ALAN WILSON
ATTORNEY GENERAL

April 5, 2013

The Honorable Peter M. McCoy, Jr.
Member, House of Representatives
135 King Street
Charleston, South Carolina 29401

Dear Representative McCoy:

Attorney General Alan Wilson has referred your letter of April 1, 2013 to the Opinions section for a response. The following is this Office's understanding of your question presented and our opinion concerning the issue based on that understanding.

Issue: Is a particular candidate eligible to represent a Congressional District on the Board of Trustees of the Medical University of South Carolina when his wife owns (in her name only) a residence registered as her primary residence in a Congressional District other than his?

Short Answer: As far as the law reads, as long as the candidate truthfully meets the requirements to be a qualified elector (and thus a resident) of the Congressional District to which he is a candidate, then he is eligible to represent that Congressional District. Based on the facts as presented, it is the opinion of this Office that the particular candidate's wife's primary residence in a different Congressional District does not defeat that candidate's eligibility to represent the Congressional District for the county he claims as his residence.[1]

Law/Analysis:
This Office only issues legal opinions based on its authority, as this Office is not a fact-finding agency. Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Op. S.C. Atty. Gen., 1983 WL 182076 (December 12, 1983)). These are the facts that were provided to this Office as provided in your letter:

> *Dr. Smith co-owns a house [House A] in [a certain city (City A)] in South Carolina with his wife, and this house is taxed at the 6% [property] tax assessment rate. His wife also solely owns a house [House B]...in ... county [B], and this house is taxed at the 4% rate. Dr. Smith is registered to vote in [the county where he co-owns a house (County A)]. His driver's license lists his ... [Home A] as his residence. His long-time medical practice is in [City A]. Furthermore, he publicly declares that [City A]*

[1] However, this Office makes no verification regarding law outside of the facts given in this request, such as how the candidate files his taxes and other unknown documents that declare a primary residence, etc.

is his residence. Considering these factors, the committee is trying to determine whether Dr. Smith is a resident of [County A] or [County B].

Therefore, this Opinion will be based on the facts as you provided them. You further state in your letter:

[t]he legal standard for determining an individual's residence is codified in South Carolina Code Section 7-1-25. The statute states, in its entirety, the following:

(A) A person's residence is his domicile. "Domicile" means a person's fixed home where he has an intention of returning when he is absent. A person has only one domicile.
(B) For voting purposes, a person has changed his domicile if he (1) has abandoned his prior home and (2) has established a new home, has a present intention to make that place his home, and has no present intention to leave that place.
(C) For voting purposes, a spouse may establish a separate domicile.
(D) For voting purposes, factors to consider in determining a person's intention regarding his domicile include, but are not limited to:

(1) a voter's address reported on income tax returns;
(2) a voter's real estate interests, including the address for which the legal residence tax assessment ratio is claimed pursuant to Section 12-43-220(C);
(3) a voter's physical mailing address;
(4) a voter's address on driver's license or other identification issued by the Department of Motor Vehicles;
(5) a voter's address on legal and financial documents;
(6) a voter's address utilized for educational purposes, such as public school assignment and determination of tuition at institutions of higher education;
(7) a voter's address on an automobile registration;
(8) a voter's address utilized for membership in clubs and organizations;
(9) the location of a voter's personal property;
(10) residence of a voter's parents, spouse, and children; and
(11) whether a voter temporarily relocated due to medical care for the voter or for a member of the voter's immediate family.' (emphasis added)

In applying the statutory standards for determining a candidate's intentions for purposes of domicile (residence) one must also follow the case law concerning this topic. The case law is clear that the determination of an individual's domicile (residence) "is a mixed question of law and fact", and the intention of that person with regard to the matter "is deemed the controlling element of that decision." The intention may be proved with acts, declarations, and other circumstance, but only when these factors taken together are inconsistent with a person's declaration may the claim of residence by disproven. Clarke v. McCown, 107 S.C. 209, 92 S.E. 479 (1917); See also, *Easler v. Blackwell, 195 S.C. 1510 S.E. 2d 170 (1940) and Ferguson v. Employers Mutual Casualty Company, 254 S.C. 235, 174 S.E. 2d 768 (1970). The "duration of the residence" is not a determining factor. Ferguson, at 769.*

It is important to note that a March 31, 2008, South Carolina Attorney General Opinion dealt with a somewhat similar residency issue. In that opinion the South Carolina Attorney General stated that "[t]rustees of state colleges are public officers... [and]...must possess the qualifications of an elector". The opinion went on

> *to say that "qualified elector' means 'registered elector" and that [a] registered elector is defined by S.C. Code Ann. Section 7-5-120 which requires an elector to be a "resident in the county...in which the elector offers to vote." Attorney General Opinion 2008 WL 903972. Furthermore, the "intent of the individual is probably the most important element in determining the residency of an individual."* Id.
>
> *... It appears that Dr.[...] Smith is a clearly a resident of [County A and therefore eligible to be a candidate for that particular Congressional District].*
>
> *I appreciate your review of these facts and the applicable law and ask that you please respond....*

Let us begin with a review of the law. Trustees of State colleges in South Carolina are public officers. Op. S.C. Atty. Gen., 2008 WL 903972 (March 31, 2008) (citing S.C. Code § 8-1-10). The Medical University of South Carolina is included as a State college or university. S.C. Code § 59-101-10 (1976 Code, as amended). Therefore, it is subject to the requirement by the South Carolina Constitution for a public officer to have the qualifications of an elector. S.C. Const. Art. VI, § 1. It specifies:

> "No person may be popularly elected to and serve in any office in this State or its political subdivisions unless he possesses the qualifications of an elector, is not disqualified by age as prescribed in this Constitution, and has not been convicted of a felony under state or federal law or convicted of tampering with a voting machine, fraudulent registration or voting, bribery at elections, procuring or offering to procure votes by bribery, voting more than once at elections, impersonating a voter, or swearing falsely at elections/taking oath in another's name, or has not pled guilty or nolo contendere to these offenses. However, notwithstanding any other provision of this Constitution, this prohibition does not apply to a person who has been pardoned under state or federal law or to a person who files for public office fifteen years or more after the completion date of service of the sentence, including probation and parole time, nor shall any person, serving in office prior to the ratification of this provision, be required to vacate the office to which he is elected. No person may be elected or appointed to office in this State for life or during good behavior, but the terms of all officers must be for some specified period except officers in the militia."

S.C. Const. Art. VI, § 1 (emphasis added). The South Carolina Constitution further details requirements for elected officials and officeholders by stating:

> No person shall be elected or appointed to any office in this State unless he possess the qualifications of an elector....

S.C. Const. Art. XVII, § 1. The qualifications of an elector were addressed in a previous opinion by this Office. This Office opined:

> The phrase "qualified elector" means "registered elector" and no one who has not been registered to vote (and has thus met the requirements to be a qualified elector) can hold a public office, elected or appointed. Mew v. Charleston & Savannah Ry.

> Co., 55 S.C. 90, 32 S.E. 828 (1899); Blalock v. Johnston, 180 S.C. 40 185 S.E. 51 (1936). Article II, Section 4 of the state Constitution provides in relevant part that "[e]very citizen of the United States and of this State of the age of eighteen and upwards who is properly registered shall be entitled to vote in the precinct of his residence and not elsewhere." Qualifications to be met to be a registered elector are found in S.C. Ann. § 7-5-120....

Op. S.C. Atty. Gen., 2008 WL 903972 (March 31, 2008). South Carolina Code § 7-5-120 (1976 Code, as amended) says:

> (A) Every citizen of this State and the United States who applies for registration must be registered if he meets the following qualifications:
> (1) meets the age qualification as provided in Section 4, Article II of the Constitution of this State;
> (2) is not laboring under disabilities named in the Constitution of 1895 of this State; and
> (3) is a resident in the county and in the polling precinct in which the elector offers to vote.
> (B) A person is disqualified from being registered or voting if he:
> (1) is mentally incompetent as adjudicated by a court of competent jurisdiction; or
> (2) is serving a term of imprisonment resulting from a conviction of a crime; or
> (3) is convicted of a felony or offenses against the election laws, unless the disqualification has been removed by service of the sentence, including probation and parole time unless sooner pardoned.

The law in South Carolina is clear that a person's residence is his domicile, a person may only have one domicile and that domicile is where a person has the intention of returning whenever he is gone. S.C. Code § 7-1-25 (A) (1976 Code, as amended). The law also authorizes a spouse to have a separate domicile for voting purposes. S.C. Code § 7-1-25 (B) (1976 Code, as amended). As you list in the letter and as quoted above, there are eleven factors to consider someone's intent in order to ascertain their domicile for voting purposes. S.C. Code § 7-1-25 (D) (1976 Code, as amended). All the factors concern the registered address of the voter except for the location of real and personal property (2, 9), the residence of voter's immediate family (10) and any temporary relocation for medical care (11). Id. Based on the facts given, your assessment of Dr. Smith's residency would likely be consistent with how this Office would interpret residency using those factors under the law, as the law also authorizes a spouse to have a separate domicile for voting purposes pursuant to South Carolina Code of Laws § 7-1-25 (B) (1976 Code, as amended).

However, we would be remiss if we did not discuss the Clarke v. McCown case where the Supreme Court of South Carolina held that a person's residence is a mixed question of law and fact. The court went on to say that:

> [t]he residence of a person is a mixed question of law and fact; and the intention of that person with regard to the matter is deemed the controlling element of decision. His intention may be proved by his acts and declarations, and perhaps other

> circumstance; but when these, taken all together, are not inconsistent with the intention to retain an established residence, they are not sufficient in law to deprive him of his rights thereunder, for it will be presumed that he intends to continue a residence gained until the contrary is made to appear, because inestimable political and valuable personal rights depend upon it. Therefore it is a serious matter to deprive one of his residence, and it should not be done upon evidence which is legally insufficient... That a man does not live or sleep or have his washing done at the place where he has gained a residence, or that his family lives elsewhere, or that he engages in employment elsewhere are facts not necessarily inconsistent with his intention to continue his residence at that place....

Clarke v. McCown, 107 S.C. 209, 92 S.E. 479, 480 (1917). Additionally, as you referenced in your letter, this Office previously opined regarding residency and other such related issues, including in 2008 where we stated that trustees of state colleges must possess the qualifications of an elector of the Congressional District in which they represent. Op. S.C. Atty. Gen., 2008 WL 903972 (March 31, 2008). In that same opinion, this Office opined that intent is to be determined on a case-by-case basis and is a question of fact. Id.

This Office has published multiple other previous opinions concerning similar issues as presented in your letter. See Ops. S.C. Atty. Gen., 2009 WL 2844864 (August 27, 2009) (opining that vehicle registration is a factor in determining legal residency but should not be the sole basis for denial of a primary residence reduced rate by a county assessor) (citing Op. S.C. Atty. Gen., 1993 WL 720126 (June 11, 1993) which said "[a] person may have but one domicile at any given time; and to change one's domicile, 'there must be an abandonment of, and an intent not to return to the former domicile.' 28 C.J.S., Domicile, §13. There must also be clear establishment of a new domicile. Gasque v. Gasque, 246 S.C. 423, 143 S.E.2d 143 811 (1965). The Supreme Court has emphasized that '[o]ne of the essential elements to constitute a particular place as one's domicile...is an intention to remain permanently or for an indefinite time in such place.' Barfield v. Coker & Co., 73 S.C. 181, 53 S.E. 170,171 (1906)"); 2009 WL 1968628 (June 12, 2009) (opining that all factors indicating the intent of the taxpayer must be considered in determining domicile, not just the registration of two items of personal property in a different state); 2009 WL 1968603 (June 4, 2009) (opining that a doctor who owned a home, registered his car, his driver's license and his voter registration in the same city as his business and proclaimed that city as his residence was a resident of that same city despite the fact that his wife owned a house at the beach as her primary residence which differed from his city of residence); 1983 WL 181982 (August 29, 1983) (residency is determined by one's intent, and the fact that a board member's wife is a resident of a different county than the board member is "immaterial" to what county the board member is a resident of) (citing 1975-1976 Op. S.C. Atty. Gen. 145 which said a woman living with her husband is not prohibited from establishing her own residency in order to vote in this State in spite of her active duty military husband who declared a different state as his legal residence). Based on prior opinions, your assessment of Dr. Smith's residency would be consistent with how this Office has consistently interpreted the law.[2]

---

[2] For additional discussion concerning residency, please see Ops. S.C. Atty. Gen., 2006 WL 981694 (March 28, 2006); 2004 WL 736920 (March 17, 2004); 2003 WL 22172231 (September 16, 2003); 2001 WL 1397511 (October 16, 2001); 1999 WL 626635 (July 7, 1999); 1995 WL 803330 (March 8, 1995); 1995 WL 803679 (June 12, 1995); et al.

Please note this Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law. Ops. S.C. Atty. Gen., 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984). Furthermore, "[t]he absence of any legislative amendment following the issuance of an opinion of the Attorney General strongly suggests that the views suppressed therein were consistent with the legislative intent." Op. S.C. Atty. Gen., 2005 WL 2250210 (September 8, 2005) (citing Scheff v. Township of Maple Shade, 149 N.J.Super. 448, 374 A.2d 43 (1977)).

Nevertheless, this Office would not want to acquiesce to such an assertion knowing that it might condone any violation of South Carolina law based on the information provided. Therefore, let us look to the section of the South Carolina Code of Laws that discusses primary residence. South Carolina Code of Laws Section 12-43-220(c)(2)(ii) (1976 Code, as amended) provides that:

> …the owner…shall certify to the following statement: "Under penalty of perjury I certify that: (A) the residence which is the subject of this application is my legal residence and where I am domiciled at the time of this application and that neither I, nor any member of my household, claim to be a legal resident of a jurisdiction other than South Carolina for any purpose; and (B) that neither I, nor a member of my household, claim the special assessment ratio allowed by this section on another residence."

Based on a plain reading of the statute, it appears that any such certification of her primary residence by Mrs. Smith pursuant to S.C. Code § 12-43-220(c)(2)(ii) could be truthful based on the facts given and could still be consistent with Dr. Smith having a different residence.

Conclusion: Based on the information as given, it appears your conclusion that Dr. Smith eligibility to be considered a resident and thus a qualified elector of his Congressional District is not defeated by his wife's location of a separate domicile is correct. This conclusion is consistent with prior opinions by this Office and our interpretation of the laws concerning electors. However, this Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair

Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Deputy Attorney General