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Elections - Vacancies Occurring Close to Elections

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CASE COMMENTS

Elections — Vacancies Occurring Close to Elections

The sheriff of Marshall County, West Virginia, died October 23, 1970, leaving a vacancy in that office. The next general election was to be held November 3, 1970.[1] An Assistant Attorney General of West Virginia and the prosecuting attorney of Marshall County informed voters through the local news media that an election to fill the vacant office would not be held on November 3, 1970. A Marshall County attorney published information stating that an election would be held. This conflicting information caused considerable confusion among the voters. The county court gave no notice of such an election, and the official ballot[2] contained no names of duly nominated candidates for the office of sheriff or blank spaces for the insertion of write-in votes. Of the 10,516 votes cast in the general election, only 1,087 write-in votes were cast for the office of sheriff. The office designation and the names of the candidates were handwritten on the official ballots. The petitioner, Brooks Miller, received 557 of these votes.

The commissioners of the county court, acting as the board of canvassers, refused to issue a certificate of election to Miller. He brought a writ of mandamus to compel them to issue the certificate. Bessie Allen, who was appointed to the office of sheriff on November 10, 1970, and the county court were permitted to intervene as parties defendant. After hearing testimony, the circuit court awarded the writ of mandamus to Miller, and Bessie Allen appealed. The West Virginia Supreme Court of Appeals reversed, but subsequently granted a rehearing. *Held*, the decision of the circuit court affirmed. The election of Brooks Miller to the office of sheriff should have been certified by the board of canvassers and recognized by the county court even though the write-in vote represented only ten percept of all the votes cast. The election to fill the vacancy was required by man-

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[1] W. VA. CODE ch. 3, art. 1, § 31 (Michie 1971 replacement volume) provides: "General elections shall be held in the several election precincts of the State on the Tuesday next after the first Monday in Novmber of each even year."

[2] W. VA. CODE ch. 3, art. 1, § 21 (Michie 1971 replacement volume): For each such election to be held in their county and at least thirty days before the date of such election, the board of ballot commissioners shall cause to be printed official ballots to not more than one and one-fifth times the number of registered voters in the county.

date of the constitution of West Virginia[3] and supporting statutes.[4] *Miller v. Burley*, 187 S.E.2d 803 (W. Va. 1972).

The controversy in *Miller* concerns the interpretation of two West Virginia constitutional provisions that pertain to elections. The first provision states that any vacancy shall be filled by an appointment, which shall expire when such vacancy is filled at the next general election.[5] The other provision states that the legislature shall have the power to regulate the system of elections by general laws.[6]

The court in *Miller* interpreted the first provision to compel the filling of any vacancy at the next general election. Consequently, the statute[7] that embodies this dictate was held mandatory. In effect, the court disregarded the other constitutional provision that permits the legislature to regulate the electoral process.[8] Therefore strict compliance with certain general election statutes is not required. The statutes, which require public notice to precede elections to fill vacancies[9] and which set forth a specific form to be used for write-in votes,[10] were deemed directory.[11]

The dissent contended that all constitutional provisions should be construed together as a whole. The constitutional provision that

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[3] W. VA. CONST. art. IV, § 7:
When vacancies occur prior to any general election, they shall be filled by appointments, in such manner as may be prescribed herein, or by general law, which appointments shall expire at such time after the next general election as the person so elected to fill such vacancy shall be qualified.

[4] W. VA. CODE ch. 3, art. 10, § 8 (Michie 1971 replacement volume):
Any vacancy occurring in the office of prosecuting attorney, sheriff, assessor or county surveyor shall be filled by appointment by the county court until the next general election at which time such vacancy shall be filled by election for the unexpired term. Notice of an election to fill a vacancy in any of the offices named in this section shall be given by the county court, or by the president thereof in vacation, and published or posted in the manner prescribed in section six [§ 3-10-6] of this article.

[5] W. VA. CONST. art. IV, § 7. For the exact wording of this provision see note 3, *supra*.

[6] W. VA. CONST. art. IV, § 8 provides: "The legislature, in cases not provided for in this Constitution, shall prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed."

[7] W. VA. CODE, ch. 3, art. 10, § 2 (Michie 1971 replacement volume).

[8] W. VA. CONST. art. IV, § 8.

[9] W. VA. CODE ch. 3, art. 10, § 8 (Michie 1971 replacement volume).

[10] W. VA. CODE ch. 3, art. 6, §§ 2, 5 (Michie 1971 replacement volume).

[11] "A mandatory statute may be defined as one where noncompliance with its provisions or requirements will render the proceedings to which it relates illegal and void, whereas a directory statute is one where noncompliance will not invalidate the proceedings to which it relates." State *ex rel.* Jones v. Farrar, 146 Ohio St. 467, 471-72, 66 N.E.2d 531, 534 (1948).

permits the legislature to promulgate general enabling statutes should be followed. Therefore strict compliance with the general election statutes should be mandatory because of their constitutional origin.

The majority held the Code section,[12] which requires the holding of an election to fill the vacancy, to be absolutely imperative because of constitutional mandate.[13] Conversely, the court held another part of the same Code section, which requires notice of an election to fill a vacancy, to be merely directory. The court quoted from *Griffith v. County Court*[14] in support of its position: "[T]he failure to publish the notice will not affect the validity of the election." This statement is consistent with the principle that election irregularities that are the fault of the election officials and not of the voters should not disenfranchise voters when an otherwise fair election is held.[15]

Challenging the majority's excerpt from *Griffith*, the dissent offered a more complete quotation: "Failure . . . to publish notice . . . does not avoid the election, *if it appears that candidates for such office were regularly nominated at a primary election, and were voted for at the general election by the great body of voters.*"[16] This expanded quotation is in harmony with the principle that the absence of statutory notice will invalidate an election if actual notice is not widespread.[17] If the statutory notice had been given, it is possible that the result of the election might have been different because of the small percentage of votes cast for the office of sheriff.

The holding in *Miller* was based primarily on *McCoy v. Fisher*,[18] in which the court recognized an election that was held without notice to fill a vacancy. The dissent asserted that the court erred, first in *McCoy* and again in *Miller*, in interpreting the constitutional provision relative to vacancies[19] as "self-executing." The dissent emphasized that the principle of construing the constitution as a whole[20] was disregarded by the majority. It insisted that the constitutional provision pertaining to vacancies[21] must be construed in light of the provision

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[12] W. VA. CODE ch. 3, art. 10, § 8 (Michie 1971 replacement volume).
[13] W. VA. CONST. art. IV, § 7.
[14] 80 W. Va. 410, 418, 92 S.E. 676, 679 (1917).
[15] Gibson v. Bower, 137 W. Va. 462, 73 S.E.2d 817 (1952).
[16] 80 W. Va. at 411, 92 S.E. at 676 (emphasis added).
[17] G. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS §§ 116-17 (4th ed. 1897).
[18] 136 W. Va. 447, 67 S.E.2d 543 (1951). It is interesting to note that Judge Haymond wrote the court's opinion in both *Miller* and *McCoy*.
[19] W. VA. CONST. art. IV, § 7.
[20] Flesher v. Board of Review, 138 W. Va. 765, 77 S.E.2d 890 (1953).
[21] W. VA. CONST. art. IV, § 7.

that grants the legislature power to enact general enabling statutes.[22] In so doing, the dissent concluded that the election was invalid because of non-compliance with the election statutes.[23]

The dissent considering the holding in *McCoy* "palpably untenable"[24] but apparently regarded as unimportant a significant factual distinction between *McCoy* and *Miller*. Unlike *Miller*, the vacancies in *McCoy* (for the offices of Constable and Justice of the Peace) occurred far in advance of the November election. Ample time remained for the county court to prepare the ballots and to publish the required notice, which it failed to do. In *Miller*, it was impossible for the election officials to comply with the ballot[25] and notice[26] statutes because of the proximity of the sheriff's death to the election.

In light of this factual distinction, the court's holding in *McCoy* that the notice statute be deemed directory rather than mandatory was reasonable. If the notice statute was construed as mandatory under the facts of *McCoy*, it would invalidate any election not held in exact compliance with the notice statute. Not only would innocent voters be disenfranchised by the failure to publish notice, but also the path to conspiracy and malfeasance would be left open to election officials. County election officials could intentionally refuse to comply with the election statutes; in this manner they could foreclose the possibility of fair elections and effectively control county government. Construing the notice statute as directory removes this unpleasant possibility because the absence of the required notice would not necessarily invalidate an election.

In any discussion which concludes that the election in *Miller* was lawful, it becomes necessary to consider whether the write-in votes received by Brooks Miller were valid. The majority and the dissent again disagreed about the proper construction to be applied to pertinent Code sections. The section concerning the preparation of ballots[27] states that a blank space for the insertion of a name shall be printed on all ballots for any office where the name of a duly nominated candidate does not appear. The other Code section,[28] applicable to write-in votes, states that if the voter wishes to vote for any person whose name

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[22] W. VA. CONST. art. IV, § 8.
[23] W. VA. CODE ch. 3 (Michie 1971 replacement volume).
[24] 187 S.E.2d at 814.
[25] W. VA. CODE ch. 3, art, 1, § 21 (Michie 1971 replacement volume).
[26] W. VA. CODE ch. 3, art. 10, § 6 (Michie 1971 replacement volume).
[27] W. VA. CODE ch. 3, art. 6, § 2 (Michie 1971 replacement volume).
[28] W. VA. CODE ch. 3, art. 6, § 5 (Michie 1971 replacement volume).

does not appear on the ballot, he may do so by *substituting* the name in the proper place. The majority, in favor of liberal enfranchisement, held these statutes directory and not mandatory.[29] Therefore, the omission of blank spaces on the ballots was a mere technical irregularity attributable to the election officials and did not affect the validity of the votes so cast.[30]

The dissent again took issue with the holdings of *McCoy*. Asserting that elections and, as a consequence, balloting procedures are of a purely constitutional and statutory origin, it stated that the manner in which write-in votes can be cast is strictly regulated by statute.[31] The dissent also contended that judicial construction of these ballot statutes was unnecessary and was a usurpation of the powers of the legislature.[32] If the ballot statutes are construed as mandatory however, the same opportunity for malfeasance by election officials arises as was previously discussed with regard to the notice statute.[33] By intentionally refusing to have blank spaces printed on the ballots, the election officials could effectively prohibit the casting of write-in votes.

The holdings of *McCoy* and *Miller* now appear to be the law in West Virginia. It might seem that the problem of a vacancy occurring near in time to a general election is resolved. Yet, the "ridiculous

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[29] Miller v. Burley, 187 S.E.2d 803, 811-12 (W. Va. 1972); *accord*, McCoy v. Fisher, 136 W. Va. 447, 67 S.E.2d 543 (1951); Brannon v. Perkey, 127 W. Va. 103, 31 S.E.2d 898 (1944); State *ex rel.* McKown v. Board of Canvassers, 113 W. Va. 498, 168 S.E. 793 (1933); Chapman v. County Court, 113 W. Va. 366, 168 S.E. 141 (1933); State *ex rel.* Lambert v. Board of Canvassers, 106 W. Va. 544, 146 S.E. 378 (1928); Hatfield v. Board of Canvassers, 98 W. Va. 41, 126 S.E. 708 (1925).

[30] It is well established by the decisions of the court that a voter should not be disenfranchised merely because of errors that are the fault of election officials. Gibson v. Bower, 137 W. Va. 462, 73 S.E.2d 817 (1952); Burrows v. Bower, 137 W. Va. 459, 73 S.E.2d 825 (1952); State *ex rel.* Hammond v. Hatfield, 137 W. Va. 407, 71 S.E.2d 807 (1952); Hatfield v. Board of Canvassers, 98 W. Va. 41, 126 S.E. 708 (1925); Morris v. Board of Canvassers, 49 W. Va. 251, 38 S.E. 500 (1901).

[31] W. VA. CODE ch. 3, art. 6, §§ 2, 5 (Michie 1971 replacement volume); Miller v. Burley, 187 S.E.2d 803, 814 (W. Va. 1972) (dissenting opinion); State *ex rel.* Kincaide v. Canvassing Bd., 85 W. Va. 440, 102 S.E. 104 (1920).

[32] In Morris v. Board of Canvassers, 49 W. Va. 251, 255-56, 38 S.E. 500, 502 (1901) the court stated:

> The moment a court ventures to substitute its own judgment for that of the legislature in any case where the constitution has vested the legislature with power over the subject, that moment it enters a field where it is impossible to set limits to its authority and where its discretion alone will measure the extent of its interference. The judiciary cannot run a race of opinion upon the point of reason and expediency with the law-making power.

[33] W. VA. CODE ch. 3, art. 10, § 8 (Michie 1971 replacement volume).

analogy" the dissent proposed is still a possibility under present West Virginia law. This analogy contended that had the death of the sheriff occurred on Monday, November 2, 1970, there would have been a constitutional requirement that the resulting vacancy be filled at the general election held on the following day; anyone receiving a majority of two write-in votes would have been legally elected to that office. Any system of elections that might permit such an occurrence suggests the need for improvement.

Judicial response has not supplied an adequate remedy. If the election statutes are construed as mandatory, then the opportunity for conspiracy and malfeasance arises. If the statutes are construed as directory, the possibility of disenfranchising the majority of voters arises.[34]

Continued judicial interpretation of these statutes will complicate further the electoral process in West Virginia. A constitutional amendment and a legislative response are recommended. The Commonwealth of Virginia recently solved its problem of filling vacancies by means of legislation.[35] The wording of Virginia's provision is substantially similar to its West Virginia counterpart,[36] but the following sentence has been added: "In the event the vacancy occurs within one hundred twenty days prior to the next ensuing general election, the writ of election shall issue for an election to fill the vacancy at the second ensuing general election." This eliminates the problem that arises when a public officer dies, resigns, or is otherwise removed from office at a time near the general election. Article IV, section 7 of the West Virginia constitution states that vacancies occurring prior to a general election shall be filled by appointments which "shall expire at such time after *the next general election* as the person so elected to fill such vacancy shall be qualified." (emphasis added). An amendment to the West Virginia constitution, which would contain the principle of the Virginia statute, may be necessary in light of Article IV, section 7. Legislation pertaining to write-in votes is also required. All ballots should contain blank spaces for the insertion of office designations and names. Requiring blank spaces on all ballots would be a marked improvement over the present section of the Code.[37] The present section

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[34] Miller v. Burley, 187 S.E.2d 803, 821 (W. Va. 1972) (dissenting opinion).

[35] VA. CODE ANN. § 24.1-76 (Michie Supp. 1972).

[36] W. VA. CODE ch. 3, art. 10, § 8 (Michie 1971 replacement volume). For the exact wording of the W. Va. provision see note 4, *supra.*

[37] W. VA. CODE ch. 3, art. 6, § 2 (Michie 1971 replacement volume).

requires that a blank space be left only in the event that the name of a duly nominated candidate does not appear on the ballot. Such new legislation would promote fair elections in West Virginia, and put an end to the ambiguities presently existing in this area of the law.

James H. McCune

Legal Ethics — Drafter of a Will Who Serves as Executor

Defendants, Gulbank Gulbankian and Vartak Gulbankian, were Armenian immigrants who practiced law as partners in an area of Wisconsin populated mainly by people originally from eastern and southern Europe. Throughout a period of approximately sixteen years, they drafted and filed for probate 135 wills. The majority of these contained a provision that one or the other of these attorneys be appointed to serve as attorney for the probate of the testator's estate or that one of the defendants, Vartak Gulbankian, serve as executrix.

The Board of State Bar Commissioners of Wisconsin sought to discipline the defendants by filing a complaint with the Supreme Court of Wisconsin. They claimed the large percentage of wills directing or requesting the employment of the defendants raised a necessary inference that the attorneys had solicited or suggested to their clients they be employed as attorneys for probate of the estates. Because of language and ethnic kinship, the defendants claimed to have a closer relationship with their clients than most attorneys. They further maintained their clients voluntarily asked them to serve as executrix or attorney for probate.

A referee found no solicitation but expressed concern that the defendants' actions might give the appearance of solicitation to laymen who were not aware of the peculiar circumstances involved in the case. *Held*, affirmed. Although an attorney cannot solicit or suggest to a testator that he be named executor or be employed as attorney for probate, the court determined it was not compelled to draw an inference of solicitation in this case. *State* v. *Gulbankian*, 196 N.W.2d 733 (Wis. 1972).

This allegation of solicitation was decided after the Supreme Court of Wisconsin had adopted the American Bar Association's new Code of Professional Responsibility, which replaces the Canons of