

Opinion No. 67

ELECTIONS; Ballots, absent voter's ballot not to be counted if voter dies before election—Section 23-1313, Revised Codes of Montana, 1947

Held: An absent voter's ballot should not be counted where the absent voter has died before the date of the election.

November 4, 1960

Mr. Tom Darland
Sheridan County Attorney
Plentywood, Montana

Dear Mr. Darland:

You have requested my opinion on the following question:

Where an absentee elector votes by absent ballot and deposits his ballot with the County Clerk and Recorder but dies before the date of the election, should the absent ballot be counted?

In Volume 11, Reports and Official Opinions of the Attorney General, page 347, Attorney General L. A. Foot ruled that, "Upon the death of a voter prior to the date of the election, who has voted an absent voter's ballot, the ballot should be counted as it is the voting and not the counting which governs." Attorney General Foot based his

opinion on the theory that the vote of an absentee voter was complete when the voter filled out his ballot and deposited it with the County Clerk and Recorder. However, in *Maddox v. Board of State Canvassers*, 116 Mont. 217, 149 Pac. (2d) 212, (1944), the Montana Supreme Court held that:

“. . . voting is done not merely by marking the ballot but by having it delivered to the election officials and deposited in the ballot box before the closing of the polls on election day . . . The absent voters' law makes no change in that respect; for the absent voters' ballots must be deposited in the ballot box between the opening and closing of the polls.”

Section 23-1313, RCM, 1947, (1959 Supp.) which governs absent voters' ballots, provides in pertinent part:

“In case the judge finds . . . that the applicant **is then a duly qualified elector** of such precinct, and has not voted at such election, . . . they shall . . . deposit the ballot or ballots in the proper ballot box or boxes, and make in their election records the proper entries to show such elector to have voted. **In case . . . such applicant is not then a duly qualified elector of such precinct, such vote shall not be allowed**, but, without opening the absent or physically incapacitated voter envelope, the judges of such election shall mark across the face thereof . . . 'rejected as not an elector' . . .” (Emphasis added)

The provisions of this statute, as interpreted by the Montana Supreme Court in *Maddox v. Board of State Canvassers*, supra, clearly require that the determination of an absent voter's eligibility to vote is to be made on the date of the election and not at the time the absent voter marks his ballot. For this reason, the contrary opinion of Attorney General Foot in 11 Reports and Official Opinions of the Attorney General 347, must be, and is hereby overruled.

It is therefore my opinion that an absent voter's ballot should not be counted where the absent voter has died before the date of the election.

Very truly yours,
FORREST H. ANDERSON
Attorney General