

VOTER REGISTRATION CHALLENGES IN WASHINGTON

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I. INTRODUCTION

Voter registration is one of the major building blocks of our system for conducting elections. The right to vote is fundamental, and so measures that make voter registration readily available play a vital role in assuring that qualified voters will be able to participate in the electoral process. At the same time, measures to assure that voter rolls are limited to legally qualified voters also play a vital role in the integrity of the electoral process.

Washington law provides several methods for review of registration records to remove voters who lack the legal qualifications to vote. These include processes for verifying data contained within voter registration applications,² routine list maintenance based on changes of address or returned mail,³ notices that a voter has died⁴ been judicially declared mentally incapacitated,⁵ or been convicted of a felony.⁶ They also include processes by which the Secretary of State reviews the database for duplicate registrations,⁷ and compares the database with other state data to detect ineligible felons.⁸

In addition to these procedures, through which election officials review the registration rolls, state law permits voters to challenge the registration of another voter when they have evidence that the other voter is improperly registered. The legislature thoroughly rewrote the statutes governing this process at their 2006 session, resulting in a significantly more clear and comprehensive statutory procedure. This paper summarizes that procedure and addresses the legal issues that can arise in the course of a voter registration challenge.

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² RCW 29A.08.107 (modified by court injunction, *Washington Ass'n of Churches v. Reed*, U.S.D.C. No. CV06-0726RSM).

³ RCW 29A.08.605.

⁴ RCW 29A.08.510.

⁵ RCW 29A.08.515.

⁶ RCW 29A.08.520.

⁷ RCW 29A.08.610.

⁸ RCW 29A.08.520.

II. PROCEDURE

A. Who May Challenge a Registration

State law authorizes three categories of people to challenge the registration of a voter: Any registered voter, or the county prosecuting attorney, may challenge a voters' registration at any time. RCW 29A.08.810(2). In addition, a poll site judge or inspector may challenge the registration of a voter who presents himself or herself to vote on election day. *Id.*

B. Grounds and Procedure for Raising a Voter Registration Challenge

1. Grounds and Procedure in General

As revised in 2006, Washington law now sets forth in greater detail and clarity both the grounds on which a voter registration can be challenged and the information that the challenger must provide in support of a challenge. The statute begins with the statement that, "Registration of a person as a voter is presumptive evidence of his or her right to vote."⁹ RCW 29A.08.810(1). It then provides that challenge to a voter's registration must be based on personal knowledge of at least one of five potential grounds:

1. Felony conviction, for which the voter's civil rights have not been restored. RCW 29A.08.810(1)(a).
2. Judicial declaration of ineligibility due to mental incompetency. RCW 29A.08.810(1)(b).
3. Residence. RCW 29A.08.810(1)(c).
4. Age (as of the date of the next election). RCW 29A.08.810(1)(d).
5. Citizenship. RCW 29A.08.810(1)(e).

In order to commence the challenge, the challenger must "file a signed affidavit subject to the penalties of perjury swearing that, to his or her personal knowledge and belief, having exercised due diligence to personally verify the evidence presented, the challenged voter either is not qualified to vote or does not reside at the address given on his or her voter registration record" based on one of the grounds listed above. RCW 29A.08.810(3). The statute therefore clearly requires that the challenge be based on actual personal knowledge of the voter's status, and not merely upon suspicion, speculation, or information from anonymous third parties. *Id.*

The challenger must set forth in the affidavit itself the specific factual basis for the challenge. *Id.* A challenger therefore may not successfully commence a challenge merely by filing a generalized statement asserting that he or she has personal knowledge of the voter's lack of qualifications. The document initiating the challenge must, itself, set forth the factual basis for the challenge. *Id.* All documents pertaining to the challenge are public records. *Id.*

⁹ This is the only sentence that RCW 29A.08.810 contained prior to its 2006 amendment that remains part of the statute following the amendment. Other than that sentence, the 2006 legislation struck the entire text of the statute and substituted new language.

2. Grounds and Procedure When Challenged Based on Residence

When a challenge is based on the allegation that the voter does not reside at the address listed on his or her voter registration record, the statute requires that the challenger provide additional information. The challenger must either provide the challenged voter's actual residence on the challenge form, or submit alternative evidence to verify that the voter does not reside at the listed address. RCW 29A.08.810(1)(c)(i) & (ii).

This means, for example, that in a challenge based on knowledge that a voter claims to live at one address, but in fact lives at another, the challenger satisfies his or her initial "pleading" burden by providing the voter's true address in the affidavit that initiates the challenge, together with a statement of the factual basis for the challenge. *Id.*

The statute provides an alternative method of commencing a challenge based on residence when the challenger does not know where the voter actually resides. The statute provides that instead of providing the voter's actual residence on a challenge form, the challenger may "submit evidence that he or she exercised due diligence to verify that the challenged voter does not reside at the address provided and to attempt to contact the challenged voter to learn the challenged voter's actual residence," including that the challenger personally attempted to verify the voter's residence. RCW 29A.08.810(1)(c)(ii). If the challenger proceeds under this option, he or she is required to take five steps to verify that the voter does not live at the address listed on the registration record, and to set forth those actions in the affidavit that commences the challenge¹⁰:

1. Send a letter, with return service requested, to the challenged voter's residential address, and mailing address (if provided). RCW 29A.08.810(1)(c)(ii)(A).
2. Visit the address and contact persons there to determine whether the voter actually resides there. If not, the challenger must submit, with the challenge, a signed affidavit under penalty of perjury, from a person who owns, manages, resides at, or is employed at the property stating that to his her personal knowledge the voter does not reside there; RCW 29A.08.810(1)(c)(ii)(B).
3. Search local telephone directories, including online directories, to determine whether the voter maintains a telephone listing at any address in the county; RCW 29A.08.810(1)(c)(ii)(C).
4. Search the county auditor's property records to determine whether the voter owns any property in the county. RCW 29A.08.810(1)(c)(ii)(D).
5. Search the statewide voter registration database to determine if the voter is registered at any other address in the state. RCW 29A.08.810(1)(c)(ii)(E).

These requirements recognize a voter's registration is presumed valid until proven otherwise, and provide safeguards against unsubstantiated challenges. In order to validly register to vote, a

¹⁰ The statutory list of five actions is phrased in the conjunctive, joined with the word "and." RCW 29A.08.810(1)(c)(ii)(D). The challenger accordingly must take all five actions, not merely one of the five.

voter must provide, on the registration application, “the actual physical residence of the voter in Washington.” RCW 29A.08.010. If the challenger lacks personal knowledge as to where the challenged voter actually resides, the alternative method offered by RCW 29A.08.810(1)(c)(ii) offers challengers a way to allege, in essence, that he or she doesn’t know where the voter really lives but knows that the voter doesn’t live at the address on the registration record. It does so with a safeguard against unsubstantiated allegations, recognizing the presumptive validity of the registration and the importance of the right to vote.

3. Form of Challenge

The Secretary of State is required to develop a form for voter registration challenges, which county auditors must make available to prospective challengers. The challenger is not required to use the form, but may instead use “an official electronic voter registration challenge form template provided by the auditor or secretary of state that has been printed and signed by the challenger for submission.” RCW 29A.08.850.

Several aspects of this statute may potentially become significant in a particular challenge. First, although the statute states that the challenger is not required to use the Secretary’s form, the only stated alternative to the use of the form is the use of an electronic template, such as might be made available through a Web site. *Id.* This suggests that the challenger does not have the option of making up his or her own form. However, it might be argued that a challenger substantially complies with the statute by using a form that contains all of the elements of the Secretary’s form. *See* RCW 29A.08.840(1) (describing a challenge as being in the proper form if it substantially complies with the Secretary’s form). Second, the statute explicitly requires the challenger to sign the form. RCW 29A.08.850; RCW 29A.08.810(3). A challenge may not be initiated anonymously.

C. Deadlines for Filing Challenges

As a general rule, challenges must be filed not later than forty-five days before the next election. RCW 29A.08.820(1). If the voter registered to vote within sixty days before the election, or changed his or her residence within sixty days before the election without transferring his or her registration to the new address, a challenge may be filed not later than ten days before the election, or within ten days of the voter being added to the registration database, whichever is later. *Id.* The same deadlines apply to challenges initiated by the county prosecutor as to challenges initiated by registered voters. *Id.*

The deadline for filing a challenge relates to the determination of whether that voter may cast a valid ballot in an upcoming election. Missing a deadline does not mean that the voter’s registration cannot be challenged, but merely that a challenge cannot affect the challenged voter’s ballot in a specific election. If the challenge is filed within forty-five days before an election at which the challenged voter is otherwise eligible to vote, the voter’s registration record and poll book entry must be flagged so that the voter’s ballot can be identified as one cast by a challenged voter. RCW 29A.08.820(2)(a). If the challenge is filed before the auditor receives the voter’s ballot, it must be treated as a challenged ballot. RCW 29A.08.820(2)(b). If the

challenge is filed after the voter's ballot is received, the challenge can proceed but cannot affect the current election. RCW 29A.08.820(2)(c); *see also* RCW 29A.40.140.

D. Who Decides a Challenge

A challenge is decided either by the county auditor or by the county canvassing board, depending on when the challenge is filed. Challenges filed within forty-five days before an election are decided by the county canvassing board as part of the process for canvassing the election results. RCW 29A.08.820(2)(a). The county auditor decides the challenge if it is filed forty-five or more days before the next election. RCW 29A.08.820(3).

E. Rejection of Challenges Improper as to Form

The legislature has authorized the county auditor to summarily dismiss a challenge that is not in proper form or does not meet the legal grounds for a challenge. RCW 29A.08.840(1) A challenge is not in proper form if it is incomplete on its face or does not substantially comply with the form issued by the Secretary of State. *Id.*

This statutory provision should be understood in light of the presumption that a person's voter registration "is presumptive evidence of his or her right to vote." RCW 29A.08.810(1). Allowing the auditor to summarily dismiss charges that do not facially comply with the statutory requirements or legal basis for bringing a challenge has the effect of not subjecting voters to the burden of responding to patently insufficient challenges. The chilling effect of challenges that lack a legal or factual basis may be profound.

F. Hearing on Voter Registration Challenge

If the challenge is in proper form and alleges a statutory basis that meets the legal ground for a challenge, the auditor notifies the challenged voter and provides a copy of the affidavit. The auditor is also required to provide notice to any other person, upon request, including a copy of the materials provided to the challenged voter. RCW 29A.08.840(2). If the challenge is to the voter's residential address, the notice must also advise the voter of exceptions to the residence requirement allowed in RCW 29A.08.112, 29A.04.151, and Article VI, section 4 of the state constitution. *Id.* The auditor must schedule a hearing and provide notice of the time and place to the challenger and the challenged voter. *Id.* All notices must be by certified mail to the address provided in the voter registration record and any other address at which the voter is alleged to reside or the county auditor reasonably expects the voter to receive notice. RCW 29A.08.840(3).

The statute permits a challenged voter to avoid the challenge by transferring his or her registration or reregistering until the day before the hearing. RCW 29A.08.840(2).¹¹

¹¹ The option of reregistering under the cited statute must reasonably be construed to mean registering at a different address. It seems unlikely that the Legislature contemplated empowering the challenged voter to avoid the hearing merely by reregistering at the same address, particularly where the challenge is based upon evidence that the voter

At the hearing itself, the challenger and the challenged voter each have the option of appearing in person or submitting testimony by affidavit. RCW 29A.08.840(3). The challenger bears the burden of proving that the challenged voter's registration is improper by clear and convincing evidence. RCW 29A.08.840(4). The challenged voter is entitled to an opportunity to respond. *Id.* If the challenge is to the voter's residence, the voter may defend the challenge by providing evidence sufficient to convince the auditor or canvassing board that he or she lives at the location described on the registration record, or that the use of the location as a residence is supported by RCW 29A.08.112 or 29A.04.151, or by Article VI, Section 4 of the state constitution. RCW 29A.08.840(4).

If either the challenger or the challenged voter fails to appear at the hearing, the auditor or canvassing board must resolve the challenge based on the available evidence. RCW 29A.08.840(4).

G. Use of the Administrative Procedures Act as a Procedural Guide

The statutes governing voter registration challenges make no further provision for the details of actually conducting a hearing. In this light, county auditors or canvassing boards may want to consider the state's Administrative Procedures Act (APA) as a potential procedural guide. County agencies are not generally subject to the APA. RCW 34.05.010(2); *Andrew v. King Cy.*, 21 Wn. App. 566, 573 (1978). The APA does, however, provide the standards under which the final decision may be considered on judicial review. RCW 29A.08.840(6). Since a voter's constitutional right to vote is at issue on a voter registration challenge, the APA can also provide a procedural guide designed to protect the voter's right to due process of law, as well as providing the challenger with a structured opportunity to present the evidence supporting his or her allegation that the registration is invalid.

This suggests that if the decision-maker elects to use the APA as a model, the following APA provisions should be followed:

1. The decision should be made by the auditor or the statutory canvassing board (as applicable), rather than by delegated subordinates. RCW 34.05.425(1).¹² To delegate the hearing to subordinates would leave open the possibility of review by the auditor or canvassing board of the subordinate's decision, which may add an unnecessary step to the process. In other words, it is practical not to hold two hearings where one is sufficient. There may also be a question as to statutory authority to delegate.

doesn't live at that address. *See Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) ("The court must also avoid constructions that yield unlikely, absurd or strained consequences").

¹² RCW 29A.62.015 sets forth the membership of the canvassing board. That statute permits the auditor or prosecutor to either sit personally on the board or designate a deputy; similarly, it allows the chair of the county legislative authority to designate another member of the board. *Id.* If such designations are made, then the people designated constitute the "statutory canvassing board." The recommendation above is not intended to suggest that the auditor, prosecutor, and chair of the legislative authority must sit personally, but merely that they should not delegate the hearing to somebody other than the canvassing board, in the manner that is permissible under the APA.

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2. The voter or challenger may be represented by counsel, at their own expense. RCW 34.05.428(2).
3. The hearing must be recorded, although a court reporter is not necessary. The auditor or canvassing board is not required to provide a transcript at public expense, but either the voter or challenger may have a transcript made at their expense. RCW 34.05.449(4).
4. The hearing must ordinarily be open to the public. RCW 34.05.449(5).
5. All parties should be freely allowed to present the relevant facts and issues. The auditor, or canvassing board, shall regulate the conduct of the hearing. Both sides must be allowed the opportunity to respond, present evidence and argument, conduct cross-examination, and present rebuttal evidence. RCW 34.05.449(1) and (2). This is subject, of course, to reasonable efforts to control the hearing and keep it to the relevant subject.
6. The rules of evidence do not apply. All evidence is admissible:

if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

RCW 34.05.452. This means that evidence is freely admissible, without concern as to technical objections that might apply in court (although the rules of evidence may be used as a guide). However, the auditor or canvassing board may still exclude evidence that is “not of a kind prudent persons are accustomed to rely upon.” *Id.* The decision-maker is also required to suppress evidence based on constitutional principles (such as the right against self incrimination in a criminal sense), and privilege (such as the marital privilege, doctor-patient privilege, etc.). The auditor or canvassing board is also allowed to exclude evidence that is irrelevant, immaterial, or unduly repetitious, all of which provides the means to prevent a hearing from becoming excessively lengthy or tedious.

7. All testimony must be under oath or affirmation. RCW 34.05.452(3).¹³ This requirement, however, is generally regarded as applying to the witness physically testifying at the hearing. Since hearsay evidence is admissible, unsworn letters and other documents offered by witnesses or parties are generally accepted. In a voter registration challenge, parties may desire to present

¹³ County auditors have the authority to administer oaths. RCW 36.22.030. By statute, an oath is administered as follows:

The person who swears holds up his right hand, while the person administering the oath thus addresses him: “You do solemnly swear that the evidence you shall give in the issue (or matter) now pending between [the parties] shall be the truth, the whole truth, and nothing but the truth, so help you God.”

evidence in such forms as affidavits, declarations, or simple letters from neighbors regarding the use the voter makes of a particular address as a residence. The statute would not bar the acceptance of such evidence, but there may be issues regarding the weight it can be assigned. The problem here is that the opposing party has no opportunity to cross examine a witness who appears only in the form of a document. If an opposing party can identify a material reason why cross examination or rebuttal would assist the auditor in determining the relevant facts, it may be advisable to find a way of accommodating this desire. If the party's suggested reasons, however, would not change the result, it would be unnecessary to extend the hearing for this purpose, but the reasons should be noted in the final order.

8. The auditor or canvassing board should not communicate with either the voter or the challenger regarding the challenge, except when both are present or by means of correspondence directed to both, except to coordinate some procedural aspect of the matter. RCW 34.05.455(2). If the auditor or canvassing board has received any ex parte communications regarding the challenge, such communications should be placed on the record at the beginning of the hearing. RCW 34.05.455(5).

A script can be used to allow the auditor or chair of the canvassing board to easily cover the various items and to set the record for potential judicial review. Attached as an appendix is a suggested script, derived from one developed by the King County Prosecutor's Office, incorporating ideas generated by the Kitsap County Prosecutor's Office, as well as the ideas of the present author.

H. Consequence of Sustaining a Challenge

If a challenge is brought before a particular election, one of the questions that arise is whether the canvassing board should permit that voter's ballot to be counted. Obviously, if the voter's registration is held to be valid, the ballot must be counted. RCW 29A.08.840(6). If the voter's registration is held invalid, then the canvassing board's decision as to the validity of the ballot is more complex.

If the challenge is based on any ground other than a challenge to the voter's residence, and the canvassing board finds the registration invalid, then the challenged ballot is not counted. RCW 29A.08.840(5). However, if the challenge is based on the voter's residence, then the board must permit the voter to correct his or her registration and any races and ballot measures on the ballot that the voter would have been qualified to vote for shall be counted. *Id.* This result is similar to the treatment of provisional ballots cast in the wrong precinct.

As noted above, if the challenged voter casts a ballot by mail, then the challenge can only affect the ballot cast in a specific election if the challenge is filed prior to the county's receipt of the ballot. RCW 29A.40.140. This provision reflects the reality that if an absentee ballot has already been received by the time a challenge is filed the ballot will be intermixed with other ballots. The protections inherent in the concept of a secret ballot would preclude the identification of that ballot.

I. Judicial Review of Final Decision

“The decision of the county auditor or canvassing board is final subject only to judicial review by the superior court under chapter 34.05 RCW.” RCW 29A.08.840(6). This is the only reference to the administrative procedures act in the voter registration challenge statutes. It incorporates by reference the judicial review provisions of the APA.

Those provisions provide a mechanism by which courts review an administrative decision that was reached through an adjudicative hearing. This involves a court reviewing the record produced before the administrative agency, rather than conducting a new trial on the merits. *See* RCW 34.05.510 through 34.05.598; *Motley-Motley v. State*, 127 Wn. App. 62, 72-73, 110 P.3d 812 (2005) (as a general rule, the court may not consider new evidence and issues not raised before the administrative body, with exceptions set out in statute).

III. LEGAL STANDARDS FOR RESOLVING A CHALLENGE

A. Burden of Proof

The burden of proof determines which party must come forward with evidence and persuade the auditor or canvassing board that the challenged voter’s registration is invalid. Hypothetically, if no evidence were presented at all, the party having the burden of proof would lose.

The burden of proof always rests with the challenger. RCW 29A.08.840(4). This reflects the presumption that a person’s voter registration is evidence of his or her right to vote. RCW 29A.08.810(1).

B. Standard of Proof

A related question to the burden of proof is the standard by which the proof must be measured. For example, in most civil litigation, the standard is the “preponderance of the evidence.” Under this standard, if the party bearing the burden of proof offers evidence making it even slightly more likely that the facts are as he or she maintains, that party wins.

By statute, the challenger is required to prove that the voter’s registration is invalid “by clear and convincing evidence.” RCW 29A.08.840(4). The Washington Supreme Court has described clear and convincing evidence as evidence sufficient to convince the trier of fact (the auditor or canvassing board), “that the fact in issue is ‘highly probable.’” *Colonial Imports v. Carlton N.W.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993).

C. The Legal Concept of Residence for Voting Purposes

In many, but by no means all, challenges, the ultimate question to be determined is whether the challenger has proven that it is highly probable that the address on the registration record is not the voter’s true residence. Neither the statutes nor court decisions provide explicit guidance as to what elements will determine residence. A recent statutory amendment provides some guidance,

and a few court decisions provide additional instruction, but ultimately residence is a factual question, to be resolved by the auditor or canvassing board in light of all the evidence.

By statute, residence for voting purposes is defined as, “a person's permanent address where he or she physically resides and maintains his or her abode.” RCW 29A.04.151. The statute further sets forth, however, several reasons why a person may not lose residence, by reason of his or her absence, or gain residence despite his or her presence. The statute explains:

However, no person gains residence by reason of his or her presence or loses his or her residence by reason of his or her absence:

(1) While employed in the civil or military service of the state or of the United States;

(2) While engaged in the navigation of the waters of this state or the United States or the high seas;

(3) While a student at any institution of learning;

(4) While confined in any public prison.

Absence from the state on business shall not affect the question of residence of any person unless the right to vote has been claimed or exercised elsewhere.

Id. Thus, a voter will retain residence at a particular address even if he or she is absent for any of these reasons.

Conversely, his or her presence in the state for any of these purposes may not be sufficient to establish residence. *Id.* The statute in this regard should not be read in an unduly restrictive manner, however, and in particular neither military service nor status as a student necessarily *precludes* establishing a new residence. As the Washington Supreme Court explained in a different context, while military personnel and students have a right to retain their prior residence while away for those reasons, it is also possible to forfeit that right and to establish residence in a new location even while serving in the military or attending school. *Fiske v. Fiske*, 48 Wn.2d 69, 71-72, 290 P.2d 725 (1955). The pertinent question is whether the individual intended to do so. *Id.*

The *Fiske* decision is notable for reciting several other general principles regarding residence as well. Although the case arose in the context of a divorce action, much of the evidence concerned residence for voting purposes, which may accordingly be instructive in a voting context. General rules recited by the court included the principle that a residence once established is presumed to continue. *Id.*, 48 Wn.2d at 72. The voluntary acquisition of a new residence, however, abandons the previous one. *Id.* at 71. Finally, the case suggests that the finder of fact should be prepared to distinguish between evidence of future intent to reside at a location, and that of present residence. *Id.* at 73.

Washington courts have decided a few cases involving residence for purposes of running for, or serving in, elected office. Among those cases, the court of appeals briefly discussed the concept of residency in *Fruend v. Hastie*, 13 Wn. App. 731, 537 P.2d 804 (1975). In that case, the

successful candidate for Island County Sheriff faced a challenge to his right to hold office, based on the argument that he was actually a resident of Thurston County. *Id.* at 732-33. The court described the two elements of residency as including, “residence in fact, coupled with the purpose to make the place of residence one’s home.” *Id.* at 734 (quoting *In re Lassin*, 33 Wn.2d 163, 165-66, 204 P.2d 1071 (1949)). An intention to make a location a residence in the future is not enough. *Id.*¹⁴

In *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 969 P.2d 64 (1998), the court suggested additional facts that might support a finding that a person resides in a particular place.¹⁵ That case involved the residence of a Pierce County Superior Court Judge, who was married to a judge from Kitsap County. The opinion explained that the Pierce County judge had signed a refinancing agreement on his wife’s house in Kitsap County, and filed certain documents with the Public Disclosure Commission using the Kitsap County address, both facts that the challenger used to question his residence in Pierce County. The court explained that it appeared that the judge in fact lived in Pierce County, even if his wife did not. *Id.*, 136 Wn.2d at 902 n.10. The opinion also cited an older case for the proposition that “a change in residence does not consist solely in going to and living in another place, but it must be with the intent of making that place the permanent residence.” *Id.* (citing *Polk v. Polk*, 158 Wash. 242, 248, 290 P. 861 (1930)).

The case illustrates the kind of facts that the court regards as important. The individual at issue had lived with his first wife in a house in Tacoma until his divorce in 1989, and at that point he moved into a Tacoma apartment. *Id.* In 1990 he began living on a boat moored at the Tacoma Yacht Club where he paid a “live aboard” fee. When he bought the boat, he reported it as his new address to the IRS. In 1992 he married the Kitsap County judge, but the court explained that they both retained separate residences despite the marriage. They each apparently spent two nights each week at their respective residences, and divided the weekends. He received his mail at the boat. His driver’s license, checks, and car registration reflected the boat address. He maintained his voter registration in Pierce County.¹⁶ His bank accounts were in Pierce County, and he paid his living expenses from them. His banker, doctor, dentist, dry cleaner, and insurance agent were all in Pierce County, and he belonged to various organizations in Pierce County and none in Kitsap. *Id.*

¹⁴ The 2006 amendments to RCW 29A.08.840 modify at least one conclusion reached in *Fruend*, however. The *Fruend* court placed the burden of proof with the party asserting that a voter’s residence has changed. *Id.* at 734. The statute, as presently codified, however, explicitly provides that the burden of proof in a voter registration challenge always rests with the challenger. RCW 29A.08.840(4).

¹⁵ *Quick-Ruben* should be viewed with some caution on this subject, because the court’s discussion of residency was unnecessary to its decision in the case, which was based on procedural grounds. *Quick-Ruben*, 136 Wn.2d at 901. It might therefore be argued that the discussion of residence does not bind future courts. As a practical matter, however, the court’s commentary on the subject may be persuasive in the future.

¹⁶ The court listed this as a factor supporting a finding of residence in the county, but this seems to beg the question in a voter registration challenge. It would seem odd to rule that a person is properly registered in a county simply citing his or her voter registration in support of that fact.

Each of the factual elements recited as indicating residency in the county is potentially useful as an indicator in future cases. Presumably similar facts in the other cases would also support a finding of residency. Additionally, these facts should be regarded as merely illustrative, reflecting the details of the life of one particular individual. Other people might have different facts available to illustrate their intent as to residence.¹⁷

The case of *Dumas v. Gagner*, 137 Wn.2d 268, 971 P.2d 17 (1999), presented a residency question in a very different context. In that case, the parties all agreed as to where the voter lived. The question was whether that location should be regarded as within or without a particular district when the dividing line between districts cut through her property. *Id.* at 283. The court emphasized the “elastic” nature of the concept of residency, which must be interpreted in light of the purpose behind the particular statute under which residency is at issue. *Id.* at 286-87. For example, in *Dumas*, the issue concerned a candidate’s eligibility to take office. The court found a strong public interest in construing the concept of residence broadly in that context, in favor of the candidate’s eligibility and of the voters’ freedom of choice. *Id.* at 289-90. It seems likely that a court would find the protection of voting rights to be sufficiently important to justify a lenient view of residence as well, although certainly not one without limits.

Noting the broad construction given to the concept of residence in *Dumas*, it may be equally important to note the narrow construction afforded in a later election case, *In re Contested Election of Schoessler*, 140 Wn.2d 368, 998 P.2d 818 (2000). In that case, a voter challenged the election of a successful candidate for mayor based on the argument that the candidate did not reside in the city. *Id.*, 140 Wn.2d at 369. The court distinguished that case from *Dumas* on the basis that in *Dumas* the context of the challenge dictated that residence be construed broadly “because of the strong public policy in favor of eligibility for public office and the unique facts of that case,”¹⁸ but in *Schoessler* the case involved, “no facts which would justify a broad construction of the word ‘resident’ . . .” *Id.* at 391. The court relied upon the candidate’s lack of good faith in complying with the residence requirement, including his request that his ex-wife falsify information concerning his residence. *Id.* Although *Schoessler* was an election contest action, rather than a voter registration challenge, the court’s analysis may serve to emphasize the importance of the specific facts in each case. Where the voter acts in bad faith in asserting residence in a particular location, the facts of the case may strongly influence a court’s analysis.

The final decision as to where the voter resides depends upon the unique facts of a particular case. The Kitsap County Prosecutor has suggested that the following subject areas may yield relevant information. Some of these factors are specifically mentioned in *Quick-Ruben*, strengthening the suggestion that facts of this nature are relevant and helpful. Not all would necessarily apply in a particular case, and their relative importance would vary. The list includes:

¹⁷ The court’s discussion of the number of nights spent at each location is potentially important. The court did not suggest a “majority” rule—that is, that residence could be determined by finding out where the voter sleeps a majority of the nights. The court recognized that residence is a more ambiguous concept, suggesting that it cannot be reduced to numerical calculation. This decision illustrates a number of factors that the court regarded as significant but does not suggest a quest for mathematical certitude.

¹⁸ *Id.*, 140 Wn.2d at 390.

Family history
Marital history
Voter registration of spouse
Address listed on challenged voter's driver's license
Length of time spent at respective homes/residences
Mailing address
Address for IRS purposes
Titled record holder of real property
Percentage of time spent at respective locations
Length of time of residence listed in registration
Place of birth
Place of marriage
Residence of family members
Location of social, fraternal, political, or religious memberships
Location where challenged voter sleeps
Bank account location
Address at which automobile is registered
Past voting record

This list is not exclusive. In some cases there may be other indicators. For example, if the voter is a member of a professional organization or licensing body that requires current address information, the address on record may be relevant.

After consideration of each of these items, in light of the burden of proof, the standard of proof, and the presumption that the registration is valid, the auditor or canvassing board must make a decision as to the facts of the particular case. If, based upon all the evidence, the challenger has proven that it is highly probably that the voter does not reside at the listed address, the registration should be challenged. If this standard has not been met, the registration should be upheld.

VOTER REGISTRATION CHALLENGE HEARING
Recitations at Opening of Hearing

This hearing is called to order.

This is voter registration challenge hearing being held pursuant to RCW 29A.08.840. This challenge relates to the voter registration of _____, and the challenge is raised by _____.

The date is _____, 20__, and the time is now approximately: _____.

Present at the hearing are the following:

[List by name and title or function]

This challenge is based on [state statutory basis for challenge], and was initiated pursuant to RCW 29A.08.810.

The challenge was made [more than] [less than] 45 days prior to the[primary] [election], and therefore will be resolved by [me as County Auditor] [____ County Canvassing Board].

The challenge was initiated in writing, and was received in the Auditor's office on _____, 20__. The letter to the challenged voter with a copy to the challenger was sent on _____, 20__, setting this time and place for hearing.

[Describe any additional pertinent correspondence or documents received]

The hearing is held in order to allow both parties, the challenger and the challenged voter, to present their facts and arguments.

[If the voter voted a challenged ballot: The challenged voter did vote [at the polls] [by absentee ballot] [by mail ballot] and the ballot has been set aside and sealed in a special envelope as required by statute.]

After reviewing the facts and arguments, including any evidence submitted by either side, the statute requires [me] [the board] to rule as to whether the voter registration is valid. [I or we intend to do so by written order after reviewing the evidence], and [__do __ do not] anticipate ruling orally today.

All testimony, including presentation of facts and arguments in this matter, shall be under oath and shall be recorded. I shall administer the oaths.

In determining this challenge. [I] [We] shall be guided by the principle that the registration as a voter is presumptive evidence of his or her right to vote at any election, as provided in RCW 29A.08.810. The burden to prove otherwise is therefore upon the challenger. The challenger

must do so by presenting clear and convincing evidence that the voter is not legally qualified to vote for the reasons stated in bringing this challenge.

The challenger, _____, shall present [his] [her] facts and arguments first. Afterward, _____, the challenged voter, may present [his] [her] facts and arguments. Both presentations will be under oath and on the record. Either party can call witnesses, or present documentary evidence, or both. If either party calls witnesses, the opposing party will be permitted to cross-examine those witnesses immediately following the questions posed by the party calling the witness.

The rules of evidence do not apply to this hearing, and so evidence will be freely heard. [I] [We] will, however, only base [my] [our] decision upon the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. If the parties or witnesses move into clearly irrelevant or immaterial matters, I will direct them to return to the issue at hand.

The challenger may now begin [his] [her] presentation.

* * *

Closing Comments: At the conclusion of the evidence, the auditor or chair of the board should explain the manner in which the decision will be announced, including that the party who does not prevail may seek judicial review in superior court pursuant to RCW 34.05.