

County Election Administrator when his right to vote in the Bozeman city elections was challenged.

SUMMARY OF FACTS

1. McCrone has resided in Gallatin County, Montana since 1991. He initially registered to vote at "315 S. 13th, Bozeman, Montana," an address located within the Bozeman city limits.
2. Since at least 1994, McCrone's personal residence has been located outside the Bozeman city limits at 14350 Kelly Canyon Road. He registered to vote at this address in 1994.
3. McCrone changed his voter registration from the Kelly Canyon Road address to an address located within the Bozeman city limits on June 18, 1998. He listed his "residence address" as "2150 S. Story Mill Road, Bozeman, Montana" on his amended 1998 voter registration card.
4. McCrone owns a business (the historic Old Story Mill) at the Story Mill Road address located within the Bozeman city limits. He is restoring the Old Story Mill and leases space in the Mill to several businesses. McCrone also maintains personal office space at the Mill, which includes a bed, bathroom, coffee pot, microwave, and changes of clothes.
5. McCrone became a Bozeman City Commission candidate in 1999. His claim of residency within the City of Bozeman and McCrone's eligibility to serve as a Bozeman city commissioner became a major issue in the 1999 city commission campaign.

6. Todd Reier challenged McCrone's right to vote in the November 1999 Bozeman city election in October of 1999.¹

7. McCrone filed a lawsuit in Gallatin County District Court in response to the challenge of his right to vote in the November 1999 city election. McCrone asked District Judge Thomas Olson to prevent the Gallatin County Election Administrator from interfering with McCrone's right to vote in the 1999 Bozeman city election and to declare the challenged statutes in effect in 1999 unconstitutional. McCrone's lawsuit also alleged that nothing in federal, state, or local law "requires that a registered voter or elector of the City of Bozeman reside within the city limits of Bozeman."

8. In the hearing on McCrone's 1999 lawsuit, the following evidence and testimony was offered in support of McCrone's contention that he was a lawful resident of the City of Bozeman and entitled to vote in the 1999 Bozeman city election:

1. McCrone had not voted in any other state, county, or city election since moving to Bozeman in August of 1991;

2. Although the Old Story Mill ("the Mill") is a residence other than where his family resides, he had always taken up, returned to, and continued to reside in Bozeman, Montana with the intention of remaining in Bozeman.

3. McCrone "solely resided" at the Mill for over 2 years;

4. After acquiring the Kelly Road residence in 1994, McCrone continued to spend some nights at the Mill;

5. McCrone maintained changes of clothes at the Mill;

6. In June of 1998, McCrone solely resided at the Mill while his Kelly Canyon Road residence was being painted; and

¹ The 1999 challenge was filed under Sections 13-13-304 to 311, MCA. These sections were subsequently repealed and/or radically amended by the 2003 Montana Legislature.

7. McCrone demonstrated his intent to be a resident of Bozeman by serving on the Bozeman Design Review Board for 5 years; serving on Bozeman's Historic Preservation Board; serving jury duty in Bozeman City Court; and donating land to the City of Bozeman for a trail.

9. Judge Olson refused to intervene in the challenge to McCrone's right to vote in the Bozeman city election and ruled that the procedure for challenging an elector's right to vote before the Gallatin County Election Administrator under Sections 13-13-304-311, MCA, was constitutional. The applicable challenge statute in effect in 1999 (Section 13-13-304, MCA, 2001) required McCrone to take an oath and be subject to examination concerning his qualifications to vote in the Bozeman city election.²

10. Close alleges in his complaint that McCrone "declined to take the oath as to his residence..." and that he did not vote in the 1999 Bozeman city election. McCrone asserts that he voted in the 1999 Bozeman city election and that he took the oath affirming his residency within the Bozeman city limits. The Gallatin County Election Administrator's office has indicated that records documenting who voted in the November 1999 Bozeman city election have been destroyed pursuant to state law and that it is not possible to confirm whether McCrone voted in the 1999 election. The Election Administrator's office did provide a copy of Mr. Reier's 1999 challenge affidavit but could not locate a copy of any oath signed by McCrone in 1999.

11. Close challenged McCrone's right to vote in the 2002 general and 2003 Bozeman city elections. McCrone signed an oath and voted in both elections.

12. The Gallatin County Election Administrator's office indicates that McCrone voted in the same City of Bozeman precinct in the 2001 and 2003 Bozeman city elections and the 2000, 2002, and 2004 general elections.

² The oath and examination procedures were subsequently repealed by the 2003 Montana Legislature.

13. McCrone's current driver's license (issued in 1999 and expiring in 2007) and passport list his Story Mill Road address.
14. McCrone stated that he has generally spent a couple of nights a week in his Story Mill Road office, more often in the summer months and less frequently in the winter months.
15. McCrone also stated that he had no family residing at the Kelly Canyon Road residence before his recent marriage in November of 2004.
16. McCrone reaffirmed his intent to be a resident of Bozeman and that he has only voted in the current City of Bozeman precinct since 1998.
17. McCrone stated that after personally studying applicable voter residency statutes and consulting an attorney, he reached the conclusion that he could vote in Bozeman city elections.

STATEMENT OF FINDINGS

As stated in Claims I through V, Close contends that McCrone committed deceptive election practices when he knowingly misrepresented his residency for the purpose of voting in the Bozeman city election by giving a false oath to Gallatin County election officials, signing improper and inaccurate voter registration cards and absentee ballots, and filing a fraudulent voter registration card. Close alleges that McCrone knowingly misrepresented his residency committed the offenses of false swearing and perjury. Close's complaint requires that the residency issue be addressed first.

Section 13-1-112, MCA, declares that the residence of an individual for registration or voting must be determined by the following rules "as far as they are applicable:"

"(1) The residence of an individual is where the individual's habitation is fixed and to which whenever the individual is absent, the individual has the intention of returning.

...
(7) The place where an individual's family resides is presumed to be that individual's place of residence. However, an individual who takes up or continues a residence at a place other than where the individual's family resides with the intention of remaining is a resident of the place where the individual resides.

(8) A change of residence may be made only by the act of removal joined with intent to remain in another place."

Of the eight subsections establishing the rules for determining residence for the purpose of voting, only two, subsections (4) and (6), create a specific prohibited activity that, if acted upon, would trigger the loss of residency. For the purposes of this complaint, section 13-1-112(4), MCA, states that "[a]n individual does not lose residence if the individual goes to another state or other district of this state for temporary purposes with the intention of returning, unless the individual exercises the election franchise in the other state or district." Close does not assert that McCrone forfeited his right to claim residency for voting purposes within the City of Bozeman by voting in another Montana precinct, county, or state. In addition, I can find no evidence that McCrone voted in the precinct in which his Kelly Canyon residence is located after McCrone changed his voter registration in 1998.

Montana has also enacted general residency rules in Section 1-1-215, MCA, which reads, in pertinent part, as follows:

"1-1-215. Residence -- rules for determining. Every person has, in law, a residence. In determining the place of residence, the following rules are to be observed:

(1) It is the place where a person remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns in seasons of repose.

(2) There may be only one residence. If a person claims a residence within Montana for any purpose, then that location is the person's residence for all purposes unless there is a specific statutory exception.

(3) A residence cannot be lost until another is gained.

...
(6) The residence can be changed only by the union of act and intent."

Neither Title 13, Title 1, nor any other statute dealing with residency for registration or voting define the crucial terms used in 13-1-112 and 1-1-215, MCA -- resident, residence, residency, resides, or habitation. McCrone contends that the absence of specific legislative definitions concerning residency for registration and voting in Montana law and favorable decisions in Montana case law do not prohibit him from establishing residency within the Bozeman city limits and voting in the Bozeman city elections.

Section 1-2-107, MCA, states that when a word or phrase is defined in any part of the Montana Code Annotated, "such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears." Numerous sections of Montana law define residency to meet specific public policy goals, including assessing and paying taxes, hunting and fishing licenses, vehicle registration, and public contracting and procurement of services. Applying each of these definitions to McCrone's circumstances is illustrative of the problem that faces anyone seeking a definitive answer to the question of residency.

Montana's income tax code defines a "resident" as a "natural person" who is "domiciled in the state of Montana and any other person who maintains a permanent place of abode within the state even though temporarily absent from the state and who has not established a residence elsewhere." Section 15-30-101(28), MCA. McCrone satisfies this statutory definition because he was domiciled in Gallatin County or had a permanent place of abode in the County since 1991.

Montana's hunting and fishing license laws devote a page and one-half to defining a "resident." Section 87-2-102, MCA. The pertinent portions of the statute clearly classify an individual as a Montana resident if he or she has a "principal or primary home or place of abode" in Montana for at least 180 consecutive days and the individual files a Montana tax return, licenses his or her

vehicles in Montana, and the individual only registers to vote in Montana. Section 87-2-102(2) & (4), MCA. Even though an individual cannot claim a "vacant lot or a premises used solely for business purposes" as a principal or primary home or place of abode under 87-2-102(2), MCA, McCrone would presumably satisfy the hunting and fishing law definition of residency because he does not claim that his Story Mill Road business property is used "solely" for business purposes and he has been a full-time resident of Montana since 1991.

Montana's statutes governing the apportionment of vehicle taxes define the term "legal residence" to mean a "jurisdiction where the person lives or conducts his business." Section 61-3-712(4), MCA. The definition goes on to specify that the intent to live or conduct business does not have to be "on a permanent basis" and that a person can have "several residences, but only one domicile" (the term "domicile" is not defined). Again, McCrone would appear to satisfy this statutory definition because either living in Montana or conducting a business in Montana is sufficient to satisfy the residency definition.

Montana's contractor bid preference law defines a "resident" to include "actual residence of an individual within this state" for more than one year. Section 18-1-103, MCA. McCrone satisfies this statutory definition.

The preceding analysis of Montana's statutory definitions of "resident" or "residency" illustrates that the Legislature has adopted disparate definitions of the terms depending on the public policy objectives of the statute. When tax policy is the issue, the Legislature adopts broad definitions designed to maximize tax revenue and collections from part-time residents. When purchasing lower cost resident hunting and fishing licenses is the issue, then residency requirements are narrowly and specifically defined. None of these statutory definitions of residency resolve the central issue raised in the Close complaint -- whether an individual who has resided in Gallatin County since 1991 and who owns a personal residence located outside the Bozeman city limits and a

business located within the City of Bozeman can legally register and vote in the Bozeman city elections.

Turning then to Montana court decisions on residency and the right to vote, I find very little applicable case law that specifically addresses the issues raised by Close. However, there are cases that appear to support McCrone's interpretation of Montana's residency laws. Montana courts have generally relied on the intent of the elector and acts supporting the elector's intent in making residency determinations, as illustrated by the following:

In *Bush v. Park County*, Sixth Judicial District, Park County, Cause No. DV 02-180, April 15, 2004 Order, District Judge Wayne Phillips ruled that National Park Service employees who were required to live at Mammoth in Yellowstone National Park, Wyoming could vote in Park County, Montana even though they did not reside in Park County. *Id.*, p. 13. The Court recognized that under the United States and Montana Constitutions, the right to vote is a "fundamental political right, because [it is] preservative of all rights." *Id.*, p. 11. The Court found that the electors had previously resided in Park County before being required to move to Wyoming as a condition of employment, paid Montana income taxes, had children attending school in Park County (at Gardiner, Montana), registered their private vehicles in Park County, had personal and commercial ties to Park County, had not registered to vote in Wyoming, and had expressed an unequivocal intent to permanently return to Park County upon completion of Park Service employment or the lifting of the Wyoming residency requirement as a condition of employment. *Id.*, p. 12. Park County and the State of Montana raised concern about the electors being able to vote on tax and other matters "for which they would not have to bear the concomitant tax burden." *Id.* Judge Phillips balanced the electors' fundamental right to vote against the concerns expressed by Park County and the State and ruled that the electors were "residents" of Park County for the "purposes of the electoral franchise." *Id.*

See also *Drummond v. Town of Virginia City*, 253 Mont. 428, 432 & 433, 833 P. 2d 1067 (1992), in which Montana's Supreme Court refused to invalidate nineteen mail-in ballots and rejected an interpretation of a local definition of "resident" that was inconsistent with 13-1-112, MCA; and *Lima School District No. 12 v. Simonsen*, 210 Mont. 100, 110 & 111, 683 P. 2d 471 (1984) in which a residency decision was based on the particular facts of the case, expressions of intent, the general guidelines of 1-1-215, MCA, and not "the mere application of mechanical rules."

Based on the absence of definitions in the registration and voting statute (13-1-112, MCA) and the case law cited in the preceding paragraphs, it is not possible to conclude that McCrone violated any applicable registration or voting requirements under the facts of this case. The need for a legislative public policy debate to resolve the municipal residency and voting issues raised in the Close complaint is obvious. Section 13-1-112, MCA, is not clear, unambiguous, or precise in establishing rules for determining residency to register and vote. Crucial terms are not defined and key phrases are susceptible to different interpretations. The Commissioner of Political Practices is precluded from inserting what has been omitted or omitting what has been inserted. Section 1-2-101, MCA.

Commissioner Linda Vaughney's May 21, 2004 decision *In the Matter of the Complaint Against Pat Davison and David Mihalic* goes into greater detail about the implications of adopting a clear and unequivocal residency definition. As an example, the Legislature does not have absolute discretion to define residency for voting purposes or any other purpose and the courts have invalidated the adoption of onerous residency requirements that unconstitutionally restrict who can run for public office. Additionally, it appears to me that there is a significant constitutional issue that should be addressed as far as residency requirements for the purpose of voting. In section 13-1-112(4), MCA, a literal application would seem to preclude an individual from voting in a special district

election where the individual owns real property if that special district is located outside of the city or county where the individual normally votes for district and statewide candidates or statewide ballot issues. In this day of second homes, condominiums, and the ownership of recreational property, such a literal interpretation of 13-1-112(4), MCA, may not pass constitutional muster.

McCrone asserts, for example, that he is in compliance with 13-1-112(1), MCA, because he has chosen his Story Mill Road property as the place where his "habitation is fixed" and to which he "has the intention of returning" (e.g., McCrone lists his Story Mill Road address on his driver's license and passport). The phrase "habitation is fixed" illustrates the ambiguities of the statute. The word "habitation" is alternatively defined in *Webster's II New College Dictionary*, 1995 edition, to mean "the act of inhabiting" or "dwelling place." The word "fixed" is defined in *Webster's, supra*, to mean "stationary" or "not subject to change or variation" or "constant." None of these plain language definitions from *Webster's* preclude McCrone's assertion that his Story Mill Road business was used as his dwelling place for several days and nights a month and that his business location is fixed (stationary or constant).

The presumption of residency based on where an individual's family resides (13-1-112(7), MCA) can be overcome under the express language of this statutory provision and may not apply to the facts of this case. McCrone asserts that he had no family residing at his Kelly Canyon Road home before he married in November of 2004. Even if the presumption of 13-1-112(7), MCA, applies, McCrone can present credible evidence and arguments that his intent was to establish his Story Mill Road business office as his residence for registration and voting purposes (See Statement of Findings No.'s 3, 4, 13, and 14).

It appears that McCrone has combined the necessary acts and intent to establish that his residence for registration and voting purposes is his Story Mill Road business. Section 13-1-112(8), MCA.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings there is insufficient evidence to conclude that Ed McCrone knowingly committed deceptive election practices by misrepresenting his residency for the purpose of voting, knowingly filed a fraudulent voter registration card, or committed false swearing or perjury.

Dated this 24th day of May 2005.

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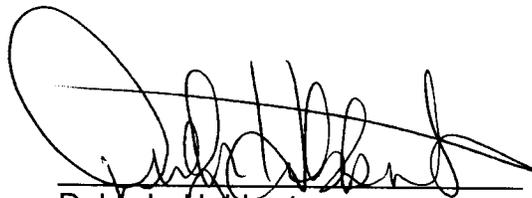
Gordon Higgins
Commissioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of May 2005, the foregoing decision of the Commissioner was served on the parties hereto, addressed to the parties as follows:

Certified U.S. Mail, Postage Prepaid
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A handwritten signature in black ink, appearing to read 'Dulcy L. Hubbert', written over a horizontal line.

Dulcy L. Hubbert
Program Supervisor
Commissioner of Political Practices