

LETTER OPINION
93-L-144

April 23, 1993

Mr. Jerry Renner
Kidder County State's Attorney
PO Box 229
Steele, ND 58482

Dear Mr. Renner:

Thank you for your March 22, 1993, letter requesting my opinion on the residency of an individual. You explain that a resident of a township has sold all property in the township and has moved to a different county. You ask whether this individual may continue to vote or hold township office in the township in which he formerly owned property.

N.D.C.C. ? 16.1-01-04 sets out several requirements to vote in North Dakota including, age, citizenship and residency. For purposes of this discussion I am assuming that the individual clearly meets all qualifications to vote such as age and citizenship. Therefore I will only address the residency question you raise.

The starting point for consideration of your question is found in N.D.C.C. ? 16.1-01-05 which provides:

Where a qualified elector moves from one precinct to another precinct within this state, he is entitled to vote in the precinct from which he moved until he has established his new voting residence.

Thus whether the person in your case can continue to vote and hold office in the township depends upon whether he has gained a new residence. If he has not gained a new residence he may continue to vote and hold office in that township until he does so. If he

Mr. Jerry Renner
April 23, 1993
Page 2

has changed residence he may no longer vote nor hold office in the township.

Whether a person's residency has changed must be determined by reference to the facts of the particular case. The Legislature has set forth some general rules for determining residency in N.D.C.C. ? 54-01-26. These rules include:

1. A person's residence is the place where he remains unless "called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose."

2. A person may have only one residence.

3. A person may not lose his residence until another residence is gained.

4. A person's residence can be only be changed when the person's actions and intent are joined.

The term "residence" as used in N.D.C.C. ? 54-01-26 is equivalent to the word "domicile". Schillerstrom v. Schillerstrom, 32 N.W.2d 106, 114 (N.D. 1949). In this sense, a person may have two or more actual residences, but only one legal residence. Dietz v. City of Medora, 333 N.W.2d 702, 704 (N.D. 1983).

Once a person has acquired a legal residence, there is a legal presumption against its change, see N.D.C.C. ? 31-11-03(40), and the burden of proving any change of legal residence lies with the person alleging the change. Dietz at 705. "To find a change of domicile, the fact of physical presence at a residence must occur with the intent to make that place the legal residence." Matter of Burshiem, 483 N.W.2d 175, 180 (N.D. 1992). However, a so called "floating intention" to return to a former place of abode at some indefinite future time based upon contingencies which may never happen, is not sufficient to retain the former domicile. See State v. Moodie, 258 N.W 558, 564 (N.D. 1935).

[Although any] act, event, or circumstance in the

Mr. Jerry Renner
April 23, 1993
Page 3

life of an individual may be evidence from which the state of mind [or intent] . . . may be inferred with more or less precision; . . . it is impossible to formulate any general rule by which the weight due to any particular point of evidence may be determined.

Schillerstrom, 32 N.W. 2d at 115. Thus where a person moves out of a township and sells all property in the township, including his house, it would appear that the person intended to give up the residency in the township and gain a new residence elsewhere. However the person's actual intent as expressed in his declarations as well as his other actions must also be considered. In that regard the fact that the person does not vote in the new township, but returns to the old township to vote weighs on the side of a conclusion that there is no intent to acquire a new residence. Because there is a presumption against the change in residency, BRT v. Executive Dr. of the Social Service Bd. of North Dakota, 391 N.W.2d 594 (N.D. 1986), the fact that he continues to vote in the township could support a conclusion that there has been no union of action and intent and that he has not acquired a new residence.

As a practical matter the question you present will most likely be raised at the polls or when a voter applies for an absentee ballot. In either case if there is a question as to the person's residency the person should be asked to sign an affidavit such as that provided for in N.D.C.C. ? 16.1-05-06. The affidavit will state that the person is in fact a resident of that precinct. If the affidavit is completed the individual must be allowed to vote.

If the election officer's concerns are not allayed by the signing of the affidavit, he may request the state's attorney to bring an action to prosecute the person for violating the law. Generally, this extreme remedy is not necessary however because many individuals continue to vote in their old precincts because they have an incomplete understanding of the law. Once it is explained to them, they can then make an affirmative statement whether they intend to continue to reside where they now live or whether they intend to return to their original precinct at some point in time.

I am sorry that I cannot give you a decision on the

Mr. Jerry Renner
April 23, 1993
Page 4

facts you present. However I hope that the rules I have laid out will assist you in determining the matter after you have collected all the applicable facts including the intention of the person in question.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rms/vkk

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