

# RESCINDED

DE 88-32 - September 12, 1988

## Witnesses on Absentee Ballot Sections 101.64 and 101.65, F.S.

*To: Honorable Donna Bryant, Supervisor of Elections, Osceola County, Post Office Box 759, Kissimmee, Florida 32742*

*Prepared by: Division of Elections*

This is in reference to your request for an advisory opinion on the Florida Election Code, Chapters 97-106, Florida Statutes. You are the Supervisor of Elections in Osceola County and under Section 106.23 (2), Florida Statutes, the Division of Elections has authority to issue this opinion to you.

Your specific question is:

When a registered voter of Osceola County serves as an attesting witness on an absentee ballot and fails to list his address, may the supervisor use the official voter registration record of Osceola County as proof of address and thereby satisfy that portion of the statute?

Section 101.64, Florida Statutes, provides for the delivery of absentee ballots for electors who are unable to vote at the polls on election day and requires that the elector's signature must be witnessed by either a notary or an officer, or by two witnesses who are at least eighteen years of age. The voter certificate which is prescribed by this section also provides a place for the addresses of the two witnesses.

Section 101.65, Florida Statutes, contains the instructions to electors when voting absentee and the supervisor must enclose with each absentee ballot instructions which must substantially meet the form provided in the statutes. Instruction six reads as follows:

6. VERY IMPORTANT. Sign your name on the line above "(Voter's Signature)."
  - a. Persons serving as attesting witnesses shall affix their signatures and addresses on the Voter's Certificate. Any two persons 18 years of age or older may serve as attesting witnesses, except that no candidate may serve as an attesting witness.
  - b. Any notary or other officer entitled to administer oaths or any other Florida supervisor of elections or his deputy, other than an candidate, may serve as a sole attesting witness. The sole attesting witness shall affix his signature, official title, and address to the Voter's Certificate.

Instructions 6.b. provides that witnesses must affix their signatures and addresses on the voter's certificate and that a notary or officer must affix his signature, title and address to the certificate.

Your question is, when a witness has failed to list his address, may the official registration records of the county be used as proof of address by the supervisor of elections. This is not necessary and, unless there is evidence of fraud, the ballot may be counted if witnessed but the witnesses failed to give their addresses.

Sections 101.64 and 101.65, Florida Statutes, have no residency requirements for witnesses for the voter certificate although the addresses of such witnesses is required by the instructions for absentee electors. Election laws are to be liberally construed to prevent disfranchisement of legal voters. State ex rel. Carpenter v. Barber, 144 Fla. 159, 198 So. 49 (1940). However, absentee ballots are in derogation of common law and are to be substantially construed. Boardman v. Esteva, 323 So.2d 259 (1975). Cert. den. and app. dismd. 425 U.S. 967, 48 L.Ed. 2d 791, 96 S.Ct. 2162.

The Supreme Court of Florida in the Boardman v. Esteva case stated:

In developing a rule regarding how far irregularities in absentee ballots will affect the result of the election, a fundamental inquiry should be whether or not the irregularity complained of has prevented a full, fair and free expression of the public will. Unless the absentee voting laws which have been violated in the casting of the vote expressly declare that the particular act is essential to the validity of the ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as directory, not mandatory, provided such irregularity is not calculated to affect the integrity of the ballot or election. (Emphasis added.)

Id., 265.

Therefore, a determination must be made as to whether the requirement contained in Section 101.65, Florida Statutes, is directory or mandatory. The instructions to the voter states, "Persons serving as attesting witnesses shall affix their signatures and addresses on the voter's certificate."

In the Boardman v. Esteva case, Esteva brought suit in circuit court seeking to have the court declare him the winner in an election for a seat on the Second District Court of Appeal on the basis of the invalidity of 3,389 absentee ballots. The court noted that some of the alleged irregularities involved a number of "clerical misprisions or omissions, most of which are of so little real significance as to be fairly classified as unsubstantial." For example:

The other irregularities, such as address of attesting witness omitted, post office cancellation stamp not affixed, vague identification of witnesses, failure of deputies to record oath, and the other discrepancies are not of vital consequence and may be attributed more logically to human misunderstanding of minute technicalities than a lack of diligence to comply with essential requirements. Fraud, corruption or gross negligence are completely absent.

Id., 262.

Therefore, it is our opinion that based upon the Supreme Court of Florida's interpretation of the requirements for attesting witnesses, that in the absence of evidence of fraud, a ballot may be counted

if witnessed but the witnesses failed to give their residences.

### **SUMMARY**

An absentee ballot which has been witnessed but the witnesses failed to give their addresses may be counted if there is no evidence of fraud.