

ELECTIONS:
ABSENTEE VOTING:

When votes are cast both for a deceased candidate and for his officially-designated successor in an election, the opposing candidate shall be declared elected if he receives more votes than were cast for both the deceased candidate and the successor candidate; the successor candidate shall be deemed elected if, not crediting him with votes for the deceased candidate, he receives more votes than were cast for the opposing candidate; and the election shall be declared void, if the opposing candidate receives more votes than the successor candidate but fewer votes than the total cast for the deceased candidate and the successor candidate. Straight party ticket votes for the party ticket which included the name of the deceased candidate shall be credited to the successor candidate as if the name of the successor had appeared thereon.

OPINION NO. 294

November 6, 1972

Honorable Donald E. Parker
Prosecuting Attorney
Buchanan County, Courthouse
St. Joseph, Missouri 64501



Dear Mr. Parker:

This official opinion is in response to your request for a ruling on a question arising from the following situation:

Eleven days prior to a general election, a candidate for county office died. The following day, the party committee of that candidate's party designated another person to fill the vacancy caused by the original candidate's death and to become the party's new candidate for that office, under procedures provided by Section 120.550, RSMo 1969. Prior to the death of the original candidate, however, absentee and war ballots had been issued and cast. You request a ruling on the following question:

How shall the clerk count those absentee ballots cast prior to the death of the original candidate?

Missouri election statutes give very little guidance in resolving the question presented by this opinion. Chapter 112, RSMo 1969, establishes the regulations governing absentee voting, and it requires, in Section 112.020, that each person who qualifies to vote an absentee ballot shall receive "an official ballot for the election district or precinct in which he resides." At the time the absentee ballots here involved were sent or given to the voters involved, the original candidate was the official

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nominee of his party and was properly placed on the ballot; therefore, the absentee voters did receive "an official ballot." Furthermore, absentee ballots are required to be prepared for distribution thirty days prior to an election (Section 112.020, RSMo 1969), and war ballots must be prepared within thirty days after the primary election, or approximately sixty days prior to a general election (Section 112.330(1), RSMo 1969). Section 120.550 provides a procedure for making substitute nominations in the case of a candidate's death, but provides no procedure for handling absentee ballots which have been previously issued.

Section 112.020 allows a voter to destroy his absentee ballot prior to 9:00 a.m. on the Friday before the election, if he will in fact be able to cast a vote in person on election day. However, the statutes make no provision at all for the counting of votes under a situation such as is found in the present case.

In approaching a question of election laws, it is important to keep in mind the opinion of the Supreme Court of Missouri in the case of Nance v. Kearbey, 251 Mo. 374, 158 S.W. 629 (1913). In that case the court stated, 158 S.W. 1.c. 631:

"two main settled and uniform rules of interpretation, thus:

"First. Election laws must be liberally construed in aid of the right of suffrage. . . . The whole tendency of American authority is towards liberality to the end of sustaining the honest choice of electors. . . . The choice of electors must be judicially respected, unless their voice is made to speak a lie, or a result radically vicious, because of a disregard of mandatory statutory safeguards.

"Second. The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction." (Citations omitted).

With this principle in mind, and with the guidance of decisions rendered by courts in this and other states, we turn now to resolving the question at hand.

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The question in this opinion is how those absentee votes cast while the now-dead candidate was on the ballot and not subsequently recast shall be tabulated. (For purposes of this opinion the death of a candidate shall also include any disqualification). In particular, there are three classes of votes which must be considered: first, those cast by voting a straight party ticket (i.e., placing an "X" in the Republican or Democratic column); second, those votes cast by marking an "X" to the name of the now deceased candidate; and third, those votes cast by marking an "X" next to the name of the candidate of the opposing party.

The first of these classes may be resolved simply. In the case of Bradley v. Cox, 197 S.W. 88 (Mo. Banc 1917), certain voters had been given party ballots which contained a name of a person who was not a candidate for the particular office his name was listed for. The court held that straight party ballots voted for the incorrect candidate should properly be counted as votes for the real candidate and, therefore, the official candidate was declared the winner. The court based its opinion on the premise that a voter who votes a straight party ticket intends thereby to cast a vote for all officially designated candidates of that party, and that an error in the printing of the ballots should not negate his opportunity to do so. More recently, this office followed that case in an opinion holding that "all straight party ballots of that particular party are to be counted as if the ballots contained the correct name of the candidate." Opinion No. 52, to Honorable Buddy Kay, March 2, 1971.

The logic of the Supreme Court decision requires the conclusion in this case that all votes cast for a straight party ticket should be counted as having been cast for those candidates who appear on the ballot on election day. Such a conclusion is most in keeping with the objective of attempting to giving effect to an elector's vote whenever possible.

The tabulation of votes cast for a particular person, as opposed to votes cast for a party, is more difficult. Here, the voter was expressing his preference as between two individuals, one of whom is no longer a candidate. Several possibilities for counting these ballots exist: They could be credited to the successor candidate, they could be credited to the deceased candidate (making it in effect a three way race), or they could be declared nullities. A consideration of relevant legal authority, however, indicates that a combination of these approaches is required. The general rule in American elections is that "votes cast for a deceased, disqualified or ineligible person, although ineffective to elect such person to office,

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are not to be treated as void or thrown away, but are to be counted in determining the results of the election as regards the other candidates." Anno. 133 A.L.R. 319. Most cases dealing with dead candidates have arisen under circumstances in which, although the candidate died prior to the election, his name remained on the ballot, and he received the highest number of votes. Where this was the case, the election was generally voided and a vacancy declared in the office, rather than deeming the votes for the dead man nullities and declaring the person with the next highest number of votes elected. See State ex Inf. McKittrick v. Cameron, 342 Mo. 830, 117 S.W.2d 1078 (1938) (ineligible candidate) and other cases cited in Anno., supra.

The reasoning behind this result is that the people who voted cast legal ballots, and in choosing candidate A, they, at the same time, rejected candidate B. The fortuity of A's death should not be allowed to frustrate the will of the people and cause B to be elected.

Although there is a split of authority on this point, the Missouri (and majority) rule is that even votes knowingly cast for a dead or ineligible candidate shall be counted, as they are a measure of the voter's intent that a vacancy in office is preferred to the election of the opposing candidate. State ex rel. Herget v. Walsh, 7 Mo.App. 142 (1879), cited with approval in Sheridan v. St. Louis, 183 Mo. 25, 81 S.W. 1082 (1904).

It does not necessarily follow, however, that votes cast for candidate A should be credited to his officially designated successor. People who voted for candidate A may have done so for any one of several reasons, and there is no legally required presumption that they would have voted for his successor candidate as well. See American Veterans Party v. Heffernan, 59 N.Y.S.2d 216, 186 Misc. 224 (N.Y.S.C.Sp.T. 1945).

Finally, votes cast for the candidate of the opposing party should still be credited to that candidate despite the death of his original adversary, since the opposing party candidate was the choice of those voters who voted for him to fill the office involved.

In conclusion, therefore, votes cast for the opposing candidate should be credited to him, while votes cast for the now-deceased candidate should be counted against the opposing candidate but not for the successor candidate. This may be done in the following fashion:

1. If the opposing candidate receives more votes than the total cast for the deceased candidate and the successor candidate, then the opposing candidate should be declared elected.

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2. If the successor candidate (not crediting him with any votes cast for the deceased candidate) should receive more votes than the opposing candidate, then the successor candidate should be declared elected.

3. If the opposing candidate should receive more votes than the successor candidate, but fewer votes than the total cast for the successor candidate and the deceased candidate, then the election should be declared void and a nullity.

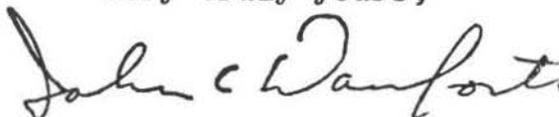
CONCLUSION

It is therefore the opinion of this office that:

When votes are cast both for a deceased candidate and for his officially-designated successor in an election, the opposing candidate shall be declared elected if he receives more votes than were cast for both the deceased candidate and the successor candidate; the successor candidate shall be deemed elected if, not crediting him with votes for the deceased candidate he receives more votes than were cast for the opposing candidate; and the election shall be declared void if the opposing candidate receives more votes than the successor candidate but fewer votes than the total cast for the deceased candidate and the successor candidate. Straight party ticket votes for the party ticket which included the name of the deceased candidate shall be credited to the successor candidate as if the name of the successor had appeared thereon.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 52
3/2/71, Kay