Qualifications, Residency, and Oaths of Office
Getting on the Ballot and Eligibility to Hold Office

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I. CANDIDATE QUALIFICATIONS

A. Constitutional Considerations.

The Georgia Constitution, as amended in 1990 and 2002, provides an extensive list of factors that may render an individual ineligible to "hold any office or appointment of honor or trust in this State." Ga. Const. Art. I, § 4, ¶ 3. The list includes the following:

(1) The person must be a registered voter.

(2) One is ineligible if he/she has been convicted of a felony involving moral turpitude, unless his/her civil rights have been restored and at least ten years have elapsed since the date of the completion of the sentence with no subsequent conviction of another felony involving moral turpitude.

(3) One is ineligible to hold office if he/she is a "defaulter of any federal, state, county, municipal, or school system taxes required of such office holder or candidate if such person has been finally adjudicated by a court of competent jurisdiction to owe those taxes." However, a candidate's "ineligibility" may be removed "at any time" either by full payment, by making payments pursuant to a "payment plan," or under such other conditions as the General Assembly may provide by general law.

(4) No person holding public funds illegally is eligible to hold office.

This constitutional provision does not purport to provide an exclusive list of disabilities for holding office. Additional conditions of "eligibility to hold office" by a write in vote,

or for "holding offices or appointments of honor or trust" other than elected constitutional officers, may be imposed by act with the General Assembly. Ga. Const. Art. I, § 4, ¶ 3.

The Constitution specifically addresses the conditions of eligibility of members of county boards of education as follows:

> Each school system shall be under the management and control of a board of education, the members of which shall be elected as provided by law. School board members shall reside within the territory embraces by the school system and shall have such compensation and additional qualifications as may be provided by law.

Ga. Const. Art. VIII, § 5, ¶ 2.

B. Additional Statutory Provisions Pertaining to Candidate Qualification.

There are a variety of statutory provisions that affect the right to run as a candidate. While they are generally "innocuous" in that they require that a candidate be an eligible voter and the like, the interplay of the various statutes can have some serious consequences that one might not anticipate unless all of the statutes are read closely together. The general qualifications of candidates for county and municipal offices are set forth in O.C.G.A. § 21-2-6, which also includes provisions pertaining to the review of prospective candidates' qualifications, the procedures for allowing them on the ballot (or excluding them), and the like. Generally, the statute provides:

> Qualifications of candidates for county office; determination of qualifications
>
> > (a) Every candidate for county office who is certified by the county executive committee of a political party or who files a notice of candidacy, and every candidate for municipal office who is certified by a municipal executive committee of a political party or who files a notice of candidacy, shall meet the constitutional and statutory qualifications for holding the

office being sought.

O.C.G.A. § 21-2-6(a).

The next provision authorizes election superintendents, on motion or *sua sponte*, to challenge the qualifications of any such candidate "at any time prior to the election of such candidate." O.C.G.A. § 21-2-6(b). Moreover, any elector who is eligible to vote in that particular election may, within two weeks after the deadline for qualifying, challenge prospective candidates' qualifications. The election superintendent shall then set down a hearing on the matter and make a determination of the candidate's qualification to "seek and hold a public office for which such candidate is offering." O.C.G.A. § 21-2-6(c).

An adverse decision by a challenging elector may be appealed to superior court within ten days of the final decision of the superintendent. In this review procedure, the superior court "shall not substitute its judgment for that of the superintendent as to the weight of the evidence on questions of fact." O.C.G.A. § 21-2-6(e). Rather, as in a regular appeal, the court is limited to reversing or modifying the superintendent's decision, *inter alia*, where it is deemed "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Id*.

Note that this procedural route may not be the most advantageous route of challenge because of the clearly erroneous scope of review in the later court. The same issue – the lack of legal qualification of the candidate – may be raised in an election contest, for example. *Haynes v. Wells*, 273 Ga. 106, 538 S.E. 430 (2000). That proceeding is a *de novo* one in the trial court, which may have an important impact on the outcome of the controversy for obvious reasons.

C. Residency Determinations.

Candidate eligibility – and the right to continue to hold office even after an election – requires residence within the particular municipality, county, subdistrict of a political subdivision, or legislative district. In Georgia, residency has long been the subject of challenges, controversies, and litigation. It will continue to be so because residency is ultimately determined in Georgia by a complex of factors and ultimately hinges on the subjective intent of the person. "The residence of any person shall be held to be that place in which such person's habitation is fixed, without any *present intention* of removing therefrom. . . ."[1] O.C.G.A. § 21-2-217(a)(1). The italicized words are the source of most of the controversies over a person's proper residence for determining his/her right to run for elective office.

The legislature has adopted a list of rules for determining residence. They are:

> Rules for determination of residence.
>
> (a) In determining the residence of a person desiring to register to vote or to qualify to run for elective office, the following rules shall be followed so far as they are applicable:
>
> > (1) The residence of any person shall be held to be in that place in which such person's habitation is fixed, without any present intention of removing therefrom;
> >
> > (2) A person shall not be considered to have lost such person's residence who leaves such person's home and goes into another state or county or municipality in this state, for temporary purposes only, with the intention of returning, unless such person shall register to vote or perform other acts indicating a desire to change

[1] At least in the context of voting, and residency determinations for voter registration and qualifying for office, Georgia law equates "residency" with "domicile." *Holton v. Hollingsworth*, 270 Ga. 591, 593, 514 S.E.2d 6, 9 (1999); *Avery v. Bower*, 170 Ga. 202, 206 (2), 152 S.E. 239 (1930).

such person's citizenship and residence;

(3) A person shall not be considered to have gained a residence in any county or municipality of this state into which such person has come for temporary purposes only without the intention of making such county or municipality such person's permanent place of abode;

(4) If a person removes to another state with the intention of making it such person's residence, such person shall be considered to have lost such person's residence in this state;

(4.1) If a person removes to another county or municipality in this state with the intention of making it such person's residence, such person shall be considered to have lost such person's residence in the former county or municipality in this state;

(5) If a person removes to another state with the intention of remaining there an indefinite time and making such state such person's place of residence, such person shall be considered to have lost such person's residence in this state, notwithstanding that such person may intend to return at some indefinite future period;

(6) If a person removes to another county or municipality within this state with the intention of remaining there an indefinite time and making such other county or municipality such person's place of residence, such person shall be considered to have lost such person's residence in the former county or municipality, notwithstanding that such person may intend to return at some indefinite future period;

(7) The residence for voting purposes of a person shall not be required to be the same as the residence for voting purposes of his or her spouse;

(8) No person shall be deemed to have gained or lost a residence by reason of such person's presence or absence while enrolled as a student at any college, university, or other institution of learning in this state;

(9) The mere intention to acquire a new residence, without the fact of removal, shall avail nothing; neither shall the fact of removal without the intention;

(10) No member of the armed forces of the United States shall be deemed to have acquired a residence in this state by reason of being stationed on duty in this state;

(11) If a person removes to the District of Columbia or other federal territory, another state, or foreign country to engage in government service, such person shall not be considered to have lost such person's residence in this state during the period of such service; and the place where the person resided at the time of such person's removal shall be considered and held to be such person's place of residence;

(12) If a person is adjudged mentally ill and is committed to an institution for the mentally ill, such person shall not be considered to have gained a residence in the county in which the institution to which such person is committed is located;

(13) If a person goes into another state and while there exercises the right of a citizen by voting, such person shall be considered to have lost such person's residence in this state;

(14) The specific address in the county or municipality in which a person has declared a homestead exemption, if a homestead exemption has been claimed, shall be deemed the person's residence address; and

(15) For voter registration purposes, the board of registrars and, for candidacy residency purposes, the Secretary of State, election superintendent, or hearing officer may consider evidence of where the person receives significant mail such as personal bills and any other evidence that indicates where the person resides.

(b) In determining a voter's qualification to register and vote, the registrars to whom such application is made shall consider, in addition to the applicant's expressed intent, any relevant circumstances determining the applicant's residence. The registrars taking such registration may consider the applicant's financial independence, business pursuits, employment, income sources, residence for income tax purposes, age, marital status, residence of parents, spouse, and children, if any, leaseholds, sites of personal and real property owned by the applicant, motor vehicle and other personal property registration, and other such factors that the registrars may reasonably deem necessary to determine the qualification of an applicant to vote in a primary or election. The decision of the registrars to whom such application is made shall be presumptive evidence of a person's residence for voting purposes.

O.C.G.A. § 21-2-217.

The range of evidence that the board of registrars, the Secretary of State, or the election superintendent may consider in determining residence is broad. It contemplates a practical assessment of the person's activities in order to best determine his/her ultimate intent. Thus, in *Holton v. Hollingsworth*, 270 Ga. 591, 514 S.E.2d 6 (1999), a husband and wife[2] were found to be residents entitled to vote in a city election based on, in effect, a whole review of their lives: (1) the husband had grown up in the city before entering the military, and his relatives still lived there; (2) although the married couple had a house in another city, they always considered the original city "to be their home;" (3) the husband worked for the city he desired to vote in, and would regularly travel back and forth between the two towns; (4) the couple attended church in the city, and had had a trailer there which they had sold two or three years earlier; (5) after selling the trailer, they stayed with the husband's mother in the city; (6) the husband owned some property in the city, and was there virtually every day; (7) the wife maintained a bank account in the city and had voted there for 16 years (i.e., their declared residence was not a recent ploy for some particular purpose); and (8) their ultimate expressed intent was to keep their house in the other city "temporarily" and one day to return to the city permanently.[3]

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[2] It was not so long ago that Georgia law made the residence of a married woman that of her husband through an irrebuttable presumption. That law was held unconstitutional in 1973. *Kane v. Fortson*, 369 F.Supp. 1342 (N.D.Ga. 1973).

[3] A recitation of these findings of fact does not necessarily mean that, on the same or similar evidence, the same result would obtain. Rather, the Supreme Court's ruling in *Holton* was that the "evidence authorized the trial court's finding that both Mr. and Mrs. Freeman were qualified to vote in the City of Midway." 270 Ga. at 594, 514 S.E.2d at 10. Those findings of

D. Persons Entitled to Register and Vote in Georgia.

The Georgia Constitution requires United States citizenship, residency in Georgia, and the minimum age of 18 years. In addition, residency requirements may be enacted by the General Assembly. Ga. Const. Art. II, § 1, ¶ 2.

Elector qualifications, by statute, also require that any eligible voter must reside within the county or municipality in which he/she seeks to vote. O.C.G.A. § 21-2-216(a). The voters must also "possess all other qualifications prescribed by law." O.C.G.A. § 21-2-216(a)(5).

II. THE IMPORTANCE OF THE NOTICE OF CANDIDACY AND CANDIDATE OATH

O.C.G.A. § 21-2-6(a) requires that candidates have the qualifications for "holding the office being sought." Candidates must also file a "notice of candidacy." O.C.G.A. § 21-2-132. Notices of candidacy are filed with the appropriate officials as part of the qualifying process. The notice of candidacy must be accompanied by an affidavit from the candidate attesting to various facts, including: (1) residence; (2) profession; (3) the name of the candidate's precinct; (4) and the like. Further, candidates must swear in their affidavit that: "(5) He or she is an elector of the county or municipality of his or her residence eligible to vote in the election in which he or she is a candidate . . . [and that] (7) he or she is eligible to hold such office. . . ." O.C.G.A. § 21-2-132(f).

The effect of this provision is to require that candidates hold all of the

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fact concerning the voters' residency was, of course, subject to the usual clearly erroneous rule on appeal, and one would expect that – particularly since the ultimate question is the subjective intent of the voter – the customary deference to the trial court's findings would be a very significant factor in challenging or establishing residence. Essentially, the same evidence could produce opposite results in two separate cases, and both judgment could be affirmed.

qualifications to ultimately hold the office at the time they qualify. *Haynes v. Wells, supra*. That raises interesting questions for candidates who may seek to run for offices that, if they are elected, they cannot hold because, for example, an employment related disqualification. As a matter of law, school board employees cannot serve as board members. O.C.G.A. § 20-2-51(c). Query whether taking these various statutes together, a current school board employee is disqualified from even qualifying for office. A school board employee would not, at the time he/she qualified, "meet the constitutional and statutory qualifications for holding the office being sought," as required by O.C.G.A. § 21-2-6(a).

While there is relatively little case law pertinent to this specific point, the same statutory language was construed in the case of *Barbour v. Democratic Executive Committee*, 246 Ga. 193, 269 S.E. 2d 433 (1980). The court there was faced with the question of whether the statutory language prescribing the eligibility to hold the office of sheriff would be applied to the time of qualifying and running in a primary, as well as to the time of actually taking the office. The statute at issue stated: "No person shall be eligible to hold the office of Sheriff who does not have all the following qualifications...." At the time of qualifying, the appellant in *Barbour* was not legally qualified to hold office, having been convicted of a felony of moral turpitude. The court acknowledged that the appellant could be pardoned prior to the time when he might hold office, if he won the election. Regardless, the Supreme Court held that the eligibility requirement would attach at the time of qualifying.

Following these principles and Georgia statutes pertaining to voter registration, can disqualify someone who otherwise might be a legally qualified candidate. The parameters of this issue was addressed in the recent decision *Haynes v. Wells*, 273 Ga. 106, 538 S.E.2d 430 (2000). In that case, the trial court found that Haynes, the challenger, was not a qualified voter in the particular school board district for which he was running. As such, when he filed his affidavit of candidacy, he was not then "eligible to hold the office" that he was seeking. The election superintendent had nevertheless allowed the challenger to be listed on the ballot in the primary election. In a subsequent election contest, however, the trial court ruled that Haynes was an illegal candidate because his affidavit in support of his notice of candidacy was spurious in testifying that, at the time of qualifying, he was actually ineligible to hold the office. The court issued an order striking him from the ballot for the general election. Moreover, in addressing an issue that had rarely been raised in Georgia law, the superior court ruled that the incumbent – who had come in second in the primary – should be immediately placed on the general election ballot as the winner. That relief was justified because there were only two candidates, and with one being disqualified, there could be no other winner. The usual rule of election contests – that when the outcome is "placed in doubt" there is a new election – did not apply.

> The trial court concluded that, in this case, since there was only one qualified candidate, Barbara Wells, a second primary was unnecessary, pointless, and a waste of public funds. The trial court ordered that Wells be placed on the ballot as the democratic nominee for the general election to be held in November, 2000.

273 Ga. at 106, 538 S.E.2d at 431. The outcome of the election was not so much "in doubt;" rather, the only legal possibility was that the sole legally qualified candidate

should have been deemed the primary winner. *Haynes v. Wells, supra.*

On appeal, the superior court judgment was affirmed in all regards. *Id.* One of the important issues the Supreme Court resolved pertained to the possible conflict between one's "actual residence," and the residence in which he/she is registered at the time of filing a notice of candidacy. The challenger in *Haynes v. Wells* sought to run for the 5th school board district seat, but at the time he filed his notice of candidacy, he was registered in another district within the county. The Supreme Court held that the fact that Haynes was not registered in the district for which he sought to run at the time he filed his notice of candidacy was fatal, even if his actual residence was in the district for which he ran.[4]

The challenger also contended that he should have been deemed to be a member of the district he sought to qualify in because he had recently filed a request to change the address on his driver's license to the new location in the proper district. He argued that, under governing federal and state law, a change of address form submitted for purpose of a driver's license also serves as notice of change of address for voter registration. *See,* 42 U.S.C. § 1973(gg)(3)(d); O.C.G.A. §§ 21-2-218(c); 21-2-221(d). The defendant claimed that he was merely a victim of the local officials' failure to change his voter registration when he filed his driver's license change of address form.

The Supreme Court would hear none of that. First, the Court noted that the change of voter registration, based on a driver's license change, is not automatic. Filling

[4] Whether that was his true residence was disputed as well, as there was substantial evidence that Haynes had just recently moved into an apartment for the purpose of establishing the appearance of residency in the desired district, as opposed to a true "intent" to reside there permanently.

out a license change form does not directly cause the individual to be qualified in a different district. Rather, there is an administrative procedure that transpires after a driver's license change is filed. That initial change form goes, first, from the Department of Public Safety to the Secretary of State, who in turn forwards the change of address information to the county board of registrar. The county board is empowered to review all information available to it and determine, at that point, what is an appropriate district for the individual to vote in. "Until this action is taken, a person is not eligible to vote within a particular district." 273 Ga. at 107, 538 S.E.2d at 432, citing O.C.G.A. § 21-2-221(e). The board is not required by law to defer automatically to the license change filing.

> Haynes must bear complete responsibility for his ineligibility to vote in the July 2000 primary. Prior to the close of qualifying on April 28, 2000, Haynes could have presented a change of residency directly to the Clayton County Registrar. Had he done so, he would have been properly registered within the fifth district when he declared his candidacy. Because he did not do so, however, Haynes was properly registered at an address outside of the fifth district when he executed his Declaration of Candidacy for the fifth district seat on April 24. Thus, according to the dictates of the Elections Code, Haynes was ineligible to run for the seat, and his declared candidacy was illegal.

273 Ga. at 107, 538 S.E.2d at 432.

The Supreme Court also rejected Haynes' contention that he needed only to be eligible to hold the office on the date of the election itself. (Which would at least be earlier than the time at which he would be sworn in). The Supreme Court rejected this contention by following the express language that required the notice of candidacy to include an attestation by a candidate that he/she is "eligible to vote in the election in which he or she is a candidate" – the affidavit specifically attests that the individual ***is***

"eligible to vote in the election in which he or she is a candidate." *Id*.

Haynes' final argument was that the constitutional provision that prescribes the qualification for school board electors only addresses the requirement that candidates be residents of the entire district encompassed by the school system. It does not mention electoral subdistricts. Because of that, Haynes contended that Georgia law requiring that candidates be eligible to vote in the particular election in which they running – i.e., be residents of the specific electoral subdistricts, in addition to the county as a whole – violated the Constitution by imposing additional, unauthorized requirements on candidacy. The Supreme Court ruled that that enumeration of error was waived, but it nevertheless went on, *in dictum*, to reject the argument. As the Court held: ". . . the Georgia Constitution expressly provides that additional qualification for school board members may be provided by law . . . [T]his does not limit the legislature from establishing other qualifications for office." 273 Ga. at 108, n.7, 538 S.E.2d at 433.

III. SPECIAL REMEDIES: Election contests and quo warranto actions.

A. Election Contests.

Election contests are the specific subject of another presentation in today's program so they will not be addressed further here – except to "warn" anyone who undertakes a contest to be extremely wary of the host of procedural pitfalls and time limits that apply in election contests.

B. Quo Warranto Actions.

1. *General Principles and the Scope of the Writ.*

Quo warranto actions fall into the class of what are called the "ancient writs." They are not commonly used – indeed, many lawyers have never heard of them

– but they can provide a very effective route to seeking a judicial determination of certain issues relating to the right of candidates to run for and hold office. Quo warranto actions can be particularly valuable if one is trying to raise issues that could otherwise be raised in an election contest, but they were not raised either because the election contest was not brought in time, or one of the other several procedural traps available to a defendant in an election contest presented a decision on the merits. Quo warranto actions can be brought long after the time for an election contest, and after the "offending" candidate has been sworn into office, etc.

The basic quo warranto statute provides:

> The writ of quo warranto may issue to inquire into the right of any person to any public office the duties of which he is in fact discharging. It may be granted only after the application by some person either claiming the office or interested therein.

O.C.G.A. § 9-6-60.

> The Governor alone is excepted from quo warranto jurisdiction: The question of who is the lawful Governor of this state may not be tried by quo warranto, but the writ of quo warranto will lie to all other civil or military officers.

O.C.G.A. § 9-6-91.

Essentially, any elected official in Georgia, whether municipal, county, or state, is someone whose "right" to hold public office may be inquired into by a court in a quo warranto proceeding. A "public office" has been interpreted to mean any lawfully created office under the Georgia Constitution, state law, or a municipal ordinance passed pursuant to legislative authority. *Ritchie v. Barker*, 216 Ga. 194, 115 S.E.2d 539 (1960). The kind of "public office" contemplated by the quo warranto statute is the sort of office in which the office holder is invested with some portion of the sovereign

functions of the government, to be exercised by him/her for the benefit of the public. But authority of the office at issue must arrise from the law, as opposed, for example, under a contract that the individual might hold with some branch of government. *McDuffie v. Perkerson*, 178 Ga. 230, 173 S.E. 151 (1933). Generally inherent in the concept of a "public office" under the statute is some "element of tenure and duration which must exist in order to qualify [defendant] as a public officer." 174 S.E. at 155. In a split decision, the Supreme Court of Georgia has held that grand jurors are not "public officers." *McDuffie v. Perkerson, supra*.

> Many persons perform duties of a public nature who are not officers. Witnesses, persons assisting sheriffs and other peace officers, persons in the military service, and the like. While the duties thus performed relate to and promote the public weal, yet the persons performing them lack some of the more important official elements. A juror summoned to attend court has no certain term of office. He may be discharged immediately with or without his consent.

173 S.E. at 155.

The quo warranto statute has been held to reach, as public officers, persons who discharge a quasi- public function and whose office is established by statute. Thus, because state statutes have given the office of the chairman of state political executive committees status in the law "at least the equivalent of that of an office and a corporation," one can challenge the right of such party officials to hold their office. *Ritchie v. Barker*, 216 Ga. 194, 115 S.E.2d 539 (1960: *Morris v. Peters*, 203 Ga. 350, 46 S.E.2d 729 (1948). Similarly, the right of an individual claiming to be a county executive committeeman of a political party may be challenged by quo warranto in light of the legal status attached to that office under Georgia law. *Ritchie v. Barker, supra*. The official "clerk" of a board of county commissioners has, historically, been deemed to be a

"public office" under the quo warranto statute. *Worthy v. Cheatham*, 142 Ga. 440, 83 S.E. 113 (1914). The right of a city solicitor to hold office is properly tested by quo warranto. *Hornsby v. Campbell*, 267 Ga. 511, 480 S.E. 2d 189 (1997).

A juvenile court intake officer has been held to be a "public officer" for purposes of quo warranto proceedings. *Brown v. Scott*, 266 Ga. 44, 464 S.E.2d 607 (1995).

> [1] A public officer is any "individual who has a designation or title given him by law, and who exercises functions concerning the public assigned to him by law ..." *Smith v. Mueller*, 222 Ga. 186, 187, 149 S.E.2d 319 (1966). This conclusion is not altered simply because the officer's duties are narrowly confined. *Id*.
>
> [2] This Court has held that a public officer and employee can be distinguished on the basis of creation, duration and emoluments of office. *See Fowler v. Mitcham*, 249 Ga. 400, 401, 291 S.E.2d 515 (1982). A juvenile intake officer is appointed by the judge of the juvenile court to determine whether a child who has been taken into custody should be released or retained. O.C.G.A. § 15-11-19. The appointment is durable – it is not merely transitory.

Brown v. Scott, 266 Ga. 44, 45, 464 S.E.2d 607, 608. In *Brown*, the juvenile intake officer was disqualified from holding that office because he was a police officer as well. Separation of power prohibited any individual from serving in both capacities. People could not "assume and discharge the duties of a law enforcement officer, as an executive function, and at the same time undertake the duties of juvenile intake officers, a judicial function." 266 Ga. at 46, 464 S.E.2d at 609.

Although publically employed and holding a "public office" in one sense, professors and department chairmen of a state college were not "public officers" subject to quo warranto. The same was true with regard to the director of the criminal justice institute at the college. *McDougald v. Phillips*, 262 Ga. 778, 425 S.E.2d 652 (1993).

The right or "title" of an individual to an office is literally put at issue in a quo

warranto proceeding. The remedy is an order ousting the office holder from the office he/she had been holding. A quo warranto action is not the proper remedy where allegations of misconduct are to be tried. *Turner v. Wilburn*, 206 Ga. 149, 56 S.E.2d 285 (1949); *McDonough v. Bacon*, 143 Ga. 283, 84 S.E. 588 (1915).

Quo warranto writs are not exclusive remedies. The fact that an injunction – or an election contest – may be available as an alternative remedy to obtain the same or similar relief does not bar a quo warranto action. *Boatright v. Brown*, 222 Ga. 497, 150 S.E.2d 680 (1966); *Rogers v. Croft*, 203 Ga. 654, 47 S.E.2d 739 (1948). Conversely, the possible availability of a quo warranto remedy does not preclude another remedy, such as injunction. *White v. Miller*, 235 Ga. 192, 219 S.E.2d 123 (1975).

2. *Possible Grounds Where Quo Warranto May Lie.*

Successful quo warranto actions have been brought in Georgia to test whether the office holder is a bona fide resident as required by applicable law. Such a challenge may include the length of time for which the office holder was a resident prior to an election, if such residency requirements existed. For example, where a city charter provided that the recorder must have resided for two years in the city before taking office, the writ of quo warranto was available to inquire into those facts and determine the eligibility of the office holder to hold that office if the facts were proved. *Blake v. Middlebrooks*, 182 Ga. 500, 185 S.E. 786 (1936).

Issues that are "classic" election contest issues may also be raised in a quo warranto proceeding in some circumstances. Thus, in *White v. Miller*, 235 Ga. 192, 219 S.E. 2d 123 (1975), a successful quo warranto action was brought challenging the right of a declared winner of a county school board election who won by virtue of a successful

write in candidacy. The defendant's right to hold office was challenged under the requirement that persons must give notice of their intention of candidacy a specified number of days prior to an election, and that "intention of candidacy" must be timely published in the official organ of the county in advance of the election.

While an election contest could have been brought under those circumstances, it is subject to a host of procedural limitations. Quo warranto was also available as an alternative remedy. A quo warranto action can be brought to challenge the fundamental constitutionality of the means and mechanism for electing the defendants to office. *Boatright v. Brown*, 222 Ga. 497, 150 S.E.2d 680 (1966). Whether an office should be elected or appointed under the properly construed law may be challenged in a quo warranto proceeding. *Hornsby v. Campbell*, 267 Ga. 511, 480 S.E. 2d 189 (1997).

One question that is not well answered in the case law is the effect of a disqualifying condition that may have affected the office holder at one time, but not necessarily at another. For example, if one holds a federal office that precludes his/her right to simultaneously hold a state position of trust, would a judgment necessarily preclude the office holder from holding office prospectively? Or might the appropriate remedy be to require the defendant to abandon his/her federal office as a precondition of continuing in state office – i.e., allow the defendant an election.

Similarly, what if one did not initially satisfy the residency requirement, but does when a quo warranto action is brought? There are some potentially conflicting lines of authority on these points. In *Highsmith v. Clark*, 245 Ga. 158, 264 S.E.2d 1 (1980), the court affirmed an order ousting a county commissioner from office and declaring the seat vacant where, at the time of trial, he was also serving as a part-time federal

magistrate. The defendant's disability arose there under the Georgia statute that makes ineligible to hold any civil office persons who "hold any office for profit or trust under the government of the United States . . . ." *Highsmith v. Clark,* 245 Ga. at 159. Given the Supreme Court's recent application of the "oath" procedures, the issue might best be subsumed by challenging the defendant's right to have been a candidate in the first place – at least where the candidate's ineligibility existed at the time of that event.

3. *Persons Entitled to Bring Quo Warranto Actions.*

The statute permits the writ to be sought "by some person either claiming the office or interested therein." O.C.G.A. 9-6-60. This language has been broadly construed. Any number of cases hold that "any citizen and taxpayer of a community may challenge the qualifications of a public official to hold office in that community" in a quo warranto proceeding. *Highsmith v. Clark*, 245 Ga. 158, 264 S.E.2d 1 (1980); *Huff v. Anderson*, 212 Ga. 32, 90 S.E.2d 329 (1955). While the "taxpayer" language is an often repeated refrain from some of the older cases, it is questionable whether one really needs to be a taxpayer today to serve as a plaintiff:

> Are not resident citizens of a municipality interested in the offices through which the civil government of the city is administered? Are they not interested in having such offices legally filled, honestly and impartially administered? These offices are created by law for the benefit and convenience of the citizens, and if any usurper should assume their duties, can redress be had only through [an election] contestant claimant? We think not.

Highsmith v. Clark, 245 Ga. 158, 160, 264 S.E.2d 1 (1980), quoting from *Churchill v. Walker*, 68 Ga. 681, 684 (1882).

Where a defendant may have been elected from one district within the county, a quo warranto plaintiff need not reside in the same district nor have been entitled to have

voted on the defendant whose title to office is challenged. *Highsmith v. Clark*, *supra*. Notwithstanding the language in the statute that an applicant may be "some person claiming the office," a converse argument was raised, and rejected, in *White v. Miller*, 235 Ga. 192, 291 S.E.2d 123 (1975). The defendant there contended that the plaintiff should not be permitted to bring a quo warranto action because he was the defeated candidate in the election, the results of which were challenged in the quo warranto proceeding. Overruling some earlier language that may have supported that position, *White v. Miller* held that one's status as such was not a bar to bringing a quo warranto action, notwithstanding that the plaintiff there could have brought an election contest as well.

4. *Procedural Issues in Quo Warranto Proceedings.*

Historically, application for the writ of quo warranto was governed by particularly onerous requirements, as were many of Georgia's special statutory proceedings. Today, though an action seeking the writ is still considered to be a "special statutory proceeding," it is subject to the Civil Practice Act. *Anderson v. Flake*, 270 Ga. 141, 508 S.E.2d 650 (1998). For that reason, a quo warranto petition is not subject to dismissal absent the inquiries and leniency generally permitted by the Civil Practice Act. The sufficiency of a petition should thus be tested by the usual standard applicable in civil actions generally where a motion to dismiss for failure to state a claim has been brought. An amendment to a quo warranto petition should be accepted by the court at the commencement of the hearing on the petition, even though the amendment was not verified. *Id*.

Where there is a factual dispute, a jury is to be empaneled to hear the evidence and make the required factual determinations. O.C.G.A. § 9-6-65. Consider the practical consequences of a jury trial in such cases, or in election contests. Political schisms can make unanimous verdicts difficult to reach.

Where there has been a successful judgment obtained in a quo warranto action, the office holder is prevented from taking any further action under auspices of his/her office. Under the *de facto* officer rule that has long been a part of Georgia law, however, actions taken by the office holder while acting under color of title are presumptively valid and are not affected by the subsequental quo warranto judgment. *Center v. Arp*, 198 Ga. 574, 32 S.E.2d 308 (1944).