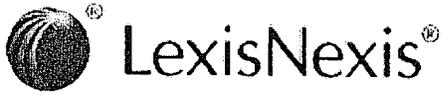


### Appendix 3

#### Cases

- A. *Pedigo v. Grimes*, 113 *Ind.* 148; 1887 *Ind. LEXIS* 324.
- B. *State Election Board v. Evan Bayh*, 521 *N.E.2d* 1313; 1988 *Ind. LEXIS* 113.
- C. *In Re: David E. Evrard*, 263 *Ind.* 435; 1975 *LEXIS* 324.
- D. *State ex rel. Flaughner v. Rogers et al.*, 226 *Ind.* 32; 1948 *LEXIS* 131.
- E. *Indiana ex rel. White v. Scott*, 171 *Ind.* 349; 1908 *Ind. LEXIS* 128.
- F. *Maddox v. The State*, 32 *Ind.* 111; 1869 *Ind. LEXIS* 149.
- G. *Daniel Kribs v. State of Indiana*, 917 *N.E.2d* 1249; 2009 *Ind. App. LEXIS* 2593.
- H. *Indiana v. Karl D. Jackson*, 889 *N.E.2d* 819; 2008 *LEXIS* 364.
- I. *Callahan v. Raymond J. Parker*, 580 *N.E.2d* 1006; 1991 *Ind. App. LEXIS* 1872.
- J. *George Pabey v. Robert Pastrick*, 816 *N.E.2d* 1138; 2004 *Ind. LEXIS* 705.
- K. *Poulard v. LaPorte County Election Board*. No. 46C01-0710-MI-384, Oct 26, '07.



LEXSEE 113 IND. 148



Analysis  
As of: Oct 20, 2010

**Pedigo v. Grimes.****No. 13,848.****SUPREME COURT OF INDIANA*****113 Ind. 148; 13 N.E. 700; 1887 Ind. LEXIS 324*****November 3, 1887, Filed**

**SUBSEQUENT HISTORY:** [\*\*\*1] Petition for a Rehearing Dismissed Jan. 21, 1888.

**PRIOR HISTORY:** From the Orange Circuit Court.

**DISPOSITION:** Judgment reversed, with instructions to award a new trial.

**COUNSEL:** J. W. Buskirk, H. C. Duncan, R. W. Miers, E. Corr, W. Farrell, R. A. Fulk and M. S. Mavity, for appellant.

J. H. Loudon and W. P. Rogers, for appellee.

**JUDGES:** Elliott, J.

**OPINION BY:** Elliott

**OPINION**

[\*149] [\*\*701] Elliott, J.--The appellee, proceeding under the statute providing for the contest of election, filed a written statement contesting the election of the appellant to the office of auditor of Monroe county. By appeal the case went to the Monroe Circuit Court, and thence, by change of venue, to the Orange Circuit Court.

The court did not err in denying the appellant's request for a trial by jury. Our cases hold that a jury trial is not demandable in contested election cases, and they are supported by authority. *Knox v. Fesler*, 17 Ind. 254; *Cory v. Segar*, 62 Ind. 60; *Ewing v. Filley*, 43 Pa. 384; *Hulseman v. Rems*, 41 Pa. 396; *Ford v. Wright*, 13 Minn. 518; *Williamson v. Lane*, 52 Tex. 335; *Wright v. Fawcett*, 42 [\*150] Tex. 203; *Grier v. Shackelford*, 3 Brev. 491; [\*\*\*2] *State v. Harmon*, 31 Ohio St. 250; *State v. Marlow*, 15 Ohio St. 114; *Luther v. Borden*, 7 HOW 1, 12 L. Ed. 581.

113 Ind. 148, \*; 13 N.E. 700, \*\*;  
1887 Ind. LEXIS 324, \*\*\*

Three witnesses introduced by the appellant, Fesler, Hooper and Rabb, were examined at much length upon the question of residence, and at the close of the direct examination the court said to counsel for the appellee: "You are now entitled to examine the witness on that one question of residence."

The contention of appellant is, that it was error to permit a cross-examination, because one question asked by his counsel of each of the witnesses was not answered. The contention upon this point is not that there was error in not compelling an answer, but that there was error in permitting a cross-examination. We perceive no foundation for this position. If appellant elected to make the witnesses his own, and to examine them in chief as to any subject, he opened that subject to cross-examination. *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409, 3 N.E. 389.

As he did open on a subject, and did avail himself of the benefit of the examination in chief, he certainly can not complain because the court did not deny a cross-examination upon that subject.

[\*\*\*3] Three witnesses, Hooper, Fesler and Rabb, were asked on the direct examination to say for whom they voted for the office here in controversy, but the court declined to compel them to answer. It is the theory of our law that the ballot is secret, and no man who casts a lawful ballot can be compelled to disclose the names of the persons for whom he voted. *Williams v. Stein*, 38 Ind. 89 (10 Am. R. 97); Cooley Const. Lim. (5th ed.), 760.

Where, however, the vote is illegally cast, the voter may, so our statute provides, be compelled to make disclosure. Accepting, without inquiry, this statute as valid, the question which first presents itself is, whether the votes were illegally cast, and this question must, in the first instance, [\*151] be decided by the trial court upon the evidence. It appears, therefore, that a question of fact was presented for the decision

of the court, and where this is so the decision will be upheld unless it is clearly erroneous. The principle that the appellate court will not disturb the finding of the trial court upon a question of fact is a familiar one, and is illustrated in a great variety of cases. *Shular v. State*, 105 Ind. 289 (55 [\*\*\*4] Am. R. 211, 4 N.E. 870); *Lexington, etc., R. R. Co. v. Ford Plate Glass Co.*, 84 Ind. 516. We must, therefore, uphold the finding of the trial court on this question of fact, unless it is clearly shown to be wrong.

It is presumed that the voters were not guilty of an unlawful act, and before they could be compelled to make disclosure it was incumbent on the appellant to remove this presumption. This presumption, like a *prima facie* case, stands until overthrown. *Bates v. Prickett*, 5 Ind. 22 (61 Am. Dec. 73); *Adams v. Slate*, 87 Ind. 573 (575); *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264 (54 Am. R. 312, 3 N.E. 836); *Louisville, etc., R. W. Co. v. Thompson*, 107 Ind. 442, 8 N.E. 18.

The strength of this presumption is augmented by the fact that the law is very careful to preserve inviolate the secrecy of the ballot. *People v. Cicott*, 16 Mich. 283.

[\*\*702] We can not, therefore, disturb the decision of the court, unless the testimony clearly shows that the persons who were asked to state for whom they voted cast illegal votes. This the testimony does not show. Taking the view of the testimony most favorable to the appellant, [\*\*\*5] the utmost that can be said of it is, that the voters entered the State University at Bloomington without at the time of entering having formed a definite intention of making that place their residence, but that they did subsequently determine that it should be their residence. This gave them the right to vote, because there is no evidence that this was not their intention, formed and acted upon in good faith. We think it clear, that if they had gone to Bloomington with the intention of remaining simply as students, and there was no change of

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intention, they would [\*152] not have acquired a residence. *Granby v. Amherst*, 7 Mass. 1; *Fry's Election Case*, 71 Pa. 302 (10 Am. R. 698); *Dale v. Irwin*, 78 Ill. 170; *Vanderpoel v. O'Hanlon*, 53 Iowa 246, 5 N.W. 119.

Where, however, the intention is formed to make the college town the place of residence, and that place is selected as the domicile, then the person who does this in good faith becomes a qualified voter.

In *Vanderpoel v. O'Hanlon*, *supra*, the court said, speaking of a student: "It would probably be admitted, if, when he went to Iowa City, or at any time thereafter before he offered to vote, [\*\*\*6] his intention was to make that place his home and residence when he ceased to attend the university, that such place was and became his place of residence in such a sense that he would have become a legal voter in Johnson county." Judge McCrary says: "It will be found from an examination of these authorities, and from a full consideration of the subject, that the question whether or not a student at college is a *bona fide* resident of the place where the college is located, must in each case depend upon the facts. He may be a resident and he may not be. Whether he is or not depends upon the answer which may be given to a variety of questions, such as the following: Is he of age? Is he fully emancipated from his parents' control? Does he regard the place where the college is situated as his home, or has he a home elsewhere to which he expects to go, and at which he expects to reside?" McCrary Elections, sec. 41.

The case of *Sanders v. Getchell*, 76 Me. 158 (49 Am. R. 606), is a strong one, for there the Constitution of the State provided that "The residence of a student at any seminary of learning shall not entitle him to the right of suffrage in the town where such seminary [\*\*\*7] is situated," yet it was held that a student might acquire a residence. In the course of the opinion it was said: "It is clear enough that residing in a place merely as a student does not confer the

franchise. Still a student may obtain a voting residence, if other conditions exist sufficient to create it. Bodily residence in a place, [\*153] coupled with an intention to make such a place a home, will establish a domicile or residence."

It can, we conceive, make no difference that the person is a student, if he has in good faith elected to make the place where the college is located his residence, since there is no imaginable reason why a person may not be both a student at a college and a resident of the place where the college is situated. If he is at the place merely as a student, then he is not a resident; but if he has selected that place as his abode, he acquires a residence which entitles him to vote, if he possesses the other qualifications.

It is said by appellant's counsel that "To effect a change of domicile, there must be intention and act united--the fact of residence and the intention of remaining." In support of this proposition, counsel cite McCrary Law of Elections, [\*\*\*8] 39, 40; Cooley Const. Lim. 604; 2 Kent Com. 431; *Astley v. Capron*, 89 Ind. 167; *Culbertson v. Board, etc.*, 52 Ind. 361; *McCollem v. White*, 23 Ind. 43; *Maddox v. State*, 32 Ind. 111.

The counsel's statement is, doubtless, an accurate one, but here the intention and the act, as the trial court found, did unite, and we think this finding is fully sustained by the testimony before the court. It is not necessary, however, that there should be an intention to remain permanently at the chosen domicile; it is enough if it is for the time the home of the voter to the exclusion of other places. Judge Cooley says: [\*\*703] "A person's residence is the place of his domicile, or the place where his residence is fixed without any present intention of removing therefrom." Cooley Const. Lim. (5th ed.) 754. Judge Story makes substantially the same statement of the rule. Conflict of Laws, section 43.

In the case of *Cessna v. Meyers*, reported and strongly approved by Judge McCrary, it was said: "A man may acquire a domicile, if he be personally present in a place and elect that as his home, even if he never design to remain there always, but design at the end [\*\*\*9] of some short [\*154] time to remove and acquire another. A clergyman of the Methodist church who is settled for two years may surely make his home for two years with his flock, although he means, at the end of that period, to remove and gain another." McCrary Elections, p. 496; *Id.*, section 38. This principle was applied to the case of a student of Andover college, in *Putnam v. Johnson*, 10 Mass. 488, where it was said: "A residence at a college or other seminary, for the purpose of instruction, would not confer a right to vote in the town where such an institution exists, if the student had not severed himself from his father's control, but resorted to his house as a home, and continued under his direction and management. But such residence will give a right to vote to a citizen not under pupilage, notwithstanding it may not be his expectation to remain there forever." In this instance, the citizens, having taken up a residence in Bloomington and having no other home, were entitled to vote there, although they may not have intended to remain there always. It is frequently said in the books that a man must have a home somewhere, and it is agreed that this home is at [\*\*\*10] the place where he is bodily present with the intention of making it his domicile, although he may have in view a change of residence at some future time. Cooley Const. Lim., 754; McCrary Elections, section 39.

The intention to remain is, as Judge McCrary says, "entirely consistent with a purpose to remove at some future indefinite time." It can hardly be doubted that a man living in Evansville is a resident of that city, although he may intend to remove to Indianapolis either at a fixed time or at an indefinite period in the future. So, if a man should take a business position at Bloomington, intending to remain as

long as the business required, he would acquire a residence at that place, even though his purpose may be to return at some future time to the place of his former residence. Of course, a removal without any intention of making the place the domicile would not secure a residence, no matter how [\*155] long the person intended to remain; but if the intention was to make the place the domicile, a legal residence would be acquired.

The question asked the witnesses Hooper, Fesler and Rabb was also asked the witness Kinzie, but, as the record shows, he was required to answer, [\*\*\*11] and did substantially answer, so that no available point can be made on the ruling on the question presented on his testimony.

We have followed counsel in their argument without deciding, or assuming to decide, directly or indirectly, whether the question for whom he voted can in any case be asked a voter. We have taken it as granted, for the sake of the argument, that our statute is valid. In the absence of any argument, we have thought it better to refrain from expressing any opinion upon the validity of the statute. McCrary Elections, section 297.

The evidence introduced by the parties showed that the ballots of the electors were "strung," as the law requires, and were placed in a bag and sealed in accordance with the provisions of the statute. All the officers through whose hands the ballots passed testified that they had not been tampered with, and the officers in charge of the sealed bags testified that the seals had not been broken, and that there had been no change of the ballots in any shape or form.

David W. Barron was called by the appellant, and a question was propounded to him, to which an objection was interposed. Upon this objection the court directed an argument, [\*\*\*12] and after the argument requested counsel to put their question so as to save their

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1887 Ind. LEXIS 324, \*\*\*

exception; thereupon, as the record recites, one of appellant's counsel said: "We want the record to show that Mr. Enoch [\*\*704] Fuller, the clerk of the Monroe Circuit Court, at the request of counsel for the defendant, hands to the witness the ballots purporting to be the ballots of Benton township, Monroe county, and the same ballots testified to by the witnesses Browning and Fuller; and counsel asks the witness to examine the ballots, which he now [\*156] does, and the defendant offers to prove by the witness that he can, by certain indications that he will be able to give, and distinguishing marks to which he will be able to testify, depose that nine of the ballots that he, the witness, now selects, were not taken out of the ballot-box in counting the votes at the last election in Benton township, were not found in the ballot-box, were not counted by the election officers, were not placed upon the string, were not put in the election-pouch, were not counted, and were not returned to the county clerk's office."

In various other forms evidence was offered tending to prove a wrongful interference [\*\*\*13] with the election papers and a wrongful change of ballots.

We think this evidence was competent. The ultimate question for decision in such cases as this is, who received the highest number of legal votes? *Dobyns v. Weadon*, 50 Ind. 298; *Hadley v. Gutridge*, 58 Ind. 302; *State, ex rel., v. Shay*, 101 Ind. 36.

It is the eligible candidate who receives the highest number of the votes of the qualified electors that is entitled to the office. McCrary Law of Elections, sections 219, 221. It was, therefore, competent for the appellant to reduce the number of votes credited to the appellee by showing, if he could, that such votes were illegal, or by showing that, by changing the ballots, or by wrongfully interfering with the election papers, a greater number of votes were credited to him than he was entitled to under the law.

Notwithstanding the fact that illegal votes may have been cast for the appellant, or corrupt practices have resulted in benefit to him, still, if these illegal votes or improper practices resulted in benefit to his opponent, the appellant had a right, if he could, to establish these illegal acts by competent witnesses. If, on a just count of all [\*\*\*14] the legal votes, the appellant was entitled to the office, he could not be deprived of it because some illegal votes were cast for him, or some wrongs perpetrated by others in his behalf. If there was fraud on the part of the election officers, resulting in injury to the appellant, [\*157] he had a right to show it by direct or indirect evidence. *Wheat v. Ragsdale*, 27 Ind. 191.

We do not doubt that the ballots are the best evidence when they are the ballots that were actually cast by the electors. *Reynolds v. State, ex rel.*, 61 Ind. 392; *Duson v. Thompson*, 32 La. Ann. 861; *Hudson v. Solomon*, 19 Kan. 177; *Dorey v. Lynn*, 31 Kan. 758, 3 P. 557; *State, ex rel., v. Sutton*, 99 Ind. 300.

But here the question is, were ballots fraudulently put in the box? If the ballots were not those cast by the electors, then they were destitute of validity. Fraud vitiates everything. If, therefore, the ballots counted for the appellee were not those cast by the electors, they were vitiated for all purposes, and that they were vitiated the appellant had a right to show by direct or indirect evidence. He was not restricted to the ballots themselves, but [\*\*\*15] had a right to impeach their validity. Fraud could seldom be proved if the attacking party were held to the written instrument; but he is not so restricted; on the contrary, he may show fraud by extrinsic evidence. On their face ballots are *prima facie* valid if they come from the proper place and the proper custodian, but they may, nevertheless, be attacked on the ground of fraud. In such an attack the assailant encounters the *prima facie* case which confronts him, but he is not barred of a right to make an assault, although in making it he assumes the burden of

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overthrowing the case the ballots make against him.

We do not, of course, assume that the excluded evidence establishes fraud, for that would be an improper assumption for any court to make upon a question as to the admissibility of evidence; nor, on the other hand, can we assume to decide that it does not tend in that direction. All that it is now proper to do is to decide, as we do, that the evidence offered by the appellant was competent upon that question. It is said by appellee's counsel "that such flimsy evidence is not admissible," but, in saying this, [\*\*705] counsel indicate that they mistake the difference [\*\*\*16] between credible and competent [\*158] testimony. Evidence may not be entitled to great weight and yet not be incompetent. Here the question is not as to the credibility of the evidence, but as to its competency.

It may be true, as counsel assert, that the evidence is not entitled to credit as against the other evidence, but that does not affect the question of its admissibility, and that is the only question presented by the ruling excluding it. In deciding that testimony is admissible courts do not decide upon its weight. If it is competent it must be admitted. This is a settled rule of law by which we must abide. *Harbor v. Morgan*, 4 Ind. 158; *Hall v. Henline*, 9 Ind. 256; *Nave v.*

*Flack*, 90 Ind. 205 (46 Am. R. 205); *Boots v. Canine*, 94 Ind. 408; *Lanman v. Crooker*, 97 Ind. 163, 168 (49 Am. R. 437); *Union M. L. Ins. Co. v. Buchanan*, 100 Ind. 63; *Grand Rapids, etc., R. R. Co. v. Diller*, 110 Ind. 223, 9 N.E. 710.

In excluding the evidence to which we have referred the court erred.

The appellee contends that the evidence is not all in the record, and in this he is supported by the cases of *Fahlor v. State*, 108 Ind. [\*\*\*17] 387, 9 N.E. 297, and *Lyon v. Davis*, 111 Ind. 384, 12 N.E. 714. But there is such evidence in the record and the rulings are so presented as that it is our duty to decide the questions made on the rulings excluding the evidence offered by the appellant. *Sutherland v. Hankins*, 56 Ind. 343; *Johnson v. Wiley*, 74 Ind. 233; *Shorb v. Kinzie*, 80 Ind. 500; *Shimer v. Butler University*, 87 Ind. 218 (220); *Pavey v. Wintrode*, 87 Ind. 379; *Conden v. Morningstar*, 94 Ind. 150; *Hedrick v. D. M. Osborne & Co.*, 99 Ind. 143.

Judgment reversed, with instructions to award a new trial.

Filed Nov. 3, 1887; petition for a rehearing dismissed Jan. 21, 1888.



LEXSEE 521 N.E.2D 1313



Caution

As of: Oct 20, 2010

**STATE ELECTION BOARD, Appellant (Defendant Below), v. Evan  
BAYH, Appellee (Plaintiff Below)**

No. 73S01-8804-CV-380

SUPREME COURT OF INDIANA

*521 N.E.2d 1313; 1988 Ind. LEXIS 113*

April 28, 1988, Filed

**PRIOR HISTORY:** **[\*\*1]** Appeal from the Shelby Circuit Court The Honorable Charles D. O'Connor, Judge Cause No. 73C01-8803-CP-55.

**DISPOSITION:** The judgment of the trial court is affirmed.

**COUNSEL:** David F. McNamar, Michael R. Franceschini, Steers, Sullivan, McNamar & Rogers Attorneys for Appellant.

John P. Price, Jon D. Krahulik, Grace M. Curry, Bingham, Summers, Welsh & Spilman Attorneys for Appellee.

**JUDGES:** Shepard, C.J., All Justices concur.

**OPINION BY:** SHEPARD

**OPINION**

**[\*1314]** The question is whether Secretary of State Evan Bayh presently meets our Constitution's residency requirement for the office of Governor. We hold that he does.

This dispute began in the newspapers and made its way into the legal system when Governor Robert D. Orr asked the State Election Board to resolve the matter. The Governor appointed an independent chairman to take his place on the Board for the purpose of investigating the validity of Bayh's declaration of candidacy. As the Board began its investigation, Bayh filed this action for declaratory judgment.

The people of Indiana have been well served because both the Governor and the Secretary of State sought a prompt resolution of the issue of Bayh's eligibility. This preempted the unseemly possibility of a later *quo warranto* action challenging Bayh's residency **[\*\*2]** should he become governor. *See State ex*

*rel. Sathre v. Moodie*, 65 N.D. 340, 258 N.W. 558 (1935) (sitting governor removed from office by late *quo warranto* action). Our judgment today cannot be collaterally attacked in a later proceeding. *Oviatt v. Behme* (1958), 238 Ind. 69, 147 N.E.2d 897.

The Board moved to dismiss the action, arguing that declaratory judgment should not be an alternative to exhaustion of administrative remedies and judicial review. The trial court denied the Board's motion to dismiss. In response, the Board petitioned this Court for a writ of prohibition and mandamus to enjoin the trial court from exercising jurisdiction. We denied the writ as prayed by the Board but also prohibited the trial court from enjoining the Board in any of its customary duties, such as deciding a candidate's eligibility for placement on the ballot. *State ex rel. State Election Board v. Superior Court of Marion County* (1988), Ind., 519 N.E.2d 1214. The Board deferred to the trial court, and the matter went to trial.

After hearing evidence, the trial court concluded that Bayh met the constitutional residency requirement. Specifically, the court found that **[\*\*3]** Bayh has been domiciled in Indiana since his birth and had not intended to abandon his Indiana domicile and establish his domicile elsewhere. We granted transfer to review the trial court's determination of this important question pursuant to Appellate Rule 4(A)(10), Ind. Rules of Appellate Procedure.

### *I. Facts of the Case*

Judge Charles O'Connor entered extensive and careful findings of fact. They have been most helpful. On review, this Court will accept the trial court's findings of fact as long as there is probative evidence in the record to support them. *Melloh v. Gladis* (1974), 261 Ind. 647, 309 N.E.2d 433. The findings which support the trial court's judgment are as follows.

Evan Bayh was born in Terre Haute, Vigo County, Indiana, on December 26, 1955. He

lived with his parents in Shirkieville, Indiana, while his father worked the family farm. In September of 1958, the family rented the farm, and Bayh moved with his parents to Bloomington, Indiana, where they lived for three years while Bayh's father was attending law school. When Bayh's father graduated in May 1961, Bayh and his family moved to Terre Haute. Bayh's father was elected to represent Indiana in **[\*\*4]** the United States Senate in November of 1962. He was re-elected to the Senate in 1968 and 1974. During his father's tenure in office, Bayh lived with his parents in Washington, D.C.

When Bayh reached the age of eighteen, he registered to vote in Vigo County, Indiana. He voted there in every primary election, except one in 1978, and in every general election since he became a qualified voter. He never voted in a primary or **[\*1315]** general election conducted in the District of Columbia or in any other state. Bayh also registered with the federal Selective Service office in Vigo County after his eighteenth birthday. After graduating from high school, he attended Indiana University in Bloomington, paying in-state tuition from August 1974 through his graduation in May 1978.

In August 1978, Bayh enrolled in the University of Virginia Law School, where he paid non-resident tuition. He took a leave of absence from law school to return to Indiana to serve as chairman of his father's senatorial reelection campaign committee in 1980. After the campaign, Bayh returned to law school, worked as a law clerk at the Washington, D.C., law firm of Hogan & Hartson during the summer of 1981, and received **[\*\*5]** his law degree in January 1982.

Bayh took and passed the District of Columbia bar examination in February 1982. From March 1982 until March 1983, he clerked for the Honorable James Noland, Judge of the United States District Court for the Southern District of Indiana. During that year, George

Carneal offered him a position at Hogan & Hartson to begin after his clerkship with Judge Noland. Bayh took and passed the Indiana bar examination in February 1983. During his clerkship with Judge Noland, Bayh had several conversations with business acquaintances and friends concerning his impending employment with Hogan & Hartson. Bayh intended that the move would be temporary and said his objective there was gaining additional legal experience before returning to Indiana.

Bayh joined Hogan & Hartson in July 1983. Paul Rogers, a senior member of the firm who was instrumental in hiring him, viewed Bayh's position with the firm as temporary. Bayh signed a one-year lease for an apartment in Washington. He has never owned real estate in Washington. In August 1983, approximately a month after arriving in D.C., Bayh returned to Indiana to be sworn in as a member of the bar of this Court. [\*\*6] He signed an affidavit of intent to practice law in Indiana within two years.

During his sixteen months at Hogan & Hartson, Bayh demonstrated his intent to retain his domicile in Indiana on many occasions. He made frequent trips to Indiana, including attending the Indiana Democratic Editorial Association convention in August 1983 and again in August 1984. He subscribed to daily delivery of the *Indianapolis Star*, sent Christmas cards to Indiana Democratic Party officials, paid Indiana State Bar Association dues, and contributed to the Indiana Democratic State Central Committee. He voted in the Democratic primary election in 1984, campaigned on behalf of the Democratic gubernatorial candidate, participated in the Democratic State Convention in June, and voted in the November general election. He filed Indiana and federal tax returns in April 1984. On December 1, 1984, Bayh returned to Indiana to work for his father's law firm in Indianapolis. He has remained in Indiana since then.

## II. Standard of Review

The trial court made numerous findings of fact, and concluded that the ultimate facts were in favor of Bayh. We will neither reweigh the evidence nor reassess the [\*\*7] credibility of the witnesses and will not set aside the fact-finding of the trial court unless it is clearly erroneous. *In re Wardship of B.C.* (1982), *Ind.*, 441 N.E.2d 208. The trial court will not be reversed on the evidence unless there is a total lack of supporting evidence or the evidence is undisputed and leads only to a contrary conclusion. *Palmer v. Decker* (1970), 253 *Ind.* 593, 255 N.E.2d 797, 798. Under this standard of review, we must first interpret the Indiana Constitution's residency requirement for the office of Governor.

## III. Residence as Domicile

The Indiana Constitution requires that gubernatorial candidates be residents of the state for the five years preceding the election. The specific constitutional language provides:

No person shall be eligible to the office of Governor . . . who shall not have been five years a citizen of the United States [\*\*1316] and also a resident of the State of Indiana during the five years next preceding his election . . . .

*Ind. Const. art. V, § 7* (1851). The framers left us little to discern their intention about the meaning of the phrase "resident of the State." The history of this provision, the purpose of the residency [\*\*8] requirement, and the caselaw defining residence in other contexts lead us to interpret "resident of" in art. V, § 7 to mean domiciliary.

The Northwest Ordinance of 1787 had a residency requirement for the Governors of territorial governments. A similar requirement became part of the state constitution when Indi-

ana joined the United States. The first Indiana Constitution provided that the Governor "shall have been a citizen of the United States ten years, and have resided in the State five years next preceding his election; unless he shall have been absent on the business of the State, or of the United States . . ." *Ind. Const. art. IV, § 4* (1816). At the 1850 constitutional convention, a delegate suggested that the residency requirement be deleted but the proposal failed. *Journal of the Convention of the People of the State of Indiana to Amend the Constitution* 537 (1851). The convention did move the two exceptions relating to absence on business of the State or of the United States to the provisions on suffrage. *Ind. Const. art II, § 4* (1851).

In framing the issue, we are not interpreting the word "reside" but rather construing the present phrase "resident of" in contrast **[\*\*9]** to the prior phrase "resided in" found in the 1816 constitution. The concept recognized by the phrase "resident of" was utilized in lieu of the combination of "resided in" with the express exception for out-of-state government service. It could reasonably be concluded that by eliminating the out-of-state government service exclusion but adopting "resident of" instead of "resided in" language, the 1851 Constitution embraced a pure domicile theory.

Only two state supreme courts have found constitutional durational residency provisions to require continual physical presence. Both cases involved state constitutions requiring the gubernatorial candidate be both a citizen of the state and a resident of the state. *Ravenel v. Dekle*, 265 S.C. 364, 218 S.E.2d 521 (1975); *Secretary of State v. McGucken*, 244 Md. 70, 222 A.2d 693 (1966). In each case, the court read residency to require continuing physical presence because any other interpretation would have made the requirement mere surplusage to the requirement of state citizenship. *Ravenel*, 265 S.C. at 375-376, 218 S.E.2d at 527; *McGucken*, 244 Md. at 74, 222 A.2d at 695-696. The Indiana Constitution requires the

gubernatorial **[\*\*10]** candidate be a citizen of the United States and a resident of the state. We therefore have no reason to conclude from the constitutional language that residency requires continual physical presence.

A constitutional provision for eligibility for office must be interpreted in light of its democratic purposes. Our system of government favors an informed electorate choosing from a range of qualified candidates. It works best on the basis of maximum rather than minimum participation in democracy.

The durational residency requirement insures both an informed electorate and a knowledgeable candidate. Voters are assured of the opportunity to scrutinize the candidate and observe for themselves the candidate's conduct, character, philosophy, and experience in government. The residency requirement also insures that candidates have had the opportunity to acquaint themselves with the people of Indiana and a sufficient stake in the state they wish to govern. Using traditional legal notions of domicile as a way of determining a candidate's status as a "resident of the State" furthers these purposes.

The concept of domicile insures that a candidate is sufficiently familiar with the state **[\*\*11]** without placing undue limitations on the voters' right to select the candidate of their choice. Such an interpretation of the residency requirement allows voters to consider the candidate's relationship to the state and judge his or her familiarity with its citizens and the issues confronting them.

**[\*1317]** These purposes differ from those advanced by laws requiring a public officer to reside within the political subdivision he serves. Physical presence is necessary to retain office once elected. Such a requirement is intended to make the public officer accessible and responsive. In this context, we have held that a public officer abandons his office when he physically removes himself from the state.

*See Relender v. State (1898), 149 Ind. 284, 49 N.E. 30* (construing constitutional requirement that county officers "reside within their respective counties").

In other contexts, we have interpreted residence to mean domicile. In construing residency under the provisions of the tax assessment law, we noted, "The word 'domicil' is not used in our constitution." *Culbertson v. Board of Commissioners of Floyd County (1876), 52 Ind. 361, 366*. We examined the constitutional residency **[\*\*12]** requirements for voters and office holders, including the office of Governor, and concluded: "The words 'inhabitant' and 'resident,' 'reside' and 'resided,' are used as synonymous [sic]." *Id. at 366*.

We determined that for purposes of "the enjoyment of a privilege, or the exercise of a franchise, . . . domicile and residence are deemed to be equivalent or synonymous, i.e. that the word residence is deemed to mean domicile." *Board of Medical Registration and Examination v. Turner (1960), 241 Ind. 73, 79, 168 N.E.2d 193, 196* (construing licensing statute). We have interpreted residence to mean domicile in a variety of other circumstances. *State ex rel. Flaughner v. Rogers (1948), 226 Ind. 32, 77 N.E.2d 594* (school admission); *Croop v. Walton (1927), 199 Ind. 262, 157 N.E. 275* (taxpayer residency); *State ex rel. White v. Scott (1908), 171 Ind. 349, 86 N.E. 409* (eligibility of county office holders); *Maddox v. State (1869), 32 Ind. 111* (voter eligibility).

#### IV. The Meaning of Domicile

Domicile means "the place where a person has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention **[\*\*13]** of returning." *Turner, 241 Ind. at 80, 168 N.E.2d at 196*. Domicile can be established in one of three ways: "domicile of origin or birth, domicile by choice, and domicile by operation of law." *Croop, 199 Ind. at 271, 157 N.E. at 278*. The domicile of an unemancipated minor is de-

termined by the domicile of his parents. *Hiestand v. Kuns (1847), 8 Blackf. 345*.

Once acquired, domicile is presumed to continue because "every man has a residence somewhere, and . . . he does not lose the one until he has gained one in another place." *Scott, 171 Ind. at 361, 86 N.E. at 413*. Establishing a new residence or domicile terminates the former domicile. A change of domicile requires an actual moving with an intent to go to a given place and remain there. "It must be an intention coupled with acts evidencing that intention to make the new domicil a home in fact . . . . There must be the intention to abandon the old domicile; the intention to acquire a new one; and residence in the new place in order to accomplish a change of domicile." *Rogers, 226 Ind. at 35-36, 77 N.E.2d at 595-96*.

A person who leaves his place of residence temporarily, but with the intention of returning, **[\*\*14]** has not lost his original residence. *Yonkey v. State (1866), 27 Ind. 236*. We have said:

Where an old resident and inhabitant, having his domicil from his birth in a particular place, goes to another place or country, the great question whether he has changed his domicile . . . . will depend mainly upon the question, to be determined from all the circumstances, whether the new residence is temporary or permanent . . . . If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning . . . . as soon as such purpose is accomplished; in general, such a person continues to be an inhabitant . . . . for all purposes of enjoying civil and political privileges, and of being subject to civil duties.

*Culbertson*, 52 Ind. at 368-69 (quoting Chief Justice Shaw's opinion in *Sears v. City of Boston*, 42 Mass. (1 Met.) 250 (1840)).

Residency requires a definite intention and "evidence of acts undertaken in furtherance of the requisite intent, which makes the intent manifest and believable." *In re Evrard* (1975), 263 Ind. 435, 440, 333 N.E.2d 765, 767. A self-serving statement of **[\*\*15]** intent is not sufficient to find that a new residence has been established. See *Rogers* 226 Ind. at 36-37, 77 N.E.2d at 596. Intent and conduct must converge to establish a new domicile.

The question of residence is "a contextual determination to be made by a court upon a consideration of the individual facts of any case." *Evrard*, 263 Ind. at 263 Ind. 435, 333 N.E.2d at 768. Physical presence in a place is

only one circumstance in determining domicile. *Culbertson*, 52 Ind. at 368.

#### V. Conclusion

The trial court was correct that, as a matter of law, residence means domicile for purposes of art. V, § 7 of the Indiana Constitution.

The trial court also found that Bayh's original domicile was Indiana. The court determined that Bayh did not intend to abandon his Indiana domicile and establish a new, permanent residence elsewhere. It found that this intention was evidenced by acts consistent with retaining domicile in Indiana. While there was conflicting evidence on these questions, the record supports the court's conclusion that Bayh's residence for the five years next preceding the November 1988 election was Indiana and that he is eligible for the office of Governor.

**[\*\*16]** All Justice concur.



LEXSEE 263 IND. 435



Positive  
As of: Oct 20, 2010

**In The Matter of David E. Evrard, Judge of the Perry Circuit Court**

**No. 1172S154**

**SUPREME COURT OF INDIANA**

**263 Ind. 435; 333 N.E.2d 765; 1975 Ind. LEXIS 324**

**August 22, 1975, Filed**

**SUBSEQUENT HISTORY:** [\*\*\*1]  
Amended First Page Filed September 3, 1975.

**PRIOR HISTORY:** Original action presented by petition for removal of respondent circuit court judge.

Disciplinary Action.

**DISPOSITION:** *Ordered to resume functions as judge.*

**COUNSEL:** *John Bunner*, of Evansville, for respondent.

*David V. Miller*, Special Prosecutor, of Evansville, for petitioner.

**JUDGES:** DeBruler, J. Givan, C.J., and Prentice, J., concur; Hunter, J., dissents with opinion to follow; Arterburn, J., not participating.

**OPINION BY:** DeBRULER

**OPINION**

[\*437] [\*\*766] This original action was presented to this Court by a Petition for Removal of the respondent Judge of the Perry Circuit Court. This Court assumed jurisdiction of the case under authority vested in this Court by Art. 7, of the Indiana Constitution. Following our acceptance of the case, respondent challenged our jurisdiction. In *In re Evrard (1974)*, 263 Ind. 423, 317 N.E.2d 841, this Court rejected that challenge and appointed a judge pro tempore of the Perry Circuit Court to serve until final resolution of the case. The Court also appointed a successor hearing officer and a special prosecutor to serve in the case. On January 30, 1975, respondent filed a response to the [\*\*\*2] Petition for Removal.

[\*438] The successor hearing officer, the Honorable Saul I. Rabb, conducted a hearing upon the petition and filed his special Findings

of Fact with us on March 7, 1975. Respondent addressed several motions to this Court, which we deem unnecessary to rule upon in light of the decision we make today.

The Petition for Removal is based in part upon alleged violations of the election laws, occurring in the season of the 1970 Primary Election at which respondent was a candidate. The first charge is that respondent filed a declaration of candidacy for the office of Judge of the Perry Circuit Court with the Clerk of the Perry Circuit Court on March 7, 1970, and with the Secretary of State on March 16, 1970, in which he knowingly made the false statement that he was a qualified voter and resident of Perry County, Indiana, in violation of Ind. Code § 3-1-32-48, being Burns § 29-5948. <sup>1</sup>

<sup>1</sup> "Any person who shall . . . file any declaration of candidacy, certificate or petition of nomination, knowing the same, or any part thereof, to be falsely made . . . shall be deemed guilty of a felony."

**[\*\*\*3] [\*\*767]** The second charge is that respondent unlawfully voted, and aided and abetted his wife in unlawfully voting, in the Primary Election on May 5, 1970, in that at the time of the Primary Election respondent and his wife were legal residents of the State of Virginia, in violation of Ind. Code § 3-1-32-10, being Burns § 29-5910, <sup>2</sup> and *Ind. Code § 35-1-29-1*, being Burns § 9-102. <sup>3</sup>

<sup>2</sup> "Whoever, not having the legal qualifications of a voter who is duly registered and authorized to vote as he represents himself to be, or whoever falsely represents himself as a voter at any election authorized by law to be held in this state for any office whatever, votes or offers to vote at such election, shall be guilty of a felony."

<sup>3</sup> "Every person who shall aid or abet in the commission of a felony . . . may be . .

. convicted in the same manner as if he were a principal . . . and, upon such conviction he shall suffer the same punishment and penalties as are prescribed by law for the punishment of the principal."

**[\*\*\*4]** The third charge is that on May 5, 1970, respondent passed from, and aided his wife in passing from, the State of Virginia into the State of Indiana, and voted in the May 5th Election, **[\*439]** while neither was a bona fide resident of the voting precinct, in violation of Ind. Code § 3-1-32-13, being Burns § 29-5913. <sup>4</sup>

<sup>4</sup> "Whoever passes from any other state into this state, and votes or attempts to vote at any voting precinct or ward of this state, not being at the time a bona fide resident of such voting precinct or ward, shall be guilty of a felony."

The fourth charge is that respondent conspired with his father, Fred J. Evrard, for the purposes of committing the three offenses enumerated above, in violation of *Ind. Code § 35-1-111-1*, being Burns § 10-1101. <sup>5</sup>

<sup>5</sup> "Any person or persons who shall unite or combine with any other person or persons for the purpose of committing a felony, within or without this state; or any person or persons who shall knowingly unite with any person or persons, body, association or combination of persons, whose object is the commission of a felony or felonies, within or without this state, shall, on conviction, be fined not less than twenty-five dollars nor more than five thousand dollars, and imprisoned in the state prison not less than two years nor more than fourteen years."

**[\*\*\*5]** The substance of petitioners' case is that respondent had no legal residence in Perry County at the time he filed his sworn declaration of candidacy, and that neither respondent nor his wife had legal residences in that

county at the time they voted on May 5, 1970. It was petitioners' belief that at said times, both were residents of the State of Virginia. It is a fact that both respondent and his wife registered to vote on March 7, 1970, in Perry County, and it therefore follows that both were registered to vote on the date respondent filed his declaration and on the date both voted in the Primary. There is no allegation made in this case that respondent did establish a legal residence in Perry County prior to the Primary, but that such residence was insufficient in duration to qualify as a legal residence for candidacy and voting purposes. Rather, petitioners contend that no residence at all was established by respondent and his wife prior to the Primary Election. We accept this posture of the case and do not consider the requirements of the law, if any there be, that pre-primary residence be of any particular duration. If respondent and his wife had a bona fide residence [\*\*\*6] at the date of filing the declaration and voting, then those acts would not be unlawful. If, on the other hand, respondent and his wife did not [\*440] have a bona fide residence on those dates, his acts would have involved false statements, and the existence of such statements would give considerable support to petitioners' contention that this Court should subject respondent to disciplinary action. Upon these assumptions, we proceed to consider this case.

In *Pedigo v. Grimes*, (1887) 113 Ind. 148, this Court considered the legal requirements for establishing a voting residence. The law requires that [\*\*768] the person definitely intend to make a particular place his permanent residence and act upon that intention in good faith. The person must show to the court evidence of acts undertaken in furtherance of the requisite intent, which make that intent manifest and believable. Whether or not a person meets the residency requirement for voting is a contextual determination to be made by a court upon a consideration of the individual facts of any case. While one is probably limited to having a single residence for voting purposes at

any given time, the fact that [\*\*\*7] he has more than one "residence," or place of abode, in which he has substantial investment, social commitment, and interest, and which is useful for any number of purposes, is only one relevant fact among many others to be considered by a court. *Brownlee v. Duguid*, (1931) 93 Ind. App. 266, 178 N.E. 174. Conduct such as the abandonment of a prior residence and contemporary statements of intention to establish a new principal residence are to be considered also. *Brittenham v. Robinson et al.*, (1897) 18 Ind. App. 502.

In the late Fall of 1969, the then incumbent Judge of the Perry Circuit Court announced his intention to resign his judgeship effective January 1, 1970. During Thanksgiving and Christmas visits to Tell City, respondent was asked to run for the judgeship at the next General Election. He discussed this matter with friends and Democratic Party officials and, early in January, 1970, decided to run for the office. He immediately discussed the purchase of a house in Tell City with a realtor and asked the realtor to look for a house for him to buy. On February 10, 1970, respondent publicly announced [\*441] his candidacy for the office of Judge and his [\*\*\*8] intention to return permanently to Perry County. Both respondent and his wife registered to vote in Perry County on March 7, 1970, claiming 914 Eleventh Street, Tell City, as their residence. On March 11, 1970, respondent signed the declaration of candidacy under oath, and, on March 16, 1970, he filed it with the Secretary of State of Indiana.

Respondent and his wife returned periodically to Tell City during the months of January, February, March and May, 1970. In April, respondent obtained an estimate of the cost of moving his furniture to Tell City. In that same month, he resigned as patent attorney at the U.S. Department of Justice, but was offered and assumed a contractual relation with that Department from April, 1970 to July, 1970, for the purpose of winding up his work.

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At an earlier time, in the year 1965, respondent had purchased an airplane and his visits to Tell City had become more frequent. This airplane and a newer airplane which was purchased in 1967, had been registered with the FAA giving the address of the respondent at Tell City. From 1954, when he graduated from Purdue through July, 1970, at which time he completed his move to Perry County, respondent was [\*\*\*9] absent from the State of Indiana by reason of his military service and his employment with the U.S. Government. Respondent and his wife traveled from Virginia to Tell City on May 3, 1970, and voted on May 5th.

Most of the foregoing facts tend to support the formation of an intent to establish a residence in Tell City at the times relevant here, coupled with acts in furtherance thereof. The respondent made several public statements and commitments to run for office, which clearly were an expression of an intent to establish a residence in Tell City at the home of his parents. These statements did not stand alone. He took overt steps to sever his connections in Virginia and Washington, D.C., and to move to Tell City. On the other hand, the evidence also established that respondent owned a [\*442] house in Virginia and that his new wife's children were in school there and that the cars and driver's licenses of both respondent and his wife reflected their residence in Virginia, even [\*\*769] up to the time of the Primary Election. We believe, however, that respondent's position was that he had substantial commitments and responsibilities in Virginia and Washington, D.C., [\*\*\*10] as a lawyer, step-father, husband, home-owner, pilot and driver at the time he decided to become a candidate for Judge in Perry County and to establish a residence there. To require a person in respondent's position to have sold his house in Virginia and acquired one in Tell City, given up his employment abruptly and entirely, moved his wife's children from their school to Indiana, obtained an Indiana driver's license, and accomplished all such

other odds and ends as would have severed completely all connections with Virginia and the Washington area, as a condition of establishing a residence in Indiana, would be unreasonable. No such absolute assurance of a voter's township and precinct residence is required to protect the integrity of the election process. Here the evidence shows without question that respondent formed the intent to establish a residence with his parents until he could sell his house in Virginia and buy another one in Perry County. The fact that the residence with his parents was intended to be for a limited period only is not decisive. *Pedigo v. Grimes, supra*. Both respondent and his wife were bodily present at that place periodically during the months [\*\*\*11] of January, February, March and May. Both conducted themselves in Indiana and Virginia in a manner consistent with their expressed intent to move to Perry County. The steps which they took were sufficient to establish a residence at the home of his parents and to qualify them to register, declare candidacy, and vote in the Primary Election. No false statement is therefore shown to have been made in the declaration of candidacy or to be implied from the act of voting, as respondent had registered to vote and had established a residence at the home of his parents in Tell City.

[\*443] Upon consideration of the charge that respondent aided and abetted his wife in violating the election laws in the manner described above, we find that the same legal test of residence should be applied to determining whether or not respondent's wife established a voting residence at the home of her husband's parents. It would appear to us that Margaret Evrard had the right to choose to adopt the voting residence of her husband. By reason of this voluntary choice and her marriage to respondent, she was entitled to claim the benefit of his connections with his parents' home. We therefore find that [\*\*\*12] the evidence is insufficient to support any conclusion that respondent aided and abetted his wife in unlawfully violat-

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ing the election law or conspired with his father to so violate the law.

The final part of the Petition for Removal is based upon the allegation that respondent unlawfully aided and abetted his wife, Margaret, in the commission of the felony of Bigamy, as defined in *Ind. Code § 35-1-81-1*, being Burns § 10-4204:

"Whoever, being married, marries again, the former husband or wife being alive, and the bond of matrimony still undissolved, and no legal presumption of death having arisen, is guilty of bigamy. . . ."

The facts relating to this charge show that on December 29, 1969, respondent married Margaret Buckler. At that time Margaret Buckler had a living husband from whom she was not divorced. She had been informed from some unspecified source that her husband had been killed or had died in Vietnam. After the marriage, she learned that her husband was in fact living. She thereupon secured a divorce from him, and she and respondent were remarried.

The hearing officer found that respondent had no knowledge at the time of his marriage that Margaret's [\*\*\*13] husband was still living. He had been told by her that her husband was dead, and, according to the findings of fact, he believed that he was dead, although he did nothing to verify the information she had given him. Under [\*\*770] these facts, [\*444] we cannot conclude that respondent acted unlawfully when he married Margaret on December 29, 1969.

The appointment of the judge pro tempore for the Perry Circuit Court is hereby ordered terminated, and David E. Evrard is hereby authorized and instructed to reassume the functions and duties as regular Judge of the Perry Circuit Court.

Givan, C.J., and Prentice, J., concur; Hunter, J., dissents with opinion to follow; Arterburn, J., not participating.

#### DISSENT BY: HUNTER

#### DISSENT

Hunter, J.

I dissent. The lengthy record in this matter, upon careful review in its entirety, sustains the charges against respondent. The facts disclosed in this dissent are set out verbatim from the record, so that the conclusions drawn herein may be compared with those drawn by the majority. This Court has been repeatedly harassed by outsiders since its appointment of a judge pro tempore in this matter last November. While such pressure is to be expected, [\*\*\*14] it is no excuse for a less than complete review of the entire record, which, of course, takes a great deal of time and creates additional pressures until a decision is finally reached.

The responsibilities of this Court in maintaining and policing the judiciary deserve no less attention than we devote to civil and criminal appeals.

I.

The first charge is that respondent filed a declaration of candidacy for the office of Judge of the Perry Circuit Court with the Clerk of the Perry Circuit Court on March 7, 1970, and with the Secretary of State on March 16, 1970, in violation of *Ind. Code § 3-1-32-48*, Burns § 29-5948 (1969 Repl.), which provides in pertinent part:

"Any person who shall . . . file any declaration of candidacy, . . . knowing the same, or any part thereof, to be falsely made . . . shall be deemed guilty of a felony."

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**[\*445]** The essence of the crime of filing a false declaration of candidacy is the false swearing and filing of any of the averments required by Ind. Code § 3-1-9-5, Burns § 29-3605 (Code Ed.) [hereinafter declaration of candidacy statute], which provides:

*"Candidates -- Declarations -- Form -- Place of filing -- Receipt showing **[\*\*\*15]** filing -- Filing by mail -- Disqualification as candidate for other pecuniary office. -*  
- The name of no candidate shall be printed upon an official ballot used at any primary election, unless at least forty [40] days and not more than seventy [70] calendar days prior to such primary, a declaration, subscribed and sworn to before a notary public or other person authorized to administer oaths, shall have been filed with the secretary of state in the case of a candidate for representative in the congress of the United States, member of the general assembly of the state of Indiana, judge of a circuit, superior, probate, criminal or juvenile court, and prosecuting attorney; with the clerk of the circuit court in the case of a candidate for clerk of the circuit court, county auditor, county treasurer, county recorder, county sheriff, county coroner, county surveyor, county assessor, county commissioner, county councilman, township trustee, township assessor, justice of the peace, constable, members of the township advisory board and members of the county committee of the political parties coming under the provisions of the primary law; with the clerk of the circuit court in the case **[\*\*\*16]** of a city

**[\*\*771]** office, including judge of the city court, by the candidate in substantially the following form:

"DECLARATION OF CANDIDACY

"County of --- State of Indiana)  
ss:

"I, --- (Name must be printed or typewritten), the undersigned, do hereby certify that I am a *qualified* voter of --- precinct of the Township of ---, or of the --- ward of the City or Town of ---, County of ---, State of Indiana, and *reside* at ---; that I am a *member* of the --- (Complete residence address must be inserted)

party; and request that you place my name on the official primary ballot of said party to be voted on for the office **[\*446]** of --- at the primary election to be held the --- day of ---, 19---.

"Subscribed and sworn to before me this --- day of ---, ---

My Commission Expires:

---

(Hour and Date) Filed in the office of --- at --- P.M./A.M. local time this --- day of ---, 19---.

"Not more than one [1] day after a declaration shall have been filed in the office of the secretary of state or the clerk of the circuit court of the county, the secretary of state or the clerk of the circuit court, as the case may be, shall mail to such **[\*\*\*17]** candidate who shall have filed a declaration of candidacy, to the address set out in such declaration, a statement showing that such candidate has

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filed a declaration, the name of the candidate, the office for which he is a candidate, and the date on which such declaration was filed. No declaration of candidacy shall be made by telegraph. Declaration of candidacy may be made by mail and shall be considered filed as of the date and hour it is received in the office of the secretary of state or the clerk of the circuit court, as the case may be.

"No declaration of candidacy shall be valid unless filed with or received in the office of the secretary of state or the clerk of the circuit court by 12 o'clock noon local time of the fortieth calendar day prior to a primary election. Immediately after the deadline for filing the clerk of a circuit court and secretary of state shall certify and release to the public: (1) a list of the candidates for each office for each political party and (2) a list of all declarations of candidacy whose legality or validity is questioned. All questions concerning the legality or validity of a declaration of candidacy made to the clerk of the circuit [\*\*\*18] court shall be referred to and determined by the county election board and all questions concerning the legality of [or] validity of a declaration made to the secretary of state shall be referred to and determined by the state election board.

"Any person who executes and files a declaration of candidacy for any office for which a per diem or salary is provided for by law shall be disqualified from filing a declaration of candidacy for any other office for [\*\*772] which a per

diem or salary is provided for by law until such original declaration of candidacy is withdrawn.

[\*447] "No candidate shall be qualified to run for any public office unless he resides within the jurisdiction of the office for which he is running. The residency of the candidate shall be determined by the secretary of state or the clerk of the circuit court by the standards established by IC 1971, 3-1-21-3, as amended by Acts 1971, P.L. 11, section 9." [Emphasis added.]

An analysis of the declaration of candidacy statute shows that three material averments must be made by the candidate. First, the candidate must swear that he is a qualified voter. Secondly, he must swear to his residence. [\*\*\*19] Finally, he must swear to his party membership. The allegations contained in the first charge relate to the first two averments; there is no question that respondent truly was a member of the Democratic Party.

WAS RESPONDENT A QUALIFIED VOTER?

1. *Statement on the Law.*

To be a qualified voter, one must meet the age, citizenship and residency requirements of Ind. Code § 3-1-7-26, Burns § 29-3426 (Code Ed. Supp. 1974), [hereinafter cited as voter qualification statute], which provides:

"Every person who will be at least eighteen [18] years of age at the next ensuing general or city election, who is a citizen of the United States, who, if he continues to reside in the precinct until the next following general or city election, will at that time, have resided *in the state of Indiana six* [6]

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*months*, in the township sixty [60] days and the precinct thirty [30] days, shall be entitled, upon proper application, to be registered in such precinct." [Emphasis added.]

This statute must be read without the italicized language, for it has been declared unconstitutional. *Affeldt v. Whitcomb*, (1970) 319 F. Supp. 69, aff'd mem. 405 U.S. 1034, [\*\*\*20] 92 S. Ct. 1304, 31 L. Ed. 2d 576 (1972).

Under the voter qualification statute, respondent met the citizenship and age requirements. Thus, respondent would be a qualified voter for purposes of the declaration of candidacy [\*448] statute if he also met the residence requirement of the voter qualification statute.

"Residence" as that term is used in our voting laws means domicil. Perhaps unfortunately, the terms have been used interchangeably in Indiana case law. Thus, in *Yonkey v. State ex rel. Cornelison*, (1866) 27 Ind. 236, 245-50, we find the following statement:

"But, from the evidence in the case, we think it too clear to admit of controversy, that *Yonkey*, in going to *Washington*, under the circumstances and for the purposes shown in evidence, did not lose his residence in Clinton county, or 'cease to reside' therein as alleged. As a general rule, where a man is the head of a family and is a house keeper, the domicil of the family is presumed to be his legal place of residence. It requires an intention in order to change the domicil, and therefore if a person leaves his place of residence temporarily, on business or otherwise, but with the intention [\*\*\*21] of returning, he does not thereby lose his domicil,

as he could not by such absence acquire one elsewhere. See *Bouvier's Law Dic.*, title 'Domicil,' and authorities cited. Here, *Yonkey* resided with his family in *Clinton* county, and his family continued to reside there. It was his residence, and in going to *Washington* it is evident that he did not intend to lose his residence in *Clinton* county or change it to *Washington*. He therefore continued to reside in *Clinton* county."

[\*\*773] Ordinarily, residence simply connotes the place where a person lives. In this sense, a person may have more than one residence; i.e., he may have a summer home in Indiana, and a winter home in Florida. As that term is employed in the voting laws, however, the mere fact that one has a residence in Indiana does not ipso facto mean that such person's domicil or legal home -- his "residence" -- is in Indiana so that he may exercise the right of franchise or become an office-seeker. Thus, it must be kept in mind that the term "resident" as it appears in our voting laws is a word of art, which represents the legal conclusion of domicil. The significance of such distinction [\*\*\*22] is that while one may have several residences, he may have only one domicil. RESTATEMENT OF CONFLICTS § 11 (1934). In the following discussion, I will use [\*449] the terms "resident" and "residence," because those are the terms appearing in both the statutes and the case law; however, the precise legal issue is respondent's domicil.

In determining residence, there are constitutional, statutory and case law guidelines to be applied. I have no disagreement with the majority's restatement of *Pedigo v. Grimes*, (1887) 113 Ind. 148, 13 N.E. 700, that residence is established when a ". . . person definitely intend[s] to make a particular place his permanent residence and act[s] upon that intention in

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good faith," although such restatement appears a little broad.

The portions of *Pedigo* from which the legal standard was gleaned states:

"We can not, therefore, disturb the decision of the court, unless the testimony clearly shows that the persons who were asked to state for whom they voted cast illegal votes. This the testimony does not show. Taking the view of the testimony most favorable to the appellant, the utmost that can be said of it is, that the voters [\*\*\*23] entered the State University at Bloomington without at the time of entering having formed a definite intention of making that place their residence, but that they did subsequently determine that it should be their residence. This gave them the right to vote, because there is no evidence that this was not their intention, formed and acted upon in good faith. We think it clear, that if they had gone to Bloomington with the intention of remaining simply as students, and there was no change of intention, they would not have acquired a residence. *Granby v. Amherst*, 7 Mass. 1; *Fry's Election Case*, 71 Pa. St. 302 (10 Am. R. 698; *Dale v. Irwin*, 78 Ill. 170; *Vanderpoel v. O'Hanlon*, 53 Iowa 246.

"Where, however, the intention is formed to make the college town the place of residence, and that place is selected as the domicile, then the person who does this in good faith becomes a qualified voter.

\* \* \*

"It can, we conceive, make no difference that the person is a student, if he has in good faith elected to make the place where the college is located his residence, since there is no imaginable reason why a person may not be both a student at a college [\*\*\*24] and a resident of the place where the college is situated. If he is at the place merely as a student, [\*450] then he is not a resident; but if he has selected that place as his abode, he acquires a residence which entitles him to vote, if he possesses the other qualifications.

\* \* \*

". . . In this instance, the citizens, having taken up a residence in Bloomington and having no other home, were entitled to vote there, although they may not have intended to remain there always. It is frequently said in the books that a man must have a home somewhere, and it is agreed that this home is at the place where he is bodily present with the intention of making it his domicile, although he may have in view a change of residence at some future [\*\*774] time. *Cooley Const. Lim.*, 754; *McCrary Elections*, section 39."

A similar formulation of residence may be found in *Green v. Simon*, (1896) 17 Ind. App. 360, 367, 46 N.E. 693, 695:

"The general rule is, that a man can have but one place of residence, and that, to lose his residence in one place, he must acquire residence in another place. Personal presence alone at another

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for a moment, the change of domicile takes place.

"(4) A person can acquire a domicile of choice only in one of three ways:

(a) having no home, he acquires a home in a place other than [\*\*\*32] his former domicile;

(b) having a home in one place, he gives it up as such and acquires a new home in another place;

(c) having two homes, he comes to regard the one of them not previously his domicile as his principal home."

After respondent left the military service, the facts indicate that he gave up his domicile of origin (Tell City) and established a domicile of choice, perhaps several, in the metropolitan Washington, D.C. area. The following findings, supported by the record indicate such change.

"2.

\* \* \*

"Prior to his leaving active duty with the United States Air Force in September of 1956, the Respondent obtained employment with the United States Department of Commerce in Washington, D.C. Before beginning his job with the Department of Commerce, the Respondent took a one month vaca-

tion and spent the time with his family in Tell City, Indiana.

"While in the Air Force, the Respondent commenced Law School at Georgetown University in Washington, D.C., attending school at night.

"In July of 1959, the Respondent left his job with the Department of Commerce and went to work in the Department of Navy in Washington, D.C. He stayed with the [\*\*\*33] Department of Navy until May of 1965, at which time he was employed by the United States Department of Justice as a Patent Attorney in Washington, D.C.

"Respondent's employment with the Department of Justice continued until early April of 1970, at which time he resigned because he was a Candidate for the Office of Judge of the Perry Circuit Court in Perry County, Indiana.

\* \* \*"

[\*455] "6.

"At the thirty-second page of David Evrard's government personnel record there appears a document filled out by David E. Evrard, and signed by David E. Evrard, [\*\*777] in which a space for 'Legal Residence' was filled out as 3700 King Street, Alexandria, Virginia."

"7.

"On September 30, 1968, David E. Evrard registered to vote in Arlington County, Virginia, by personally filling out and signing a

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voters registration form in which he listed his address as 4262 SO. 35th St., Arlington, Virginia, 22206, and his previous address as 3700 King Street, Alexandria, Virginia. The said voter's registration form contained the following registration oath:

"REGISTRATION  
OATH

"I hereby make application for registration as a qualified voter of Arlington, Virginia. I, [\*\*\*34] David E. Evrard, do solemnly swear (or affirm) that I am entitled to register under the Constitution and laws of this State, and that I am not disqualified from exercising the right of suffrage by the Constitution of Virginia.

"s/ DAVID E.  
EVRARD

Signature of  
Voter"

"8.

"On November 28, 1969, in making application for a marriage license in Harrison County, Indiana, David E. Evrard stated under oath in writing that his place of residence on that date was 3224 Graham Road, Falls Church, Fairfax County, Virginia."

"9.

"Ten days later, on December 8, 1969, David E. Evrard personally enrolled Jacqueline Buckler in Walnut Hill Elementary School under the name of Jacqueline Evrard, and, on the enrollment form which he filled out, David E. Evrard's name appears on the line for the 'Father' as 'step father' and the words 'Margaret Anne', with no last name shown, appear in the space provided for the Mother's name. In this same document, Respondent set out the 'Family Address' as 3224 Graham Road, Falls Church, Virginia."

"19.

"On March 4, 1970, David E. Evrard registered two automobiles with the motor vehicle licensing bureau of the [\*456] State of Virginia, giving [\*\*\*35] his address as 3224 Graham Road, Falls Church, Virginia."

Additionally, the record indicates that respondent purchased and refurbished real estate for resale, and maintained rental property in the D.C. area.

While respondent remained at all times in the employment of the U.S. government after his severance from the service, I believe the foregoing evidence clearly shows that respondent established a domicil of choice in the D.C. area, and finally at Falls Church, Virginia. I reach this conclusion notwithstanding the provisions of Ind. Code § 3-1-21-3(10) upon which respondent relied and the majority apparently ("From 1954, when he graduated from Purdue through July, 1970, at which time he completed his move to Perry County, respondent was absent from the State of Indiana by reason of his military service and his employ-

ment with the U.S. Government,") finds applicable.

The declaration of candidacy statute, *supra*, indicates that the proper place for filing a declaration of candidacy for the office of circuit court is with the secretary of state, not the county clerk. The critical point for determining whether respondent had established a new domicile of choice in Indiana [\*\*\*36] is not March 7, 1970, the date when respondent filed his declaration in Perry County, but rather, March 11, 1970, when respondent swore to the truth of his declaration of candidacy and March 16, 1970, when it was filed with the secretary of state.

[\*\*778] Respondent alternatively maintained, and the majority opinion implicitly holds, that respondent acquired a new domicile of choice in Indiana, *prior* to March 16, 1970. This finding is based upon:

(1) Respondent's Thanksgiving and Christmas visits to Tell City in 1969;

(2) Political visits, including caucuses with party leaders and public announcement of candidacy, during the months of January, February, and March, 1970;

[\*457] (3) Respondent's testimony that he made up his mind to run for the office in early January, 1970;

(4) Respondent's testimony and that of his friend who was a realtor, that respondent consulted him about finding the respondent a home in Tell City, sometime in early January, 1970.

The majority apparently finds these actions sufficient to show that respondent's intent to

remove was unequivocally formed, and a fixed settlement at Tell City was resolved upon with no present [\*\*\*37] intention of returning to Falls Church, Virginia. *See State ex rel. White v. Scott, supra*. The majority finds that the above evidence is sufficient to rebut the presumption that respondent's residence in Falls Church, Virginia continued as of March 16, 1970. *See Green, supra*. The record does not sustain this conclusion.

Before setting out that portion of the record which demonstrates that respondent's plans to return to Tell City had not yet become unequivocal, the following sections, comments and illustrations of the RESTATEMENT OF CONFLICTS should be considered:

#### "§ 19. NATURE OF INTENTION REQUIRED.

"The intention required for the acquisition of a domicile of choice is an intention to make a home in fact, and not an intention to acquire a domicile.

"*Comment:*

"*a. Intention to make home and desire to acquire domicile.* A person sometimes desires to have his domicile in a certain place, in order to get the benefit of one or more of the legal consequences of having a domicile there, but does not wish to change his home to that place; this desire to have a domicile in a certain place has no effect in fixing his domicile there.

\* \* \*

*"Illustrations:* [\*\*\*38]

"1. A, domiciled in State X, desires to vote in state Y; he goes there on the registration day, intending to claim a domicile there, but not intending to make a home there, [\*458] and has his name put on the voting list as domiciled there. He is not domiciled in Y."

## "§ 20. PRESENT INTENTION.

"For the acquisition of a domicile of choice the intention to make a home must be an intention to make a home at the moment, not to make a home in the future.

*"Comment:*

"a. In order to possess the requisite intention, one must be able to say not, this is to be my home, but, this is now my home."

See also, Ind. Code § 3-1-21-3(3), (4), Burns § 29-4803(3), (4), (Code Ed.), *supra*.

The record shows that the declaration of candidacy filed with the secretary of state on March 16, 1970, was completed and sworn to before a notary in Washington, D.C. on March 11, 1970. On those dates, respondent, his wife

and family lived at 3224 Graham Road, Falls Church, Virginia, and respondent's stepchild attended [\*\*779] school in Falls Church. On March 4, 1970, respondent procured new Virginia vehicle registration.

Most of the overt steps which respondent took [\*\*\*39] in demonstrating his intention to move to Tell City did not transpire until after his declaration of candidacy had been filed. The first of these steps occurred in mid-April when respondent submitted his resignation to the Justice Department, thereby severing his financial lifeline. The testimony regarding his registration should be carefully scrutinized, for it shows that respondent had not yet -- the middle of April, 1970 -- irrevocably committed himself to Indiana; he had to discuss the matter with his wife to decide whether to resign and run, or to withdraw from the race and continue his employment with the Justice Department.

With respect to his resignation, respondent testified at the hearing before Judge Rabb as follows:

[\*459] DIRECT EXAMINATION OF DAVID E. EVRARD BY JOHN G. BUNNER, COUNSEL FOR THE RESPONDENT

Q. "All right. When did your regular employment with the Department of Justice cease?"

A. "In April of 1970. That was when the regular employment under the former way I was employed as a civil servant ceased."

Q. "Will you tell us how that came about?"

A. "William Ruckelshaus called me at my office and asked me to come over to his office. He [\*\*\*40] was head of the civil division of the Department of Justice at that time. When I got there, as I

recall, both he and Mr. Baize, his assistant, were present and, I'm almost sure that's right, I know Mr. Baize was present and I'm almost sure Bill was. They informed me that they had been informed that I had filed candidacy for a public office and that they wanted to know whether I intended to stay with the Department or run for office."

Q. "Was it more or less an either or --"

A. "It was definitely an either or."

Q. "So, uh, did you inform them at that time of your intentions?"

A. "As I recall, I didn't inform them at that very moment. I think I called my wife and told her what had happened. We had already made up our mind and the only thing that this could have changed was the fact that we would be even longer without employment and which meant we had to try to live on our savings and I felt that I should ask her before I went ahead and told him."

Q. "And this was in what part of April, do you know?"

A. "Mid April, I don't recall exactly when it was."

[R.p. 116-117.]

In his deposition, on February 5, 1975, respondent testified as follows:

QUESTIONS **\*\*\*41** BY  
DAVID V. MILLER, SPECIAL  
PROSECUTOR

Q84 "Had you intended to resign in April?"

A. "I intended to resign in early Spring; I didn't have a particular date picked out because I didn't know, No. 1, exactly when it would be necessary for me to actually be physically present in Perry County because **\*\*\*460** of election purposes; I discussed that with the County Chairman."

Q85 "Did someone have a conversation with you in the Justice Department **\*\*\*780** indicating to you that it would be necessary for you to resign because of your candidacy?"

A. "Both William Ruckleshaus (spell), who was then head of the civil division of the Department of Justice, and his assistant, Gary Bayes (spell); I talked to both of them."

Q86 "Were both of them of the opinion that your employment with the Department of Justice and your candidacy for a political office were violations of the Hatch Act?"

A. "That's what they said."

Q87 "Did those conversations occur in April?"

A. "Yes."

Q88 "That was the reason for your resignation?"

A. "Yes."

\* \* \*

Q92 "Before telling them that you would resign did you discuss the matter with anyone -- not the matter of being rehired -- but **\*\*\*42** did you confer with any-

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one about whether or not you should resign?"

A. "I can't recall having done so; I'm sure I called my wife."

And finally, Gary H. Baise, who at the time of respondent's resignation was serving as special assistant to the Assistant Attorney General of the United States, testified in his deposition, filed of record in this matter, as follows:

QUESTIONS BY J. HOWE  
BROWN, COUNSEL FOR PETI-  
TIONER

Q. "Did you have any connection with Mr. Evrard in terms of his work or his employment?"

A. "No, not really, no. Not on a day-to-day basis."

Q. "What were the occasions that caused you to become acquainted with him?"

A. "I met Mr. Evrard first when Mr. Ruckelhouse (phonetic) and I joined the department, because it was a practice of ours to go around to see every attorney and every individual who worked in the department at that time. That would have been approximately March or April of 1969.

[\*461] "The only other occasion I had to meet Mr. Evrard was in approximately March of 1970."

Q. "What was that occasion?"

A. "It had been brought to my attention that he was running for an office in the State of Indiana."

Q. "And did you [\*\*\*43] do anything or have any conversation with Mr. Evrard with regard to that information?"

A. "Yes, I did."

Q. "What was the substance of that conversation?"

A. "I called Mr. Evrard in for an appointment and I asked him if he was running for a public office in the State of Indiana."

Q. "What response did Mr. Evrard give?"

A. "He replied that he was."

Q. "What further conversation took place?"

A. "At that time, I advised him that I would give him really two choices. One, he could withdraw from that office and remain in the Department of Justice and that I would enter nothing in his file regarding the Hatch Act, which he was -- or at least I was advised that he was violating at that time; or he would have to leave the employment of the [\*\*781] Department of Justice obviously, because he was in violation of the Hatch Act."

Q. "You say you advised him of this?"

A. (Nods affirmative)

Q. "What response did he make?"

A. "As I recall, he said he wanted to call his wife and talk with her about the situation."

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Q. "What conversation took place?"

A. "Again, as I recall, he left my office that afternoon, and I heard from him the following day. He told me that [\*\*\*44] he had discussed this matter with his wife, and he thought that he would resign his position and return to the State of Indiana."

Q. "Did he in fact resign his position?"

A. "Yes, he did."

The next significant overt act was respondent's purchase of a home in Tell City, on May 8, 1970, following the primary of May 5. Finally, respondent moved his family to Tell City in mid-summer.

It is fitting and proper to consider the acts of respondent prior to March 16, 1970, in determining his intent on that [\*462] date. It is a bootstrap approach, however, to consider the events which occurred after that date, as the majority opinion does, as establishing respondent's intent on March 16, 1970. From the record, respondent's acts prior to March 16, 1970, do not demonstrate, to paraphrase the language of § 19 of the RESTATEMENT OF CONFLICTS, *supra*, an intention to make Tell City a *home in fact*, but demonstrate only a desire to acquire a domicile.

The writer is of the opinion that respondent was not a qualified voter as required by the declaration of candidacy statute and is, therefore, guilty of the offense charged.

II.

Respondent was also charged with aiding and abetting [\*\*\*45] his wife in her violation of the election laws of this state which prohibit nonresidents from voting. These laws are set

out in the majority opinion. In a very cursory treatment of this charge, the majority states:

". . . we find that the same legal test of residence should be applied to determining whether or not respondent's wife established a voting residence at the home of her husband's parents. It would appear to us that Margaret Evrard had the right to choose to adopt the voting residence of her husband. By reason of this voluntary choice and her marriage to respondent, she is entitled to claim the benefit of his connections with his parents' home. We therefore find that the evidence is insufficient to support any conclusion that respondent aided and abetted his wife in unlawfully violating the election law, or conspired with his father to so violate the law."

Ordinarily, the domicile of the husband is the domicile of the wife. *Jeness v. Jenness*, (1865) 24 Ind. 355; Ind. Code § 3-1-21-3, Burns § 29-4803 (Code Ed.). Where no separation is shown to have occurred, the finding that respondent's domicile was Virginia dictates, as a matter of law, that respondent's [\*\*\*46] wife was also a Virginia domiciliary. Such conclusion, however, does not rest solely upon the principle of law announced. With regard to the residence and voting of [\*463] respondent's wife, the hearing officer made the following findings:

"12.

"On May 3, 1970, David E. Evrard traveled from the State of Virginia to Tell City, Indiana, for the purpose of being present to cast his vote in the Indiana Primary

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Election on May 5, 1970. David E. Evrard was accompanied on his trip by Margaret Ann Buckler Evrard, **[\*\*782]** who, with Respondent's knowledge, also voted in the said Indiana Primary Election of May 5, 1970."

"20.

"Margaret Ann Yowaiski Buckler Evrard was born in Maryland and lived only in Maryland and in the Washington, D.C. area until moving to Indiana in July of 1970. In registering to vote in Perry County, Indiana on March 7, 1970, Margaret Ann gave her address as 914 11th St., Tell City, Indiana. There is insufficient evidence that Margaret Ann had her residence at that address."

"21.

"On May 5, 1970, Margaret Ann Yowaiski Buckler Evrard voted in the Indiana Primary Election, in Perry County, Indiana. In order to cast such vote, Margaret Ann **[\*\*\*47]** traveled to Indiana from Virginia on May 3, 1970 in a private aircraft flown and owned by David E. Evrard. All of these actions by Margaret Ann Yowaiski Buckler Evrard, were done with the full knowledge of David E. Evrard."

In addition, in the parties' stipulation of facts, we find:

"19. Margaret Anne Buckler (Evrard) was divorced from Lawrence Raley Buckler on April 2, 1970 by DECREE OF DIVORCE A VINCULO MATRIMONII of

the Circuit Court of Arlington County, Virginia upon the basis of depositions taken 2-3-70. On 2-3-70 Margaret Anne was living with David E. Evrard at 3224 Graham Road, Falls Church, Virginia and in the course of said deposition she stated that she considered herself to be a domiciliary of Virginia and intended to remain there, and that her name was Margaret Anne Buckler. (Contents of Deposition have been stipulated)"

"21. Margaret Ann Evrard was first issued an Indiana Driver's License in January, 1972. Prior to that time, she was licensed to drive under the name of Margaret Anne Yowaiski by the State of Maryland."

**[\*464]** The whole record clearly shows that Margaret Anne Evrard was not a resident of this state when she voted in the primary **[\*\*\*48]** election of 1970. The record also shows that respondent flew her to this state for the purpose of voting in said election. This charge is supported by sufficient evidence. The majority's failure to address the hearing officer's finding that there was insufficient evidence of Mrs. Evrard's residence is inexcusable. At the same time, a review of the record indicates that there was insufficient evidence presented of any conspiracy to violate the above laws involving respondent and his father. I, therefore, concur with such finding of the majority.

III.

The final charge against respondent is that he aided and abetted his wife in the commission of the felony of bigamy. While the majority finds that respondent had no knowledge that Mrs. Evrard's husband was still alive, a review

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of the entire record does not lead to that conclusion.

The parties stipulated to the authenticity of the following facts:

"12. On January 12, 1964, Lawrence Raley Buckler and Margaret Anne Yowaiski (now known as Margaret Anne Evrard) were married in Washington, D.C. Two children were born of this marriage: Jacqueline Denise Buckler on 5/27/64 and Joseph Michael Buckler on 5/16/66. In 1967 Mr. and [\*\*\*49] Mrs. Buckler separated. To the best of David Evrard's knowledge, Lawrence Buckler last saw said children in the Spring or Summer of 1968."

"13. Lawrence Raley Buckler was inducted into the United States Army on [\*\*\*783] November 12, 1968, a draftee; he served in Vietnam in 1969 and 1970 and was discharged in 1970. (Army Record of Lawrence Raley Buckler stipulated to be genuine)"

"14. Neither David Evrard or Margaret Anne Buckler Evrard ever received any official report from any member of the United States Army or any other official source that Lawrence Raley Buckler was killed in action or missing in action or captured or otherwise dead at any time during his service with the United States Army."

[\*465] "15. The marriage of Margaret Anne Yowaiski Buckler and Lawrence Raley Buckler was not terminated by death."

"16. In August, 1969, David Evrard contacted Everett Germain, an Attorney licensed to practice in

the State of Virginia regarding the filing of a divorce action on behalf of Margaret Anne Buckler against Lawrence Raley Buckler. Mr. Germain accepted employment for said purpose and the said divorce action was filed on September 17, 1969, in the Arlington [\*\*\*50] County Circuit Court, being docketed as Chancery Cause #19755."

"17. On December 29, 1969 David E. Evrard married Margaret Anne Yowaiski Buckler at Frenchtown, Harrison County, Indiana pursuant to a marriage license issued by the Clerk of said County, based upon an Application for Marriage License signed under oath by David E. Evrard and Margaret Ann Yowaiski Buckler. (The contents of said Application have been stipulated)."

"18. On the date when said application was made and signed David E. Evrard knew that the last name of his prospective bride was Buckler rather than Yowaiski and that there was, at that time, pending in the Circuit Court of Arlington County, Virginia, a proceeding for divorce filed on behalf of Margaret Anne Buckler being Chancery Cause No. 19755 naming Lawrence Raley Buckler as defendant. On 11-28-69 and 12-29-69 said proceeding for divorce had not been dismissed nor was David E. Evrard aware of any contact having been made with Everett Germain regarding dismissal thereof."

The full findings of the hearing officer on the issue are as follows:

"4.

"The Respondent became friends with Margaret Ann Yowaiski and with her family. He frequently [\*\*\*51] visited her family near Maddox, Maryland. In 1964, Margaret Ann Yowaiski married Lawrence Buckler and two children were born of that marriage.

"On November 4, 1967, Margaret and Lawrence Buckler separated. After the separation, there was very little contact between Margaret Buckler and her husband.

"In November of 1968, Buckler was drafted into the Army. His wife and children were not listed as next-of-kin, but rather he listed his mother. No allotment was taken out [\*466] of Buckler's Army pay for his children and his insurance policy was made payable to his mother.

"In the summer of 1969, David Evrard and Margaret Buckler discussed marriage and in September of that year she filed suit for divorce against Lawrence Buckler. He was served while in Vietnam with the documents relating to the proceeding and pursuant to Virginia Law, was represented at the subsequent hearing in April of 1970, by court appointed attorney.

"Later in the Fall of 1969, Margaret Buckler was told that Lawrence Buckler [\*\*784] had either been killed or had died in Vietnam. Her informant's name and address was unknown to Margaret Buckler as hereinafter set out in these findings.

"She [\*\*\*52] immediately informed the Respondent of this conversation and over the Thanksgiving vacation of that year, they obtained a marriage license in Harrison County, Indiana.

"On December 29, 1969, David Evrard and Margaret Buckler were married in Harrison County, Indiana, by the Respondent's Brother who is, and was at that time, a Roman Catholic Priest.

"The Respondent had never been married prior to his marriage of December 29th, 1969.

"From a period of time prior to his making application for a marriage license in Harrison County, Indiana, in November of 1969, and until a time subsequent to his marriage on December 29, 1969, the Respondent believed that Lawrence Raley Buckler was, in fact, dead, even though he did nothing to verify the information he received from Margaret Ann.

"Subsequent to the marriage, Margaret Evrard received information that caused her to believe that there was the possibility that Lawrence Buckler was alive, and conveyed such information to Respondent.

"The Respondent made inquiries of the Department of Defense and some time later learned that Buckler was in fact alive.

"Margaret then proceeded with the divorce proceeding that had been [\*\*\*53] filed in September of 1969, and she was granted a divorce from Lawrence Buckler in early April of 1970.

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"After her divorce was granted and prior to May 5, 1970, David Evrard and Margaret Evrard were remarried in Tijuana, Mexico."

**[\*467]** "13.

"Margaret Ann Evrard heard of the supposed 'death' of her first husband, Lawrence Raley Buckler, from a person whose name she cannot remember and whose relationship to Mr. Buckler she cannot explain. She gave this information to Respondent. Margaret Ann Buckler and the Respondent did nothing and made no effort to verify the account of the 'death' of Lawrence Raley Buckler. Neither Respondent or Margaret Ann Buckler informed attorney Everett Germaine, who was Margaret Ann Buckler's attorney in her divorce action, concerning the 'death' of Mr. Buckler."

"14.

"That less than one month after her marriage to David Evrard, Margaret Ann Buckler Evrard conversed with a person at her prior place of employment, and heard that Lawrence Raley Buckler was alive. Respondent's wife does not remember the exact time of the occurrence or the identity of the person conveying such information."

"15.

"The Court finds that on December **[\*\*\*54]** 29, 1969, the date of this marriage, that Lawrence Raley Buckler was alive."

"16.

"After the Decree of Divorce rendered in April of 1970, terminating the marriage of Margaret Ann Buckler and Lawrence Raley Buckler, David E. Evrard and Margaret Ann Buckler went to Tijuana, Mexico and were married again on April 18, 1970."

**[\*\*785]** In addition to these stipulations of fact and the hearing officer's findings, the record as a whole, particularly the testimony of Mrs. Evrard, deserves closer scrutiny than that which the majority opinion gives it. It is incredulous, to say the least, that a mother of two children would not make further inquiry upon being advised by a stranger that her husband and father of her children had been killed in the war. It is only common knowledge that advice of death in such cases travels by official messenger. Mrs. Evrard had a high school education and attended a junior college for one year. She testified that on learning of her husband's purported death:

**[\*468]** ". . . the biggest thing on my mind at that time was that I had a man that I respected, that truly wanted to marry me and take care of my children. I was going to be guaranteed **[\*\*\*55]** food and clothes and not have my electricity turned off and all of the things. That was the most important thing to me at that time."

Although apparently concerned about her financial condition, Mrs. Evrard made no effort whatsoever to procure any death benefits to which she or her family might have been entitled. When Mrs. Evrard told respondent of her husband's death, he failed to verify the death with the Department of Defense, although the record shows he was familiar with the military

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locator service and was himself a former member of the armed forces. Nor did respondent or Mrs. Evrard notify the attorney, whom the respondent knew and selected for Mrs. Evrard, to terminate his efforts in procuring her a divorce from Lawrence Buckler. In short, the evidence and the reasonable inferences therefrom lead inescapably to the conclusion that respondent knew when he married Mrs. Evrard that her former marriage had not been terminated by the death of her husband or by a decree of divorce.

#### IV.

The actions for which respondent was charged transpired prior to his election. Since his election, respondent has served responsibly in his position as judge of the Perry Circuit Court. [\*\*\*56] Based on evidence introduced by the respondent, the hearing officer found that:

"Respondent has a good to excellent reputation as a Judge and is held in high regard as such by Judges and Attorneys of Southern Indiana."

It is commendable that respondent has conducted the Perry Circuit Court in accordance with the Code of Judicial Ethics. It is unfortunate that respondent did not adhere to the same high standards when he was a candidate.

Impressed by respondent's service upon the Perry Circuit bench, the majority opinion has chosen to ignore or disregard [\*469] facts in the record which demonstrate respondent's guilt as charged.

Respondent's post-election conduct might be considered in mitigation of punishment upon finding of guilt, but it should not be considered in deciding guilt or innocence of the acts charged.

It is my belief the record as a whole sustains three of the charges against respondent. These transgressions are of such serious nature that this Court should not in good conscience ignore them. At a very minimum, this Court should issue a public reprimand to respondent and should consider a definite period of suspension. Only then would we announce [\*\*\*57] with judicial vehemence that the office of circuit judge is not yet a prize in a race where no holds are barred.



LEXSEE 816 N.E.2D 1138



Caution

As of: Oct 20, 2010

**GEORGE PABEY, Appellant/Cross-Appellee (Plaintiff below), v. ROBERT A. PASTRICK, AND THE LAKE COUNTY BOARD OF ELECTIONS AND REGISTRATION, Appellees/Cross-Appellants (Defendants below), LONNIE RANDOLPH, AND A. Santos, Appellees (Defendants below).**

No. 45S04-0401-CV-14

SUPREME COURT OF INDIANA

*816 N.E.2d 1138; 2004 Ind. LEXIS 705*

August 6, 2004, Decided

**SUBSEQUENT HISTORY:** Rehearing denied by *Pabey v. Pastrick, 2004 Ind. LEXIS 720 (Ind., Aug. 24, 2004)*

**PRIOR HISTORY:** **[\*\*1]** Appeal from the Lake Superior Court, No. 45D10-0305-MI-007. The Honorable Steven King, Special Judge. On Petition To Transfer from the Indiana Court of Appeals, No. 45A04-0308-CV-425. *Pabey v. Pastrick, 2004 Ind. LEXIS 51 (Ind., Jan. 9, 2004)*

**COUNSEL:** FOR APPELLANT/CROSS-APPELLEE (GEORGE PABEY): Bruce A. Kotzan, Indianapolis, IN, Nathaniel Ruff, Merrillville, IN, Carmen Fernandez, Hammond, IN.

FOR AMICI CURAI (ATTORNEY GENERAL OF INDIANA): Steve Carter, Attorney General of Indiana, Gary Damon Secrest, Chief Counsel, Frances Barrow, Deputy Attorney General, Doug Webber, Deputy Attorney General, U-Jung Choe, Deputy Attorney General, Gordon White, Deputy Attorney General.

FOR APPELLEE/CROSS-APPELLANT (ROBERT A. PASTRICK): George T. Patton Jr., Indianapolis, IN, Bryan H. Babb, Indianapolis, IN, Theresa M. Ringle, Indianapolis, IN.

FOR APPELLEE/CROSS-APPELLANT (LAKE COUNTY BOARD OF ELECTIONS AND REGISTRATION): James L. Wieser, Schererville, Indiana.

**JUDGES:** Dickson, Justice. Shepard, C.J., and Rucker, J. concur. Boehm, J., dissents with separate opinion in which Sullivan, J., concurs.

**OPINION BY:** Dickson

**OPINION**

[\*1140] Dickson, Justice.

Plaintiff/appellant George Pabey is appealing from a judgment denying relief in an election contest. We reverse.

[\*\*2] The primary election for the Democratic nomination for the office of mayor of the city of East Chicago, Indiana, took place on May 6, 2003. The candidates were incumbent Robert Pastrick and challengers George Pabey and Lonnie Randolph. The results of that election were:

Pastrick 4,083

Pabey 3,805

Randolph 2,289

At trial, Pabey sought to have all of the absentee ballots declared invalid or, in the alternative, to have the election invalidated and a new election ordered. Judgment for Respondent Robert A. Pastrick (hereinafter "Judgment") at 99.

Following careful consideration of extensive testimony in this election contest, Judge Steven King, regular judge of the LaPorte Superior Court and appointed by this Court as Special Judge to conduct these proceedings, issued a 103-page judgment that included comprehensive findings of fact and conclusions of law that are most impressive. We express our profound appreciation and admiration to the special judge for his excellent work, especially given the compressed time schedule that the Election Contest Statute requires and apparent efforts by some to interfere with the proceedings.

Of the 8,227 votes personally cast on [\*\*3] election day, Pabey received 199 more votes than Pastrick. But of the 1,950 absentee ballots, Pastrick defeated Pabey by 477 votes, producing a 278-vote final victory for Pastrick. The trial court concluded that Pabey had proven "that a deliberate series of actions occurred" that "perverted the absentee voting process and compromised the integrity and results of that election." Judgment at 9. The judge found "direct, competent, and convincing evidence that established the pervasive fraud, illegal conduct, and violations of elections law" and proved the "voluminous, widespread and insidious nature of the misconduct." *Id.* at 92.

Notwithstanding the overwhelming evidence of election misconduct, however, Judge King was cautious regarding his authority to order a special election under the circumstances. He noted that "Indiana election law provides little insight into the appropriate remedy available in this proceeding. Case authority on election contests provides virtually no guidance for circumstances where widespread misconduct has impacted the absentee ballots cast in an election." *Id.* at 95. The judge perceived that he was not authorized by statute to order a special election [\*\*4] because Pabey's evidence was only able to prove the invalidity of 155 actual votes, and because this was 123 votes short of the 278-vote difference that separated Pabey and Pastrick, Judge King reluctantly concluded that Pabey had failed to adequately establish that the proven deliberate series of actions "make it 'impossible' to determine which candidate received the highest number of votes." *Id.* at 100.

Perceiving his authority as a trial judge to be thus constrained, Judge King nevertheless [\*1141] noted that "relief from the May, 2003, primary election results lies in the province of the Indiana Court of Appeals or Supreme Court." Judgment at 99. In fact, he quoted from the Mississippi Supreme Court's decision in

*Rogers v. Holder*, 636 So. 2d 645, 650 (Miss. 1994), as follows:

Disenfranchisement of a significant number of voters may create sufficient doubt as to the election results to warrant a special election, even absent evidence of fraud. Invalidation of more than thirty percent (30%) of the total votes cast is generally sufficient to require a special election. *However, even where the percentage of total votes cast is small, if attended by fraud or willful [\*\*5] violations of the election procedure, the Court will order a new election without reservation.*

Judgment at 98-99 (citations omitted, emphasis supplied in Judgment). Noting that 19.2% of the 10,177 total votes cast in the East Chicago election came from 1,950 absentee ballots, of which 7.9% were invalidated, Judge King observed that the "Mississippi approach is appealing given the rampant election abuse that occurred here. The remedy of special election . . . would serve the public's interest in the certainty of the election results at issue." Judgment at 3, 99.

We note that, while election procedures are normally matters for legislative determination, this Court declared almost seventy years ago:

We are clear, however, that elections do not "belong to the *political branch* of government," if by that term is meant the legislative branch of the government. Elections belong to the sovereign people. The qualifications of electors and other matters concerning elections are prescribed by the Constitution. The Legislature may set up machinery for the conduct of elections, and delegate to ministerial or executive agencies the duty of conducting elections, and may prescribe the [\*\*6] procedure by which elections may be contested, so long as they stay within their constitutional powers, and such procedure conforms to the law, such steps and procedure will be governed by the legislative rules prescribed. *But courts have inherent power to protect the sovereign people, and*

*those who are candidates for office or claiming title to or rights in an office from fraud or unlawfulness . . . .*

*State ex rel. Nicely v. Wildey*, 197 N.E. 844, 847, 209 Ind. 1, 8-9 (Ind. 1935) (emphasis added).

Pabey initiated this appeal and sought emergency transfer to this Court under *Indiana Appellate Rule 56(A)*. Transfer was denied with the effect that jurisdiction over the appeal remained in the Court of Appeals. Pastrick then filed a motion to dismiss the appeal for lack of jurisdiction. (Appellant, Pabey's Pet. to Trans. at 4). The Court of Appeals, over the dissent of Judge Baker, issued an order summarily granting Pastrick's motion to dismiss with prejudice. Pabey again sought, and this time we granted, transfer. *Pabey v. Pastrick*, 2004 Ind. LEXIS 51 (Ind. Jan. 9, 2004).

## I

The Court of Appeals did not state its rationale for dismissing [\*\*7] the appeal with prejudice. However, we found neither of the two grounds argued in Pastrick's motion to dismiss to have been persuasive and therefore granted transfer.

In his motion to dismiss, Pastrick argued that by not requesting preparation of the transcript of the evidentiary hearing and the exhibits introduced by the other parties, Pabey failed in his duty to present [\*1142] a complete record as required by *Indiana Appellate Rule 9(F)(4)*. (Appellee Pastrick's Br. in Resp. to Pet. to Transfer at 3-4). For that reason, he asked that the appeal be dismissed or, at a minimum, that Pabey be ordered to cause a transcript of the hearing to be prepared along with the exhibits of all parties.

*Appellate Rule 9(F)(4)* provides in relevant part:

The Notice of Appeal shall designate all portions of the Transcript necessary to present

fairly and decide the issues on appeal. If the appellant intends to urge on appeal that a finding of fact or conclusion thereon is unsupported by the evidence or is contrary to the evidence, the Notice of Appeal shall request a Transcript of all the evidence.

Pabey did not request that the court reporter prepare a transcript of the evidentiary hearing. In defense [\*\*8] of his decision not to request a transcript of the evidentiary hearing, Pabey stated that no transcript was necessary because he "does not contend that these findings are unsupported by the evidence or that a conclusion is unsupported by the evidence or contrary to the evidence." (Resp. to Motion to Dismiss Appeal at 4). He argued that his specifications of error do not rely on evidence outside the trial court's findings. *Id.* Indeed, the Statement of the Facts in Pabey's brief states: "The Special Judge entered substantial and comprehensive findings of fact which Pabey adopts as his statement of the facts in this case." (Appellant's Br. at 4). Pabey then cites frequently to the court's findings throughout his brief. Pastrick does not identify any references in Pabey's brief to facts outside those found by the trial court.

*In re Walker*, 665 N.E.2d 586 (Ind. 1996), is instructive in this regard. Transfer was granted in *Walker* "to encourage litigants and reviewing courts to employ efficient appeal procedures." *Id.* at 588. The Court noted that the appellate rules in effect at the time required an appellant to transmit only those parts of the [\*\*9] record that are necessary for review of the issues to be asserted upon appeal. *Id.* at 588. This Court addressed the merits of the appeal, even though no transcript had been filed as part of the record, where the appellants accepted the trial court's findings of fact and argued that those findings did not support the trial court's judgment. *Id.* at 588-89.

Even if Appellate Rule 9(F)(4) required Pabey to submit a transcript, dismissal with prejudice was not the appropriate remedy for

his noncompliance with the rule. Former Appellate Rule 7.2(C) set out the procedure for modification or correction of an appellate record of proceedings, providing specifically that, "incompleteness or inadequacy of the record shall not constitute a ground for dismissal of the appeal or preclude review on the merits." See *Ben-Yisrayl v. State*, 690 N.E.2d 1141 (Ind. 1997) (citing this language from the rule). That language was not carried over into the new appellate rules that became effective in 2001, but that omission was not intended to authorize dismissal of an appeal based merely on the incompleteness of the part of the record submitted to the [\*\*10] appellate court. After all, the current *Appellate Rule 49(B)* provides that the failure to include an item in an appendix "shall not waive any issue or argument" and *Rule 9(G)* allows supplemental requests for transcripts to be filed.

Alternatively, Pastrick argued that the appeal should be dismissed because the trial court lost jurisdiction over the election contest due to its failure to hold a hearing within the time established by statute. (Appellee Pastrick's Br. in Resp. to Pet. to Transfer at 8). We reject Pastrick's [\*1143] premise that the trial court lacked jurisdiction.

It is true that in an election contest, "the court shall fix a date within twenty (20) days after the return day fixed in the notice to the Contestee for the hearing on a contest." *Ind. Code § 3-12-8-16*. It has also been held that the failure to comply with the requirements of the election contest statutes generally requires dismissal. See, e.g., *English v. Dickey*, 128 Ind. 174, 27 N.E. 495 (1891) (right to contest election forfeited where contestor, without assigning reason therefor, requested and obtained postponement of hearing to date outside statutory deadline [\*\*11] for hearing); *Smith v. King*, 716 N.E.2d 963 (Ind. App. 1999) (holding generally the same), trans. denied; *Kraft v. King*, 585 N.E.2d 308, 309-10 (Ind. Ct. App. 1992) (petition for election contest did not

comply with statute and thus failed to invoke jurisdiction of trial court).

In this case, however, Pastrick filed a motion to dismiss in the trial court on July 3, 2003. He argued that the trial court lost jurisdiction because the statutory deadline for the hearing was July 2. On July 15, the court denied Pastrick's motion to dismiss. The court noted delays in securing a judge to hear the case and pointed out that the special judge who ultimately tried the case was not appointed by this Court until June 30. Moreover, the court explained that given the special judge's obligations in his own courtroom, which had been fully scheduled through September, the special judge's distance from the court in which this case arose, and the many cases that had to be continued so that the special judge could hear this case, the election contest was heard as soon as practicable.

The trial court ruled that these circumstances, and the lack of any compelling indication **[\*\*12]** that Pabey was less than diligent in moving the case forward, brought this case under an exception to the twenty-day deadline discussed in *State ex. rel. Arredondo v. Lake Circuit Court*, 271 Ind. 176, 391 N.E.2d 597 (1979). In *Arredondo*, the trial court set a hearing on an election contest petition for a date within, but near the end of, the twenty-day period allowed for by statute; yet a timely hearing could not be held because the contestor's motion for change of judge (filed ten days before the hearing deadline) was granted and the new judge did not qualify in time to conduct a hearing within the statutory period. 271 Ind. at 177-78, 391 N.E.2d at 598-99. The contestee objected to the new judge proceeding to hear the case beyond the twenty-day statutory period and filed an original action to prevent further proceedings. Denying the writ, this Court reasoned:

To extend [*English v. Dickey*] to a fact situation such as the one at bar would, in our opinion, be grossly inequitable and place a

great burden upon both an election contestor and the trial court. A hearing might initially be set near the end of the statutory time limit. If, then, the **[\*\*13]** trial court either deliberately re-schedules the hearing beyond the limit or is forced to do so because of extraordinary circumstances beyond its control, a diligent and faultless contestor would forever be denied his statutory remedy. Our laws must provide a degree of flexibility to account for such situations. There can be no justification for closing the judicial doors to a bona fide litigant when the circumstances causing the delay are completely beyond his control.

271 Ind. at 178-79, 391 N.E.2d at 599. This Court concluded that when there are "extraordinary or unusual circumstances" that preclude a contest hearing from being conducted within the statutory twenty-day **[\*1144]** period, "the trial court will not automatically be divested of jurisdiction so long as the hearing is had as soon as practicable after the time limit." 271 Ind. at 179, 391 N.E.2d at 599. "The contestor, of course, must be diligent in his efforts and must not utilize tactics to delay the hearing beyond the twenty-day period," the Court explained, but it also clarified that the contestor's motion for change of judge filed ten days before the statutory deadline did not itself prevent a **[\*\*14]** timely hearing. 271 Ind. at 179, 391 N.E.2d at 599-600.

We agree with the trial court that *Arredondo* applies here. Moreover, it is unclear why Pastrick believes that his allegations of delay, even if true, require dismissal of the appeal. The trial court found the *Arredondo* exception applied, heard the election contest, and entered a judgment. No allegation has been made that Pabey's notice of appeal or appellant's brief was late under the applicable appellate rules.

For the same reasons, we reject Pastrick's claim on cross appeal that the trial court should have dismissed the election contest complaint as untimely.

## II

Pabey argues that "the pervasive fraud, illegal conduct, and violations of elections law" identified by the trial court, Judgment at 92, are sufficient as a matter of law to establish the requisite "deliberate act or series of actions occurred making it impossible to determine the candidate who received the highest number of votes cast in the election." *Ind. Code § 3-12-8-2*. Under the circumstances, he asks that the results of the primary election be vacated and a special election be ordered. (Appellant's Br. **[\*\*15]** at 24).

The evidentiary hearing in the trial court spanned eight and one-half days and included the testimony of 165 witnesses. Among the findings and conclusions included in the trial court's judgment are the following:

Petitioner George Pabey has satisfied his burden to establish that a deliberate series of actions occurred in the May 6, 2003 primary election to determine the Democrat nominee for the office of Mayor of the City of East Chicago, Indiana. Those actions perverted the absentee voting process<sup>1</sup> and compromised the integrity and results of that election.

Judgment at 9 (footnoted added).

1 *Indiana Code § 3-11-10-24* provides that a voter who satisfies any of the following is entitled to vote by mail: (1) a voter who will be absent from the county on election day; (2) a voter who will be absent from the precinct of the voter's residence on election day because of service in certain statutorily-prescribed election day worker positions; (3) a voter who will be confined on election day to the voter's residence, to a health care facility, or to a hospital because of an illness or injury; (4) a voter with disabilities; (5) an elderly voter; (6) a voter who is prevented from voting due to the voter's care of an individual confined to a

private residence because of illness or injury; (7) a voter who is scheduled to work at the person's regular place of employment during the entire twelve (12) hours that the polls are open; or (8) a voter who is eligible to vote under *Ind. Code § 3-10-11* [relating to persons who have moved not more than 30 days prior to the election] or *Ind. Code § 3-10-12* [relating to persons who change residence from a precinct to another precinct do not notify the county voter registration office of the change of address before election day].

The trial court made a most important point in its Judgment in distinguishing between the statutory requirements for voting absentee by mail and voting absentee in person before an absentee voter board:

It is emphasized . . . that *without any reason*, any registered and qualified voter may cast an absentee ballot prior to election day *in person* before an absentee voter board. *I.C. § 3-11-10-26*.

Judgment at 8-9. As the court observed, utilization of this alternative might well have "served to eliminate much of the mischief and fraud at issue" in this matter. *Id. at 9*.

**[\*\*16]** [Those] deliberate series of actions included *but are not limited* to the following:

**[\*1145]** a) a predatory pattern exercised by Pastrick supporters of inducing voters that were first-time voters or otherwise less informed or lacking in knowledge of the voting process, the infirm, the poor, and those with limited skills in the English language, to engage in absentee voting;

b) the numerous actions of Pastrick supporters of providing compensation and/or creating the expectation of compensation to induce voters to cast their ballot via the absentee proc-

ess. Those actions primarily-but not exclusively-involved the payment of money to voters to be present outside the polls on Election Day. The extensive evidence presented established that, at the least thirty-nine separate individuals . . . fell within the ambit of those activities that engaged cash incentives to encourage absentee voting;

c) the actions of various Pastrick supporters who directed applicants for absentee ballots to contact that Pastrick supporter when the applicant received his or her absentee ballot and, once called, to proceed to their home and, though not authorized by law to do so, "assist" the voter in completing **[\*\*17]** the ballot;

d) the use of vacant lots or former residences of voters on applications for absentee ballots<sup>2</sup>;

e) the possession of unmarked absentee ballots by Pastrick supporters and the delivery of those ballots to absentee voters;

f) the possession of completed and signed ballots by Pastrick supporters who were not authorized by law to have such possession;

g) the routine completion of substantive portions of absentee ballot applications by Pastrick supporters to which applicants simply affixed their signature;

h) the routine use of false representations-usually the indication that the applicant "expected" to be absent from Lake County on May 6, 2003-by those Pastrick supporters who filled out the substantive portions of applications and by votes solicited by Pastrick supporters to vote absentee to complete absentee ballot applications;

i) votes cast by employees of the City of East Chicago who simply did not reside in East Chicago; and j) a zealotry to promote absentee voting that was motivated by the personal financial interests of Pastrick supporters and, in particular, city employees.

*Id.* at 9-11 (emphasis supplied in Judgment) (footnote added).

2 An eligible voter who wishes to cast an absentee ballot by mail submits an "Application for Absentee Ballot" on a form prescribed by the Indiana Election Commission to the County Election Board. The Board then provides the voter with an absentee ballot. Judgment at 7-8.

**[\*\*18]** The series of deliberate actions set forth in [the above items (a) through (j)] implicate various state laws concerning absentee ballots [therein detailing various election and criminal laws implicated, including various violations constituting class D felonies].

*Id.* at 11-14.

It was common practice for those engaged in the Pastrick absentee voter efforts to deliver the completed absentee ballot applications that they acquired to the Pastrick campaign headquarters. **[\*1146]** There, the absentee ballot applications were photocopied. Thereafter the Pastrick campaign caused the original completed applications to be delivered to the offices of the Lake County Election Board in Crown Point, Indiana.

*Id.* at 15.

Rooted in the Pastrick campaign and its weekly exhortations in meetings with Democrat party precinct officials and city department heads to 'encourage' absentee voting, Pastrick confederates throughout the City of East Chicago in the three to four month period preceding May 6, 2003, engaged citizens in the absentee voting process. That absentee voter drive as played out in the testimony presented included criminal conduct by Pastrick supporters but, just as often, **[\*\*19]** induced unwitting citizens to engage in criminal conduct or violate election laws.

*Id.* at 84.

The commission of criminal acts by Pastrick supporters that included such activity as their unauthorized possession of completed ballots [a species of vote fraud defined by *Ind.Code 3-14-2-16(4)* and (5)], the unauthorized possession of unmarked ballots [a species of "vote fraud" per *Ind.Code 3-14-2-16(6)*], their presence while voters marked and completed their absentee ballots [a species of 'vote fraud' per *Ind.Code 3-14-2-16(3)* and a violation of *Indiana Code 3-11-10-1.5*], and the *direct* solicitation of a vote for cash all yielded absentee votes which respondent Pastrick concedes are invalid.

*Id.* at 84-85 (bracketed comments and emphasis in original).

The East Chicago Democrat mayoral primary may be a "textbook" example of the chicanery that can attend the absentee vote cast by mail: examples of instances where the supervision and monitoring of voting by Pastrick supporters and the subsequent possession of ballots by those malefactors are common [\*\*20] herein. Those illegalities came with a side order of predation in which the naive, the neophytes, the infirm and the needy were subjected to the unscrupulous election tactics so extensively discussed.

*Id.* at 89.

It is apparent that a political subculture exists in Lake County which views the political machinations at issue with a "wink and a smile" and "business as usual."

*Id.* at 91.

The routine and cavalier use of "absence from Lake County" on election day, a reason often supplied and checked by the Pastrick supporter himself [as opposed to the registered voter] of the absentee ballot applications, is the common predicate to the most insidious and widespread of the abuse tactics exposed here: the predatory approach to the unwitting.

*Id.* at 91 (bracketed comments in Judgment). The appellate briefs filed on behalf of Pastrick do not challenge or dispute any of these findings.

The trial court was also cognizant of the difficulties faced by Pabey in discovering and presenting evidence to support his claims.

Given the voluminous, widespread and insidious nature of the misconduct proven, together with the sheer number of voters impacted by that misconduct, [\*\*21] petitioner Pabey, his legal counsel, and amateur investigators faced a herculean task of locating and interviewing absentee voters, visiting multi-family dwellings and housing projects, gathering and combing through voluminous election documents, and analyzing, comparing, sifting and assembling the information [\*\*1147] necessary to present their case. . . . In short, the time constraints that govern election contests, primarily designed to serve important interests and needs of election officials and the public interest in finality, simply do not work well in those elections where misconduct is of the dimension and multi-faceted variety present here.

*Id.* at 92-93. Commenting on the "reluctance [of] voters to candidly discuss the circumstances surrounding their absentee vote," the judge observed: "It is wholly natural, of course, that voters would be reluctant to expose themselves to potential criminal liability. . . ." *Id.* at 93. The judge also noted that, in the course of the trial, several Pastrick supporters were involved in various attempts to influence or prevent witnesses' testimony, *id.* at 94, including instructing a witness to "feign a lack of knowledge on the witness [\*\*22] stand." *Id.* at 87.<sup>3</sup>

3 At the conclusion of the final judgment, the trial court noted that it had referred to Lake County Prosecutor Bernard Carter details regarding conduct of several specific Pastrick supporters who had threatened and/or otherwise at-

tempted to influence testimony of witnesses in this case, and further noted that the court had taken "appropriate action" with respect to a Lake County judge who reportedly was indicating to prospective witnesses that they did not have to testify unless they had been paid a \$ 20.00 witness fee. Judgment at 101-103.

Indiana law provides two methods to examine the results of elections: an election "recount" and an election "contest." *See Ind. Code §§ 3-12-6-1 et seq.* (recount) and *3-12-8-1 et seq.* (contest). Pabey originally challenged the results of the primary under both of these statutes. However, he subsequently dropped his request for a recount and his recount petition was dismissed with prejudice. (Br. of Appellee, **[\*\*23]** Pastrick at 2). As such, what is at issue in this proceeding is solely an election "contest" under *Indiana Code § 3-12-8-1 et seq.* We will refer to the election contest chapter of the Indiana Code as the "Election Contest Statute."

The Election Contest Statute provides that "the court shall determine the issues raised by the petition and answer to the petition." *Ind. Code § 3-12-8-17(b)*. As relevant to the issue before us, both *section 2* of the statute, which prescribes the grounds upon which an election may be contested, and *section 6*, which designates the required content of a petition to contest an election, contain substantially similar language specifying that an election may be contested on the following grounds:

- (1) The contestee was ineligible.
- (2) A mistake occurred in the printing or distribution of ballots used in the election that makes it impossible to determine which candidate received the highest number of votes.
- (3) A mistake occurred in the programming of a voting machine or an electronic voting system, making it impossible to determine the candidate who received the highest number of votes.

(4) A voting **[\*\*24]** machine or an electronic voting system malfunctioned, making it impossible to determine the candidate who received the highest number of votes.

(5) A deliberate act or series of actions occurred making it impossible to determine the candidate who received the highest number of votes cast in the election.

*Ind. Code § 3-12-8-2; see also Ind. Code § 3-12-8-6(a)(3)*. Pabey contested the results of the East Chicago mayoral primary pursuant to *subsection (5)*, that is, that a deliberate series of actions had occurred **[\*1148]** that made it impossible to determine the candidate who had received the highest number of votes cast in the primary, to which we will refer hereafter as the "Deliberate Actions" ground.

The statutory language in the Deliberate Actions ground presents various difficulties in interpretation. It is not susceptible to literal interpretation and application. For example, the phrase "deliberate acts or series of actions" is unclear because it could be interpreted to mean conscious human behavior. In addition, the phrase "number of votes cast" literally includes both legal and illegal votes. Finally, the intended application **[\*\*25]** and methodology prescribed by the phrase "impossible to determine" is not apparent from the text, and has never been construed by the appellate courts of Indiana. Because of these ambiguities, judicial construction is required.

While this Court has the inherent power to protect voters and candidates from election fraud and unlawfulness, *Nicely v. Wildey*, 197 N.E. at 847, the legislature "may set up machinery for the conduct of elections," *id.*, and we prefer to exercise our authority within the constraints of the Indiana Election Contest Statute.

The process of statutory construction is guided by well-recognized principles. "Our objective in statutory construction is to determine and

effect the intent of the legislature." *Matter of Lawrance*, 579 N.E.2d 32, 38 (Ind. 1991). We do not presume that statutory language "is meaningless and without a definite purpose" but rather seek to give effect "to every word and clause." *Combs v. Cook*, 238 Ind. 392, 397, 151 N.E.2d 144, 147 (1958). "Where possible, every word must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the [\*\*26] statute." *Hall Drive Ins, Inc., v. City of Fort Wayne*, 773 N.E.2d 255, 257 (Ind. 2002). We must assume that the language employed in a statute was used intentionally. *Burks v. Bolerjack*, 427 N.E.2d 887, 890 (Ind. 1981). We "will presume that the legislature did not enact a useless provision." *Robinson v. Wroblewski*, 704 N.E.2d 467, 475 (Ind. 1998). In interpreting a statute, we must seek to "give it a practical application, to construe it so as to prevent absurdity, hardship, or injustice, and to favor public convenience." *Baker v. State*, 483 N.E.2d 772, 774 (Ind. Ct. App. 1985). When deciding questions of statutory interpretation, appellate courts need not defer to a trial court's interpretation of the statute's meaning. *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001).

In addition, this Court has long held that statutes providing for contesting elections "should be liberally construed in order that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections." *Tombaugh v. Grogg*, 146 Ind. 99, 103, 44 N.E. 994, 995 (1896); [\*\*27] see also *Hadley v. Gutridge*, 58 Ind. 302, 309 (1877).

The trial court noted that the statutory "deliberate act or series of actions" language does not require the conduct to be a species of "vote fraud," a criminal act, or otherwise proscribed by law. Judgment at 83. The legislature cannot have intended that *any* "act or series of actions" can trigger a special election. Of course, the conduct of every election campaign will in-

volve an "act or series of actions" by candidates, political parties, and election officials alike. Standing alone, the phrase "act or series of actions" is ineffectual. The statute further requires that, to support an election contest and to justify a special election, the act or actions must be "deliberate." *Ind. Code §§ 3-12-8-2(5), -6(a)3(E)*. Used in this context, the noun "deliberate" means "considered or [\*\*1149] planned in advance with a full awareness of everything involved; premeditated" or "done or said on purpose; intentional." *American Heritage Dictionary, Second College Edition (1982)* at 378. But such a qualification would likewise apply to the ordinary purposeful but lawful activities of candidates [\*\*28] and political parties in the election process. Thus understood, the phrase standing alone would lack any definite purpose and would be meaningless, contrary to the rules of statutory construction noted above.

The statutory language adds one further qualification, however. It requires that the deliberate acts or series of actions must result in "making it impossible to determine the candidate who received the highest number of votes cast in the election." *Ind. Code §§ 3-12-8-2(5), -6(a)3(E)*. Interpreting the phrase "deliberate act or series of actions" so as to have the purpose and meaning intended, we conclude that it requires the acts or series of actions to be deliberate in the sense of being purposeful in that the actor or actors knew or reasonably should have known that such conduct would "make it impossible" to determine the candidate receiving the most votes.

As to the phrase "votes cast in the election" used in the statute, the plain meaning demonstrates that the legislature meant to restrict this ground to votes actually cast and not to include potential votes that were not actually cast. However, by the word "votes," the legislature could not [\*\*29] have meant it to include votes *illegally* cast. To impose such a meaning would render ineffectual the purpose of the statute.

More than a century ago, this Court recognized that the "true gravamen of the case, whatever may be the ground of contest, is 'the highest number of legal votes.'" *Dobyns v. Weadon*, 50 Ind. 298, 302 (1875) (emphasis omitted). We hold that the word "votes," as used in the phrase "highest number of votes," means *legal* votes.

The last and most challenging issue relating to the Deliberate Acts ground is the application and methodology intended by the phrase "impossible to determine." The trial judge focused on individual ballots to determine whether Pabey proved to a mathematical certainty that there existed a number of invalid votes cast that equaled or exceeded Pastrick's margin of victory. While recognizing the appeal of granting "some form of relief to petitioner, given the direct, competent, and convincing evidence that established the pervasive fraud, illegal conduct, and violations of elections law," Judgment at 92, the trial court believed:

[A] court is not free to engage in speculation as to whether the will of the electorate **[\*\*30]** has been served or to impose . . . its *subjective* determination as to whether it is "impossible" to determine which candidate received the most votes in an election. Objective factors established by the evidence must guide that determination.

*Id.* at 97 (emphasis in original). The trial court declared 155 votes to be invalid but concluded "that those invalid votes were the result of a series of deliberate actions that do not make it impossible to determine which of the candidates" received the most votes. *Id.* at 101. This construction is unnecessarily restrictive and incorrect.

The last four grounds for a special election quoted above from *section 2* and *subsection 6(a)(3)* of the Election Contest Statute each contain the "making it impossible" qualification. Of these four, clearly the last one, the Deliberate Actions ground, specifying conduct in

the nature of purposeful behavior, is in stark contrast to the first three, which encompass inadvertent human error or device malfunction. **[\*1150]** This distinction is significant. The occurrence and resulting consequences of printing, distribution, or programming mistakes, or machine/system malfunctions, referred to in the prior three **[\*\*31]** grounds are likely to be ascertainable with relative objectivity.

In contrast, the disruptive effects of deliberate conduct committed with the express purpose of obscuring the election outcome based on legal votes cast is likely to be more invidious and its results difficult to ascertain and quantify. Schemes that seek to discourage proper and confidential voting or that endeavor to introduce unintended or illegal votes into the outcome will inevitably produce outcome distortions that defy precise quantification. Furthermore, the grounds of mistake and malfunction are distinguished by the absence of deliberate human efforts to thwart true election results, and are generally not obscured by the material witnesses' self-interest or desire to avoid criminal self-incrimination. With its enactment of the Deliberate Actions ground in the Election Contest Statute, the legislature expressly intended to provide the remedy of a special election not merely for inadvertent mistakes and malfunctions, but also for deliberate conduct. In construing the language of these subsections, we must interpret and apply them in such a manner as to achieve the effect intended. As to the Deliberate Actions **[\*\*32]** ground, the legislature could not reasonably have intended to immunize obviously corrupt elections where the resulting distortion of an election outcome could not be precisely traced and mathematically determined.

On the other hand, the mere occurrence of conduct by one or more persons who knew or reasonably should have known that the conduct would make it impossible to determine the candidate receiving the most valid votes, but which deliberate conduct does not affect the outcome

of an election, would be inconsistent with the language "makes it impossible to determine the candidate who received the highest number of votes" and thus cannot be a valid ground requiring a special election. We are convinced that this language was intended to require that the results of an election contested under the Deliberate Actions ground may not be set aside and a special election ordered unless the deliberate acts or series of actions succeed in substantially undermining the reliability of the election and the trustworthiness of its outcome.

We therefore hold that the burden upon a challenger seeking a special election under the Deliberate Actions ground in *subsections 2(5) and 6(a)(3)(E)* of **[\*\*33]** the Election Contest statute is to conclusively demonstrate (a) the occurrence of an act or series of actions by one or more persons who knew or reasonably should have known that such conduct would make it impossible to determine which candidate receives the most legal votes cast in the election, and (b) the deliberate act or series of actions so infected the election process as to profoundly undermine the integrity of the election and the trustworthiness of its outcome. <sup>4</sup> A special election should be ordered only in rare and exceptional cases.

4 Under these subsections, a contestor need not prove to a mathematical certainty that the number of invalid votes equaled or exceeded the contestee's margin of victory, but such proof would of course be sufficient to warrant relief.

This methodology applies only to the "deliberate acts or series of actions" in *subsections 2(5) and 6(a)(3)(E)*, but not to the same phrase as used based on mistakes and malfunctions stated in the grounds set forth in *subsections 2(2)-(4)* **[\*\*34]** **[\*1151]** and *6(a)(3)(B)-(D)*. The methodology utilized by the trial court here, requiring a mathematically sufficient number of resulting invalid ballots to be demonstrated, is appropriate to a proceeding under

*subsections 2(2)-(4) and 6(a)(3)(B)-(D)* of the Election Contest Statute.

In the present case, the undisputed trial court findings establish the occurrence of a deliberate series of actions that "perverted the absentee voting process and compromised the integrity and results of that election." Judgment at 9. The court found that this scheme subjected "the naive, the neophytes, the infirm and the needy" to "unscrupulous election tactics," *id.* at 89, that there was "convincing evidence that established the pervasive fraud, illegal conduct, and violations of elections law," *id.*, and that the misconduct was "voluminous, widespread and insidious." *Id.* at 92.

When as here an election is characterized by a widespread and pervasive pattern of deliberate conduct calculated to cast unlawful and deceptive ballots, the election results are inherently deceptive and unreliable. Widespread corruption of this nature has a high probability of producing untold improper votes and unreliable **[\*\*35]** election results by coercing or intimidating citizens to vote in disregard of their own preferences and by manipulating them into voting when they would otherwise not vote at all. The effectiveness and breadth of such a scheme is inherently difficult to quantify. The opportunities for positive proof of individual ballot improprieties will inevitably be relatively few in comparison with the actual impact of such efforts.

The trial court findings abound with instances of concerted, purposeful efforts such as "a predatory pattern exercised by Pastrick supporters," Judgment at 9; "weekly exhortations in meetings," *id.* at 84; and "direct solicitation of a vote for cash," *id.* at 85 (emphasis in Judgment). As found by the trial judge, the deliberate series of actions in the campaign "compromised the integrity and the results" of the election. *Id.* at 9. The magnitude, pervasiveness, and widespread effect of the deliberate series of actions found in this case leads to but one conclusion. The Pastrick campaign cer-

tainly knew or consciously intended that the results of their conduct would so inhibit opposing votes and inject invalid favorable votes as to profoundly undermine **[\*\*36]** the integrity of the election and the trustworthiness of its outcome. And this objective was clearly achieved. Given the exceptional facts and circumstances of this case, any other conclusion is inconceivable.

In view of the uncontested factual findings of the trial court, we conclude that Pabey has established that a deliberate series of actions occurred making it impossible to determine the candidate who received the highest number of legal votes cast in the election and that the trial court erred in denying Pabey's request for a special election.<sup>5</sup> While this remedy will be appropriate only rarely and under the most egregious circumstances, it is compelled by the facts of this case.

<sup>5</sup> *Indiana Code 3-12-8-17(e)* specifies that a special election ordered in an election contest "shall be conducted in the precincts identified in the petition in which the court determines that . . . the deliberate act or series of actions occurred." Because the statute requires the petition for an election contest to "identify each precinct *or other location* in which the act or series of actions occurred," *Ind. Code § 3-12-8-6(c)* (emphasis added), a special election may be generally ordered without limitation to specific precincts where, as here, the petition alleges that "the acts and series of actions . . . occurred in each and every one" of the thirty-three (33) precincts in the City of East Chicago. Appellant's Appendix at 128.

**[\*\*37] [\*1152] III**

Pastrick contends that even if the actions found by the trial court to have occurred make it impossible to determine the candidate who

received the highest number of votes cast in the election, a special election is not a permissible remedy. He points to the remedy section of the Election Recount Statute which provides:

(a) A contest shall be heard and determined by the court without a jury subject to the Indiana Rules of Trial Procedure.

(b) The court shall determine the issues raised by the petition and answer to the petition.

(c) After hearing and determining a petition alleging that a candidate is ineligible, the court shall declare as elected or nominated the qualified candidate who received the highest number of votes and render judgment accordingly.

(d) If the court finds that:

(1) A mistake in the printing or distribution of the ballots;

(2) A mistake in the programming of a voting machine or an electronic voting system; or

(3) A malfunction of a voting machine or an electronic voting system; makes it impossible to determine which candidate received the highest number of votes, the court shall order that a special election be conducted under IC 3-10-8.

**[\*\*38]** (e) The special election shall be conducted in the precincts identified in the petition in which the court determines that:

(1) Ballots containing the printing mistake or distributed by mistake were cast;

(2) A mistake occurred in the programming of a voting machine or an electronic voting system; or

(3) A voting machine or an electronic voting system malfunctioned.

*Ind. Code § 3-12-8-17.* The omission, Pastrick argues, from *subsections (d) and (e)*, of any mention of "deliberate act or series of actions . . . making it impossible to determine which candidate received the highest number of

votes" indicates that the Legislature did not intend that a special election be a remedy under such circumstances.

Our analysis on this point requires a review of the legislative history of the Election Contest Statute and decisions of the Indiana Court of Appeals interpreting it. The modern form of the Election Contest Statute was enacted in 1986. It authorized eligible parties to contest elections on grounds of (1) irregularity or misconduct by election officials, (2) ineligibility of a candidate, and (3) "mistake or fraud in the official count of the votes. **[\*\*39]** " *Ind. Code* §§ 3-12-8-2, -6 (1986 Supp.). The Statute did not provide a special election as a remedy. *See Ind. Code* § 3-12-8-17 (1986 Supp.). In 1988, the first and third of those grounds were deleted such that the Election Contest Statute was apparently available only to contest elections on grounds of ineligibility of the candidate. 1988 Pub. L. 10, §§ 153, 155. The remedy section remained unchanged. *See Ind. Code* § 3-12-8-17 (1988). In 1989, the Statute was amended to authorize eligible parties also to contest elections on grounds that "a mistake occurred in the printing or distribution of ballots [making] it impossible to determine which candidate received the highest number of votes." 1989 Pub. L. 10, §§ 12, 13; *Indiana Code* § 3-12-8-2, -6 (1989 Supp.). The 1989 amendments also added a special election remedy for the first time but only in the precincts where the mistakenly printed or distributed ballots were cast. *Id.*, § 14; *Ind. Code* § 3-12-8-17 (1989 Supp.).

**[\*1153]** Despite the elimination of the grounds of irregularity or misconduct **[\*\*40]** by election officials and mistake or fraud in the official count, an unsuccessful primary candidate in a 1991 primary election sought to file an election contest on those bases. The Court of Appeals held that, notwithstanding the 1989 legislative changes, a candidate could challenge an election based on fraud under the Election Contest Statute. *Hatcher v. Barnes*, 597 N.E.2d 974 (*Ind. Ct. App.* 1992). It reasoned that

"fraud of all kinds is abhorrent to the law, and if one person sustains injury through the fraud of another, courts have jurisdiction to afford a proper remedy" for fraud. *Id.* at 976. The court also stated that it did not know why the legislature took fraud out of the election contest statute, but that it was "convinced that [the Legislature] did not do so with any intention of precluding candidates from public office from a remedy if fraud indeed occurred." *Id.* at 977. *See also Kraft v. King*, 585 N.E.2d 308, 311 (*Ind. Ct. App.* 1992) (Sullivan, J., dissenting).

Hatcher was the last word on the subject until 1999 when the Statute was amended in two places to authorize eligible parties also to **[\*\*41]** contest elections on grounds that "[a] deliberate act or series of actions occurred making it impossible to determine the candidate who received the highest number of votes cast in the election" and to specify this as one of the grounds that may be included in a petition to contest an election. 1999 Pub. L. 176, § 100; *Ind. Code* § 3-12-8-2, -6 (1999 Supp.). In 2004, after this case had reached this Court, the legislature corrected an apparently inadvertent omission by amending *section 17(d)* of the Election Contest Statute to conform with *subsections 2(5) and 6(a)(3)(E)* which had been adopted in 1999, to expressly provide that a special election could be ordered in such circumstances. 2004 Pub. L. 14, § 161.

Based upon this history, we conclude that eligible parties are authorized to contest elections on grounds of intentional misconduct under the Election Contest Statute and that the court has authority to order that a special election be conducted where it finds that the occurrence of a deliberate act or series of actions makes it impossible to determine which candidate received the highest number of votes.

#### IV

The Lake County Election **[\*\*42]** Board by cross appeal challenges the trial court's determination that certain votes of the 155 absentee

ballots cast in the primary are invalid because they had been cast by individuals "who applied to vote absentee by mail and made a false representation to the Lake County Election Board concerning the reason they were entitled to vote in that manner." Judgment at 87. There are 55 ballots that fall into this category. The Lake County Election Board contests the conclusion that these votes should not be counted.

We noted in footnotes 1 and 2, *supra*, several of the provisions of law applicable to this claim. *Indiana Code § 3-11-10-24* provides that a voter who satisfies certain specified conditions is entitled to vote by mail. Among these conditions are the following: that the voter will be "absent from the county on election day; . . . absent from the precinct of the voter's residence on election day because of service in certain statutorily-prescribed election day worker positions; confined on election day to the voter's residence, to a health care facility, or to a hospital because of an illness or injury; . . . [is] an elderly voter; . . . [or] **[\*\*43]** is scheduled to work at the person's regular place of employment during the entire twelve (12) hours that the polls **[\*1154]** are open." *Id.* A voter falling into one or more of these categories who wishes to cast an absentee ballot by mail submits an "Application for Absentee Ballot" on a form prescribed by the Indiana Election Commission to the County Election Board. The Board then provides the voter with an absentee ballot.

The County Election Board argues that the trial court erred in invalidating the votes in each of these 55 instances where the subject voter simply indicated on the ABS-1 Form of Application for Absentee Ballot that he or she would be absent from the County on Election Day, thus serving as a basis for Voting by Mail, when, in fact, the individual was not actually absent from the County on Election Day.

As discussed in Part II above, our ultimate resolution of this case does not rest on the mathematical comparison of votes invalidated

to Pastrick's final victory margin. Instead, it rests on the trial court's unchallenged findings and conclusions of pervasive and widespread deliberate conduct that "perverted the absentee voting process and compromised the integrity **[\*\*44]** and results of that election." Judgment at 92. The total number of absentee votes invalidated by the trial court is not determinative. Our conclusion is not altered whether the number of invalidated absentee ballots is 155 as found by the trial court, or 100, as urged by the Lake County Election Board.

### Conclusion

We reverse the trial court's determination denying a special election and remand to the trial court with directions to promptly order a special election by issuing a writ of election pursuant to *Indiana Code § 3-10-8-3*, and for all further proceedings consistent with this opinion. Any Petition for Rehearing must be actually received by the Clerk of Courts not later than ten calendar days following the date of this opinion, notwithstanding provisions to the contrary in *Indiana Appellate Rule 54(B)*.

Shepard, C.J., and Rucker, J. concur. Boehm, J., dissents with separate opinion in which Sullivan, J., concurs.

**DISSENT BY:** Boehm

### DISSENT

Boehm, J., dissenting.

I respectfully dissent. In my view, the controlling question is not whether election law violations occurred. The trial court found they did, and that finding was plainly supported by **[\*\*45]** the evidence. But the central issue here is whether the corruption was the cause of the election result. The presence of corruption, even if "widespread," is no basis to upset an election and nullify the votes of the electorate if a majority of untainted votes supported the winning candidate. As the majority opinion

spells out in some detail, the trial court found election law violations, and they were not limited to a few isolated instances. But the standard set forth in Indiana law for overturning an election it is that it is "impossible to determine the candidate who received the highest number of votes." *Ind. Code § 3-12-8-2* (1999). The trial court, like the majority, read "the highest number of votes" to mean legitimate votes. The trial court, despite the portions of the judgment quoted by the majority, found that the plaintiffs failed to carry their burden of establishing that.

The trial court's finding, like any fact determination, is reversible only if clearly erroneous. *Infinity Prods. v. Quandt*, 810 N.E.2d 1028, 1031 (Ind. 2004) (slip op. at 5) (quoting *Bussing v. Ind. Dept of Transp.*, 779 N.E.2d 98, 102 (Ind. Ct. App. 2002), **[\*\*46]** trans. denied). I believe that the trial court carefully analyzed these complex facts, and its finding is correct on this record. The trial court found the statute to require that **[\*1155]** the plaintiffs establish, by a preponderance of the evidence, that the "deliberate acts" rendered it "impossible" to determine who got the most legitimate votes. I think that is the correct reading of the statute, and I believe it is the same reading the majority gives it. I also believe that reading makes sense. If corruption is widespread but has no effect on the election result, neither the public nor the parties should be put to the trouble of redoing the election. This does not mean the plaintiffs had to prove enough individual instances of unlawful votes to tip the election. It does mean that they needed to prove that the unlawful practices made it more likely than not that the result of the election, measured by lawful votes, was unknowable. There are a number of ways that a statistician might attempt to establish that it was a more probable than not that the deliberate acts affected the result. Here the trial court's judgment turned on its finding that there was no such showing. Neither plaintiffs **[\*\*47]** nor the majority show how, on this re-

cord, the trial court was incorrect, much less clearly erroneous.

The majority concludes that it is irrelevant to the result here whether the trial court was correct in finding 155 invalid votes, rather than 100. I believe the trial court's calculations of invalid votes were excessively generous to the plaintiffs, and I do not agree that it is irrelevant. Fifty-five of the 155 ballots the trial court found invalid were defective only because they were based on an absentee affidavit that stated that the voter expected to be absent from the county on election day, but in fact the voter was in Lake County on that day. I believe it is common practice, and permissible, to vote by absentee ballot if there is any chance that voting on election day will not be possible. In today's commercial world, many people are unsure of their schedules and vote absentee to be sure they exercise their franchise, even if they know they may indeed be present on election day. To be sure, others may abuse that privilege and vote absentee in order to work at the polls in another precinct, or for other less valid reasons. But as long as the voter votes only once, and in **[\*\*48]** the precinct in which he or she is eligible, I would not disenfranchise that voter as the trial court did. The reason I believe this issue is relevant is that the conclusion that the legitimate votes are "impossible" to tally obviously turns on how close the election was. If over one third of the invalid ballots were in fact valid, it obviously affects the margin the plaintiffs need to overcome (increasing it from 278 to 333). But importantly, it also alters the percentage of irregular absentee ballots proven from 8.2% (155 of 1950) to 5.1%. It also increases the percentage of absentee ballots that were cast properly. The net result is, as the trial court found even without this adjustment, plaintiffs have not shown that the result of the election is more likely than not undetermined.

I also believe the majority's standard for judicial intervention in an election is problematic. The statute as written provides a relatively ob-

jective standard: are enough votes tainted that it is more likely than not that the result of the election, measured by lawful ballots, is unknown. The majority puts an essentially subjective patina on this test and calls for a new election whenever wrongdoing **[\*\*49]** "profoundly undermines the integrity of the election and the trustworthiness of its outcome." This seems to me to invite courts to exercise essentially discretionary authority to alter election results that they deem undermined. Given that many Indiana trial judges are selected by partisan election, it seems an unwise expansion of the quite limited standard selected by the legislature, and one calculated to lead to claims of improper judicial interference with the electoral process.

**[\*1156]** The majority's reliance on *State ex rel. Nicely v. Wildey*, 197 N.E. 844, 209 Ind. 1 (1935) is misplaced. That case stated that elections do not "belong" to the legislature. *Id.* at 847-48. But neither Nicely nor any of the cases it cites for that proposition suggests that the legislature cannot prescribe processes for challenging election results. They do stand for the proposition that a writ of *quo warranto* may be a vehicle to challenge an officeholder's right to office, even if there are also statutory remedies. If it can be shown that the officeholder did not receive the most votes, he or she may be removed by that traditional common law writ proceeding, even **[\*\*50]** if there are also statutory remedies that might be invoked. See, e.g., *State ex rel. Waymire v. Shay*, 101 Ind. 36, 37 (1885). But that does not suggest, as the majority implies, that the courts have unfettered authority to disregard legislative standards if, as here, a plaintiff invokes a statutory procedure. The election contest remedy provided by Indiana statute is specific in what must be shown and when it must be shown, and neither Mississippi case law nor Indiana precedent provides any basis for disregarding the statutory standards if a statutory challenge is raised. Moreover, if *quo warranto* had been attempted, it would require essentially the same showing that the statute demands for an election contest:

proof that Pabey received the greater number of legitimate votes. As this Court put it in *Waymire*, "Whatever form the contest may assume, the pivotal question is, Who received the highest number of votes?" *Id.* at 38.

The difficulties the plaintiffs faced in proving their case were substantial, but are in my view no reason to upset an election. To be sure, plaintiffs here labored under severe constraints, but those constraints are **[\*\*51]** imposed by statute and are designed to prevent judicial interference with electoral results except in the most extreme circumstances. Indiana law requires an election contest, as opposed to a recount, to be filed within seven days after the election. *I.C.* § 3-12-8-5 (1998). The matter is to be heard within twenty days after notice of a contest is served. *I.C.* § 3-12-8-16. This very short timetable undoubtedly imposes limits on the access to information and discovery that is available in more conventional lawsuits. But there is a very good reason why the election laws require this very expedited resolution of election disputes, even at the cost of sacrificing the court's normal opportunities for fact finding. There are many other remedies for the actions complained of in addition to setting aside an election. These include criminal prosecution of those who violate the law. As the entire nation painfully learned in the 2000 presidential contest, protracted election disputes leave the leadership and governance of the body politic in question. Upsetting an election thus visits a penalty on all citizens of the affected electorate, **[\*\*52]** not just the wrongdoers.

In sum, the legislature has provided that the election stands if, after disregarding the votes shown to be tainted, there is no showing that the result is unknown. The majority cites authorities under other statutes that suggest a lower threshold of proof may be sufficient to overturn an election. I believe under our statutes Indiana courts have no business imposing a higher standard on the electorate. The trial court faithfully carried out the charge given to

timelines, this Court would create a late ballot vacancy (which is treated differently than an early vacancies). This vacancy, unlike an early vacancy, could not be filled according to Plaintiff. Thus a candidate could, by avoiding the challenge deadline, create a "free-ride" for himself/herself. This would be abhorrent to good public policy.

**IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED** by the Court that Petitioner's request for Preliminary Injunction is denied.

**SO ORDERED** this 26th day of October, 2007.

  
**THOMAS ALEVIZOS**  
**JUDGE**

cc: Jeffrey Gunning, Esq.  
Robert C. Szalagyi, Esq.  
Robert J. Behler  
Joseph Brekke  
Clerk  
/sp