the original enactment's legislative intent if that enactment was ambiguous. Amendments that construe or clarify a prior statute 'must be accepted as the legislative declaration of the meaning of the original act.'" (Internal citations omitted.) *Brennan,* 293 Kan. at 458.

Maskin argues that the residency requirement is a change to existing law, not a clarification, because the Legislature deliberately set the effective date of this portion of HB 2539 to be January 1, 2019. This is after the current election cycle.

HB 2539 in its original form contained the January 1, 2019, effective date. Maskin points out that the House Committee of the Whole defeated a proposed amendment to change the effective date of HB 2539 from January 1, 2019, to upon publication in the Kansas Register. There was no explanation of the purpose of the amendment and there was no roll call vote. There is nothing in the Journal of the House that specifies even the number of votes for or against the amendment. See Journal of the Kansas House, 2353 (February 20, 2018). Though other changes were made to the bill at various phases of the legislative process, HB 2539 was ultimately approved by the House and the Senate, and signed by the Governor, with the January 1, 2019, effective date.

Maskin points to the written testimony of Bryan A. Caskey, Director of Elections for the Kansas Secretary of State's Office. Caskey submitted written testimony to both the House Committee on Elections and the Senate Committee on Ethics, Elections and Local Government. His testimony to both committees said, in pertinent part: "The Secretary of State's Office also believes it is imperative to make this bill effective after the 2018 elections. The Secretary of State does not want there to be any appearance of a conflict of interest concerning persons who are currently candidates and do not meet the proposed requirements."

This is the statement of a conferee representing an office in the executive branch. Caskey was speaking in favor of a provision contained in the bill as introduced. Further, the statement does not indicate that HB 2539 would be a departure from existing law. Rather, it expresses a desire to avoid a "conflict of interest" in the passage of the bill. It is not entirely clear what this

means, but it is likely a reference to the fact that various members of the executive branch and the legislature had expressed an interest in running for Governor themselves, and it might appear self-serving to participate in the passage of a bill which would eliminate nonresident competitors in the instant election cycle.

Maskin's argument is that, if HB 2539 is merely a clarification of existing law, the Kansas Legislature would have made it effective upon publication in the Kansas Register. Because it declined to do so, he reasons, the Legislature recognized that HB 2539 constituted a change to existing law. This argument is not convincing under the circumstances. There is little explanation for the January 1, 2019, effective date other than one conferee's desire to avoid the appearance of "conflicts" with existing nonresident candidates for Governor. The legislative history on this point is scant and unclear. Attempting to read the legislative tea leaves in regard to HB 2539 is not helpful to this analysis.

Summary.

There is no single Kansas statute that explicitly requires candidates for Governor and Lieutenant Governor to be Kansas residents. A variety of other statutes imply such a residency requirement. There is an ambiguity in the law requiring the Court to employ canons of statutory construction. Construing the statutes discussed above *in pari materia*, it is clear that the Kansas Legislature intended to require candidates for Governor and Lieutenant Governor to be Kansas residents. This construction avoids unreasonable results and is consistent with a common sense approach to resolving the question at hand.

CONCLUSION

For the reasons set forth above, the Court grants the Attorney General's petition for declaratory judgment. It is the judgment of this Court that existing Kansas law requires candidates for the offices of Governor and Lieutenant Governor of the State of Kansas to be Kansas residents.

This order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L.WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order providing notice to the following:

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