

Therefore, the Clerks' final tally is amended and Horseman's vote total is enlarged by two (2) votes. Keller still receives the highest number of votes in the election by three (3) votes.

Facts and Procedural History

Horseman was a candidate for City County Council District 16 in the election held November 4, 2003. After the Marion County Election Board tabulation showed Horseman was not elected, she filed this action under I.C. 3-12-6 et.seq. seeking recount. On December 17, 2003, the Recount Commission made its final determination finding Horseman had five (5) fewer votes than Keller. On December 22, 2003, Horseman filed her appeal challenging six (6) ballots. The Court held hearing on December 29, 2003. On that day, Keller filed his cross-appeal challenging 3 ballots.¹ Voters were required to vote on paper sheets by filling in circular "bubbles" next to party names, individual candidate names, or blank "write-in" lines. Absentee voters were required to vote on similar sheets by mail or in person.

Horseman's appeal presents the following:

1. Three disallowed ballots (Exhibits 1-3) in which the Democratic straight party bubble is filled, individual Democratic candidate bubbles are filled, except Horseman's - where the "write-in" bubble is filled and the name of a Democratic City Council candidate from a *separate* district is written on the blank line
2. One allowed ballot (Exhibit 6) in which the Republican straight party vote bubble is filled and an oval is drawn under the party name.

¹ The appeals were filed before the Court entered its mandatory order "acknowledging" the Commission's determination under I.C. 3-12-6-22.5 (a), but the Court finds no prohibition to proceed, no harm to any party, and public interest in expediency outweighs any *de minimus* procedural irregularity.

3. Two disallowed absentee ballots (Exhibits 4 and 5) in which the Democratic straight party bubble is filled, but there are either no initials or any stamped seal from the Clerk, as required under I.C. 3-11-4-19.

Horseman argues the “write-in” names are not “candidates” to disallow the otherwise straight party votes for her office. In addition, she claims the oval is a “distinguishing mark” and disqualifies that ballot. Finally, she acknowledges the Indiana recount statutes require initials and seals on absentee ballots, but argues such disparate treatment violates the Indiana Constitution.

Keller’s appeal presents the following²:

1. One disallowed ballot (Exhibit C) in which Keller’s bubble is filled, and an “X” placed through the bubble.
2. One disallowed ballot (Exhibit D) in which the Republican straight party bubble is filled and the word “void” is written above it.
3. One allowed absentee ballot and materials (Exhibits E-M) showing a voter listing a mailing address as the Horizen House - a nonresidential center for homeless persons.

Keller argues the “X” and the “void” do not disqualify the ballots because voter intent is evident since the voter submitted the sheet to the voting machine. In addition, he claims the Commission cannot count the ballot of an apparently homeless absentee voter because there is no evidence of residence in the precinct.

Law

² Keller does not seek appeal for Exhibits A and B unless the Court determines Horseman’s Exhibit 6 (also Keller’s Exhibit B) should be disallowed.

Voting is a “fundamental right.” Indiana Gaming Commission v. Moseley (1994), Ind., 643 N.E.2d 296,304.

Under I.C. 3-12-1-1, the primary factor in determining a voter’s “choice” is the “intent of the voter. If the voter’s intent can be determined . . . the vote shall be counted . . . if it is impossible to determine a voter’s choice . . . [it] may not be counted.”

Under I.C. 3-12-6-22.5 (b) and(c)(2) (A), an appeal of a recount commission is “final,” and an appeal is limited to “questions of law arising out of the recount.”

“Intent” is an issue of fact. Gibson County Farm Bureau Coop. Ass'n v. Greer (1994), Ind., 643 N.E.2d 313; Noblesville Redevelopment Commission v. Noblesville Associates, et.al. (1996), Ind., 674 N.E.2d 558; David v. State (1996), Ind., 669 N.E.2d 390.

The first step in interpreting any Indiana statute is to determine whether the legislature has spoken clearly and unambiguously. When a statute is clear and unambiguous, there is no need to apply any rules of construction other than that requiring words and phrases to be taken in their plain, ordinary, and usual sense. Benham v. State (1994), Ind., 637 N.E.2d 133.

Under 3-12-1-7.5:

If a voter votes a straight party ticket . . . and writes in the name of a **candidate**, the straight party ticket vote shall be counted for all offices except the offices for which a write-in vote was cast. The write-in vote shall be counted if the voter’s intent can be determined. (emphasis supplied)

Under I.C. 3-5-2-6, the definition of “candidate” includes a person who has “taken the action necessary to qualify under Indiana law for listing on the ballot at an election or to become a write-in candidate . . .”

Under I.C. 3-12-1-3 and 3-12-1-10, a ballot is void if it bears any “distinguishing mark” or a “symbol” made or written “with intent to enable a person to determine” who cast the ballot.

Under I.C. 3-11-4-19 and 3-11-10-27, absentee ballots that are mailed by a county election board *or voted in person before an absentee voter board* must bear the official seal or signature of the Clerk and the initials or signatures of the appropriate board (emphasis supplied). Since 1987, I.C. 3-12-1-13 (“Section 13”) requires an absentee ballot is void if the signature or initials are not present. However under I.C. 3-12-1-12 (“Section 12”), a vote cast by any other method, including *in person before a precinct board*, is not void despite election official failure unless there is “evidence of fraud, tampering, or misconduct affecting the integrity of the ballot . . .” (emphasis supplied). Indiana cases have strictly enforced the requirements of Section 13. Hughes v. Brooks (1992), Ind.App., 597 N.E.2d 998. But before its adoption, Indiana law allowed absentee ballots to be counted, regardless of election official’s mistakes, under a “substantial compliance” doctrine, or the policy language in Section 12 allowing votes absent evidence of fraud. Boone v. Smith (1947), Ind., 77 N.E.2d 357; Miles v. Elzroth (1976), Ind., 351 N.E.2d 77.

Article 1, Section 23 of the Indiana Constitution imposes two requirements upon statutes that grant unequal privileges or immunities to differing classes of persons. First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23,

courts must exercise substantial deference to legislative discretion. Collins v Day (1994), Ind., 644 N.E.2d 72. The first requirement incorporates and satisfies the often expressed concerns that such legislative classifications be "just," "natural," "reasonable," "substantial," "not artificial," "not capricious," and "not arbitrary." Id. at 79. Overall, the distinctions must involve something more than mere characteristics which will serve to divide or identify the class. There must be inherent differences in situation related to the subject matter of the legislation which require, necessitate, or make expedient different or exclusive legislation with respect to the members of the class. Id. at 78.

Analysis

Issues of Voter Intent Preclude Appeal of Commission's Determination Regarding Marked Ballots, Residency, and Write-In Names

The ballot marks are solely issues of fact, and no party argues otherwise. Accordingly, appeals of the Commission's final factual determinations of voter intent on Horseman's Exhibit 6 and Keller's Exhibits C and D are precluded by I.C. 3-12-6-22.5 (b) and (c)(2)(A). In addition, Keller's appeal of the Commission's final factual determination regarding the residency of a homeless absentee voter is also precluded.

Horseman's appeals regarding the "write-in" names are also issues of fact. She argues that I.C. 3-12-1-7.5(a) does not apply to disallow the otherwise straight party vote for her because the "write-in" names are not "candidates" for her district race, although undisputedly "candidates" under I.C. 3-5-2-6. The clear, unambiguous, and plain meaning of these statutes does not support her argument. Regardless, even the names of non-"candidates," and not Horseman, for the District 16 race only present issues of voter intent that have already been resolved by the Commission's factual determination. Therefore, the Commission's determination is final under Indiana law.

Section 13 Violates The Indiana Constitution.

First of all, Horseman's Exhibit 5 is an absentee ballot that contains two clerk's initials as required by law. It does not contain the Clerk's official seal as required by law. However, Section 13 only provides that absentee ballots without the initials are void. Therefore, the Commission erred as a matter of law by disallowing it.

Furthermore, as shown above, the law prescribes different standards for persons who vote *in person* at their precinct polling place and those who vote by absentee ballot, even if they also vote *in person*. Under Section 12, a regular voter will not lose their vote unless there is evidence of fraud, even if an election official fails to act or makes a mistake. But absentee voters do lose their vote merely because of the mistake or failure of a clerk, under Section 13, even when there is no evidence of fraud and the voter has done everything the law requires to enter their vote. Under Collins v. Day, supra., such different treatment of absentee voters is only allowed if it is reasonably related to "inherent characteristics," not "mere characteristics," that supposedly make absentee

voters different than the regular voter. Such different treatment must be justified by substantial considerations, not arbitrary or capricious.

Destroying one's fundamental right to vote because of a clerk's mistake is totally unjustified. It is not reasonably related to any inherent characteristic of absentee voters that is different than a regular voter, especially those who vote absentee in person at the Clerk's own office just like regular voters at their neighborhood polling places. Clerks are human and will always make mistakes. But why kill an absentee vote, but not the regular vote? There is no reason, and Section 13 accordingly violates Article 1, Section 23 of the Constitution of Indiana.

Even if a reasonable argument can be made that absentee voting by mail is "inherently" different, Collins requires a showing that the "preferential" treatment, that is, upholding the right to vote despite clerk's mistakes, must be available to everybody in the same group. Since Section 13 does not differentiate between absentee voting by mail, and absentee voting in person, it still must fail.

In addition, Collins requires this Court to accord substantial deference to the discretion of the General Assembly in adopting Section 13. The fundamental right to vote, and voter intent, all outweigh this consideration in favor of the voter.

Conclusion

The Commission's final determinations regarding ballots marks, voter residency, and "write-in" names are issues of fact that are precluded from further consideration by this Court.

The Commission erred as a matter of law by disallowing two absentee ballots for Horseman.

Order

The Clerk's final tally is amended to show two (2) more votes for Horseman. Keller receives the highest number of votes by a plurality of three (3).

IT IS SO ORDERED.

Dated this 30th day of December 2003.

David J. Dreyer, Judge
Marion Superior Court
