



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

October 26, 2010

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

Mr. Robin R. Lind
Secretary, Goochland County Electoral Board
P.O. Box 1013
Goochland, Virginia 23063

Dear Mr. Lind:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether an absentee ballot shall be counted when that absentee ballot was properly cast by a qualified voter who then dies before election day.

Response

It is my opinion that, when a general registrar knows that an absentee voter has died prior to election day, but after having voted by absentee ballot, the registrar must cancel that voter's registration, and the absentee ballot should not be counted; but that in those circumstances in which absentee ballots are cast prior to election day in a manner by which the absentee ballot no longer can be set aside, the general registrar who knows of the voter's death shall cancel that voter's registration, but election officials are not otherwise required to perform the impossible task of not counting the deceased voter's absentee ballot.

Applicable Law and Discussion

Pursuant to § 24.2-700, a registered voter meeting one of the eligibility requirements of that section may request an absentee ballot in any election in which he or she is qualified to vote. Section 24.2-707 provides two methods by which an eligible voter may vote by absentee ballot: by mail or in person. Specifically, an absentee voter either may (1) send a completed absentee ballot application to the general registrar's office and, after receiving the official printed ballot from the electoral board, mark the ballot in the presence of a witness, enclose the ballot in the designated envelope in accordance with the instructions provided, and return the ballot to the electoral board by mail to be counted on election day; or may (2) appear in person at the office of the general registrar (or at another location approved by the electoral board) to complete the application procedures and, if the official ballot is then available and the jurisdiction uses a central absentee voting precinct, cast the absentee ballot on voting equipment provided by the Electoral Board.

Section 24.2-711, which prescribes the duties of election officers with respect to absentee ballots, provides:

After the close of the polls, the container of absentee ballots shall be opened by the officers of election. As each ballot envelope is removed from the container, the name of the voter shall be called and checked as if the voter were voting in person. If the voter is found entitled to vote, an officer shall mark the voter's name on the pollbook with the first or next consecutive number from the voter count form, or shall enter that the voter has voted if the pollbook is in electronic form. The ballot envelope shall then be opened, and the ballot deposited in the ballot container without being unfolded or examined. *If the voter is found not entitled to vote, the unopened envelope shall be rejected.* A majority of the officers shall write and sign a statement of the cause for rejection on the envelope or on an attachment to the envelope.¹

The counting of absentee ballots at the close of regular balloting has long been the practice in Virginia.² A printed absentee ballot delivered to the electoral board by mail or by the voter in person is deemed to be cast on the day of the election.³ The casting of such an absentee ballot takes place when the officers of election, following the steps set forth in § 24.2-711, open the ballot envelope and deposit the ballot in the ballot container after having satisfied themselves that the person who submitted the absentee ballot is a qualified voter entitled to vote in the election. In *Moore v. Pullem*, the Supreme Court of Virginia held that before a vote could be counted, it is the duty of the election officials to:

ascertain whether each of the persons whose ballots [are] so offered had been properly registered, and then whether they had qualified themselves to vote at that election . . . and also to consider every other fact which might have then appeared to show that the person was not a qualified voter. For instance, if it then appeared that he had been convicted of a crime, or if in the interval he had died, of course, the ballot could not have been legally deposited or counted as a valid vote.⁴

Thus, a person who is deceased on election day cannot vote, and the absentee ballot of any such person should not be cast and counted.⁵ Section 24.2-427 mandates that the "general registrar shall cancel the registration of (i) all persons known by him to be deceased . . ." ⁶ A person whose registration to vote has been cancelled cannot vote, and his vote should not be counted.⁷ Accordingly, an absentee ballot of a person known to be deceased shall not be cast and counted on election day.

Virginia law, however, permits certain absentee ballots to be cast prior to election day. Section 24.2-707 expressly provides that "[t]he electoral board of any county or city using a central absentee

¹ Section 24.2-711 (2006) (emphasis added).

² See, e.g., *Moore v. Pullem*, 150 Va. 174, 183, 142 S.E. 415, 417 (1928) ("at the close of the regular balloting on the day of the election," the absentee votes shall be counted) (construing the predecessor to the current absentee voting statutes). But see § 24.2-709.1 (Supp. 2010) (electoral board may authorize general registrar to use alternative procedures prior to election day to expedite counting of absentee ballots capable of being read by an optical scan counting device so long as ballot count totals are not initiated).

³ See 1959-1960 Op. Va. Att'y Gen. 142, 142-43 (an absentee ballot mailed to the electoral board "is not deemed to be actually cast until the day of election"). See also §§ 24.2-600 through 24.2-687, setting forth the methods by which votes are cast on election day and how they are counted.

⁴ *Moore*, 150 Va. at 199, 183 S.E. at 422 (emphasis added).

⁵ *Id.*; see also 1959-1960 Op. Va. Att'y Gen. at 143 (the mailed absentee ballot of a voter who died before election day should not be counted).

⁶ Section 24.2-427(B) (Supp. 2010).

⁷ See §§ 24.2-427 (Supp. 2010) and 24.2-643 (2006).

voting precinct may provide for the casting of absentee ballots on voting equipment prior to election day by applicants who are voting in person” and that “procedures shall provide for the casting of absentee ballots prior to election day by in-person applicants on voting equipment which has been certified, and is currently approved, by the State Board.”⁸ Section 24.2-709.1 further permits an electoral board to authorize its general registrar to use alternative procedures to expedite counting absentee ballots capable of being read by optical scan counting equipment by casting those ballots through the optical scanner, without initiating ballot count totals.

The General Assembly adopted these two provisions for important public policy reasons, namely to make in-person absentee voting more convenient for voters and to ease the administrative burden on local election officials responsible for processing absentee ballots. Both sections require election officials to follow procedures intended to verify that the voter is qualified to vote in that election before the absentee ballot is cast. Once an absentee ballot has been cast on voting equipment, however, it is no longer capable of being set aside on election day.⁹ Although a voter who dies before election day no longer is a qualified voter for that election, election procedures implemented for other important public policy reasons may result in the absentee ballot of such a voter being cast on voting equipment before election day, leaving election officials with no ability to set aside the ballot so that it is not counted.

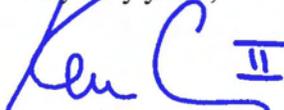
In cases of in-person voting on machines, there is no way to distinguish one electronic “secret” vote from others cast on the equipment, so the absentee vote will be counted. When a printed absentee ballot is processed, however, because the general registrar cancels a deceased voter’s registration, the voter’s name will not be found on the pollbook and the vote will not be counted. As you note, there is thus a different outcome of how an absentee vote will be treated based on the method of voting chosen.

Conclusion

Accordingly, it is my opinion that, when a general registrar knows an absentee voter has died prior to election day, but after having voted by absentee ballot, the registrar must cancel that voter’s registration, and the absentee ballot should not be counted; but that in those circumstances in which absentee ballots are cast prior to election day in a manner by which the absentee ballot no longer can be set aside, the general registrar who knows of the voter’s death shall cancel that voter’s registration, but election officials are not otherwise required to perform the impossible task of not counting the deceased voter’s ballot.

With warmest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

⁸ *Id.*

⁹ The General Assembly has recognized that once a ballot is cast it may not be possible to set it aside if officers of election later determine that the ballot is invalid *See, e.g.*, § 24.2-663 (2006) (“If any person votes, either in person or absentee, more than one time in an election, all ballots received from such person shall be void and, *if possible*, not counted. If one such ballot has already been cast, any additional ballots received from such person shall be void and not counted”) (emphasis added).