



HENRY McMASTER
ATTORNEY GENERAL

October 23, 2008

Marci Andino, Executive Director
South Carolina State Election Commission
Post Office Box 5987
Columbia, South Carolina 29250

Dear Ms. Andino:

We understand from your letter that you desire an opinion of this Office on behalf of the Charleston County Registration and Election Office as to “whether or not to count an absentee ballot cast by a voter who died after submitting the ballot.” In addition, you provided us with the following information:

In this instance, the county had determined the person was a qualified elector eligible to vote using an absentee ballot for the upcoming election. The absentee ballot was returned in a timely manner. The county has since been notified of the death by a family member and the media.

The SEC has the responsibility to remove the names of persons who have died from the list of registered voters. The SEC receives a report each month from the Bureau of Vital Statistics containing information on persons who have died. As required by SC Code of Laws Section 7-3-20(C), the executive director (state) shall delete the names of any elector who is deceased. Since the death occurred recently, we have not received notification from the Bureau of Vital Statistics at this time.

Law/Analysis

Chapter 15 of title 7 of the South Carolina Code (Supp. 2007), governing absentee registration and voting, does not specifically address how absentee ballots of deceased voters are to

be handled if the voter dies prior to the date of an election. Furthermore, in our research, we were unable to find any South Carolina case law addressing this issue. While little case law exists on this matter in other jurisdictions as well, we located an opinion issued by the Florida Supreme Court in which that Court discussed when an election begins and whether or not a change in the form of a ballot may occur after absentee voting began, but before the date of the election. State ex rel. Peacock v. Latham, 170 So. 475 (Fla. 1936). In discussing when an election begins, the Court commented as follows:

The Constitution (article 18, § 9) provides that the general election shall be held on the first Tuesday after the first Monday in November and not at any other time. No ballots have been cast nor will be cast by absentee voters until that date arrives. The law has merely provided for the accommodation of those who will not be present at their respective election precincts on that day that they may prepare a ballot which will be cast for them on that day, but, if a person preparing such a ballot and depositing it to be cast as the law directs should die before election day, the authority vested in the county judge to cast that ballot for such elector will cease to exist, and so also if, after preparing such a ballot to be cast in the general election, that proposed elector should be convicted of a felony, his right to suffrage will cease and his ballot cannot lawfully be cast.

Id. at 480.

The Kentucky Attorney General addressed whether the absentee ballot of a deceased voter may be counted in an opinion issued in 1977. *Op. Ky. Atty. Gen.*, November 3, 1977. First, the Kentucky Attorney General stated “the general rule is that absentee ballots are considered as being cast on election day even through they are actually voted prior to that time.” Id. Moreover, the Kentucky Attorney General relied on the language quoted above in Peacock in forming the following conclusion:

[S]ince a voter who dies before the election obviously cannot vote on election day, such person would not at that time retain the qualifications for voting eligibility required under § 145 of the Constitution and KRS 116.025 and would not remain a legally registered voter under KRS 116.045.

Under the circumstances, we believe that where a person applies for an absentee ballot and proceeds to vote and return the ballot to the clerk’s office by mail as the statutes require but dies before election

day, such ballot should be rejected by the board when it proceeds to review and count the absent votes under KRS 117.335, upon information submitted, pursuant to a written challenge or by the board's own information, to the effect that the absent voter was deceased.

Id.

In South Carolina, the November general election is set by statute. See S.C. Code Ann. § 7-13-10 (1976). Thus, we presume a South Carolina court would conclude that even though absentee ballots are prepared and received prior to the date of the election, they are not officially cast until election day. If the voter submitting the absentee ballot dies prior to the date of the election, the voter lacks the qualifications to be an elector. See S.C. Code Ann. § 7-3-20(C)(2)(a) (Supp. 2007) (calling for the executive director of the election commission to remove deceased voters from the master file of qualified electors); § 7-5-340 (calling for the State Election Commission to develop a program by which qualified electors who die are removed from the list of eligible voters). Accordingly, we are of the opinion that an absentee ballot cast by a voter who dies prior to the date of the election is subject to challenge as the voter lacked the qualifications to vote when he or she cast the vote.

Section 7-15-420 of the South Carolina Code (Supp. 2007) governs the tabulation and reporting of absentee ballots. This provision states:

The county election commission, municipal election commission, or executive committee of each municipal party in the case of municipal primary elections is responsible for the tabulation and reporting of absentee ballots. At 9:00 a.m. on election day, the managers appointed pursuant to Section 7-13-70, and in the presence of any watchers who have been appointed pursuant to Section 7-13-860, may begin the process of examining the return-addressed envelopes that have been received by the county registration board making certain that each oath has been properly signed and witnessed and includes the address of the witness. All return-addressed envelopes received by the county registration board before the time for closing the polls must be examined in this manner. A ballot may not be counted unless the oath is properly signed and witnessed nor may any ballot be counted which is received by the county registration board after time for closing of the polls. The printed instructions required by Section 7-15-370(2) to be sent each absentee ballot applicant must notify him that his vote will not be counted in either of these events. If a ballot

is not challenged, the sealed return-addressed envelope must be opened by the managers, and the enclosed envelope marked "Ballot Herein" removed and placed in a locked box or boxes. After all return-addressed envelopes have been emptied in this manner, the managers shall remove the ballots contained in the envelopes marked "Ballot Herein", placing each one in the ballot box provided for the applicable contest. Beginning at 9:00 a.m. on election day, the absentee ballots may be tabulated, including any absentee ballots received on election day before the polls are closed. If any ballot is challenged, the return-addressed envelope must not be opened, but must be put aside and the procedure set forth in Section 7-13-830 must be utilized; but the absentee voter must be given reasonable notice of the challenged ballot. Results of the tabulation must not be publicly reported until after the polls are closed.

S.C. Code Ann. § 7-15-420. According to this provision, the poll managers are to count absentee ballots as long as the envelope containing the ballot includes a properly signed and witnessed oath and so long as the county registration board received the ballot prior to the time for closing of the polls. This provision does not mention a requirement that the poll manager verify the qualifications of the voter submitting the absentee ballot. Thus, we do not believe that the poll manager is responsible for verifying that the person submitting the absentee ballot is alive.

However, section 7-15-420 states that if the ballot is challenged, it is not tabulated along with the other absentee ballots, but in accordance with section 7-13-830 of the South Carolina Code (Supp. 2007), the ballot is treated as a provisional ballot. Furthermore, we note that section 7-13-810 of the South Carolina Code (Supp. 2007) places responsibility on poll managers, electors, and poll watchers to challenge "the vote of a person who may be known or suspected not to be a qualified voter." Accordingly, while we do not believe a poll manager has the duty to verify that an absentee voter is alive, if a voter's death comes to his or her attention prior to the election, section 7-13-810 indicates that the poll manager has a duty to challenge the vote.

Conclusion

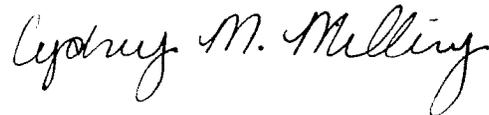
Relying on the law of other jurisdictions, we believe our courts would conclude that while a voter prepares an absentee ballot prior to the date of the election, the voter does not cast the ballot until the date of the election. Because death would render a voter disqualified from voting, we believe a ballot submitted by voter who dies after submitting his or her absentee ballot, but prior to the date of the election, is subject to challenge. While we do not believe poll managers have a duty to determine whether each voter casting an absentee ballot is alive on election day, pursuant to section 7-13-810, if that manager has knowledge of an absentee voter's death, he or she is

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responsible for challenging the vote in accordance with section 7-13-830 on the basis that the voter does not meet the qualifications of an elector.

Very truly yours,

Henry McMaster
Attorney General



By: Cydney M. Milling
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REVIEWED AND APPROVED BY:



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