HARRIS v. MOORE: THE DILEMMA OF THE DISINTERESTED SUPERVISOR OF ELECTIONS

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In the opening paragraph of its decision in *Harris v. Moore*,[1] Florida's Fourth District Court of Appeal summarized its holding as follows: "We reverse an order requiring that a proposed referendum ballot question *be stricken from the Broward County ballot* in the March 14, 2000, election."[2] For a Supervisor of Elections, in particular the Broward County Supervisor of Elections in this case, the words "stricken from the . . . ballot" provoke anxiety and uncertainties that often go overlooked by the real parties in interest in an election dispute.

The Supervisor of Elections is the instrument to provide relief in election disputes. The Supervisor of Elections takes on a unique role in such litigation: he or she usually takes no position on the main issue or underlying dispute, but must position himself or herself as to the relief sought in such disputes.[3] Election lawsuits frequently reach their crescendo in the days and weeks leading up to the election. In election disputes of the nature involved in *Harris v. Moore*, there are two issues: (1) Who is right on the merits and (2) how to effectuate relief? How to effectuate relief is frequently treated as a collateral issue, but it should be the only real issue for a Supervisor of Elections.

I. ROLE OF THE SUPERVISOR OF ELECTIONS IN ELECTION DISPUTES

The Supervisor of Elections has the statutory responsibility

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1. 752 S.2d 1241 (Fla. Dist. App. 4th 2000).

2. *Id*. at 1242 (emphasis added).

3. For this statement, the Author is relying on his firm's experience in representing the Broward County Supervisor of Elections.

for preparing ballots.[4] When the validity of a referendum question is challenged or the qualifications of a candidate for office are tested, the challenging party will almost always request that the ballot be altered, or even that the ballot omit an item. Because the Supervisor of Elections controls the ballot, he or she is a necessary party to effectuate relief that affects the ballot.[5]

The Supervisor of Elections typically has no real interest in the underlying merits of cases. At the same time, however, the Supervisor of Elections must ensure and maintain the integrity of the election process. There are statutory requirements for the preparation and mailing of absentee and overseas ballots that create timing issues for Supervisors of Elections caught in election disputes.[6] Relief sought by the parties, if granted, could severely impact the operations of a Supervisor of Elections' office and adversely affect the election process. As a result, Supervisors of Elections — and their counsel — must walk a fine line between remaining disinterested in the merits of the parties' positions regarding the underlying dispute and protecting the integrity of the election process. Unfortunately, the need to accomplish the latter often will create an impression of violating the former.

The Supervisor of Elections is required to ensure protection of the statutory voting rights of individuals requesting absentee ballots.[7] Overseas citizens must have the right to participate in an election through the absentee-voting procedures.[8] Therefore, the statute prescribes that the Supervisor of Elections must mail advance absentee ballots no fewer than forty-five days before the general election.[9] In the days and weeks before election day, thousands of absentee ballots are requested and sent out to overseas citizens.[10] As a result of the statutory time requirements,

4. *See e.g.* Fla. Stat. § 100.051 (2001) (requiring the Supervisor of Elections to print the ballots and detailing the specifications for ballots).

5. Ans. Br. Appellee Jane Carroll, Broward County Supervisor of Elections at 4, *Harris v. Moore*, 752 S.2d 1241 (Fla. Dist. App. 4th 2000).

6. *E.g.* Fla. Stat. § 100.025 (2001) (requiring ninety days' notice to allow citizens to vote absentee); *id*. § 101.62(4)(a) (absentee ballots will be mailed thirty-five days before primary election and forty-five days before general election).

7. *E.g. id*. § 100.025 (requiring supervisor to send notice of upcoming election "so that such citizen[s] may follow the procedures for absentee voting provided by law"); *id*. § 101.62 (detailing the process for supervisors to accept a request for and mailout an absentee ballot).

8. *Id*. § 100.025.

9. *Id*. § 101.62(4)(a).

10. *See* Ans. Br. of Appellee, *supra* n. 5, at 3 (stating that 4,000-5,000 absentee ballots were mailed in this matter).

election day is not the critical day for a Supervisor of Elections' preparation of ballots. The critical time actually occurs during the weeks before election. Practitioners, and sometimes the courts, frequently overlook or minimize this fact.

II. RELIEF IN ELECTIONS DISPUTES

The *Harris* decision never reached the collateral issue unique to Supervisors of Elections of how to effectuate relief, as the court made a determination on the merits that the referendum question was valid.[11] However, had the court ruled otherwise and affirmed the lower court's decision, it would have been forced to address the lower court's order to strike the question. As discussed below, thousands of overseas and absentee ballots containing the question had been mailed by the Broward County Supervisor of Elections during the pendency of the appeal.[12] Moreover, the Fourth District Court of Appeal rendered its decision on March 3, 2000, just eleven days before the general-election day.[13] Hundreds of thousands of ballots for use on election day at the precincts had already gone to print by that date.[14] Faced with these facts, the Fourth District Court of Appeal would then have had to look to precedent and argument presented by counsel for the Supervisor of Elections to fashion relief.

Florida courts have been known to strike language, issues, or candidates from ballots, or alternatively to permit such to remain but order that votes on an invalid issue or for an unqualified candidate not be counted.[15] A concern for a Supervisor of Elections is that courts view the effect of a decision in an election-dispute case on the office of a Supervisor of Elections as secondary to ensuring that the integrity of the election not be compromised. In *Polly v. Navarro*,[16] the court ordered the Supervisor of Elections to remove a candidate's name from a

11. *Harris*, 752 S.2d at 1242–1244.

12. Ans. Br. of Appellee, *supra* n. 5, at 3, 5, 8.

13. *Harris*, 752 S.2d at 1241. The court also indicated that any motions for rehearing had to be filed within five days of the opinion. *Id*. at 1244. Even assuming any such motions were disposed of by the court no later than that deadline, that situation still would have left less than a week before the election.

14. Ans. Br. of Appellee, *supra* n. 5, at 4–5.

15. *E.g. Smith v. Am. Airlines, Inc.*, 606 S.2d 618, 622 (Fla. 1992) (affirming the removal of an issue from a ballot); *McKane v. Parker*, 567 S.2d 501, 502–503 (Fla. Dist. App. 4th 1990) (affirming that votes should not be counted for an unqualified candidate).

16. 457 S.2d 1140 (Fla. Dist. App. 4th 1984).

ballot fewer than two weeks before the scheduled election.[17] In so doing, the court wrote as follows:

> [W]e concur with the reluctance expressed by the trial court in taking an action which impacts upon the electoral process and causes an administrative hardship in the conduct of an election. However, the court has a responsibility which cannot be avoided. A dispute has been presented which must be resolved. We are not unmindful of the practical effect that excluding appellee Navarro from the ballot will have upon the voters of Broward County. We must note, however, that to fail to act could result in the election of an unqualified nominee. Our legislature has determined the criteria for valid candidacy, and appellee Navarro does not meet them. We would be remiss in our duty if we allowed him to remain on the ballot.[18]

This language suggests that a court's overriding interest is in preserving the integrity of an election. Yet, the court also recognized the hardship that could befall the Supervisor of Elections in complying with the decision.[19]

To avoid placing this burden on a Supervisor of Elections, a court could simply say in essence, "Do not count." In *McKane v. Parker*,[20] the appellate court affirmed a trial-court order finding that a candidate for municipal office was not qualified to be elected to the municipality's town commission.[21] In *McKane*, the trial court rendered its decision eight days after the election, and ordered the Supervisor of Elections

> to deliver the vote tabulation for the office in question to the Broward County Canvassing Board for certification of the results as required by the Florida Election Code . . . [and] directed the supervisor not to transmit the votes cast for McKane, but instead should certify that votes for McKane were not counted pursuant to the judgment of the trial court.[22]

In this case, appropriate relief was effectuated, not by a reprint of ballots, but rather through an order affecting the tabulation and canvassing-board certification process while avoiding massive disruption of the election.

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17. *Id*. at 1144.
18. *Id*.
19. *Id*.
20. 567 S.2d 501 (Fla. Dist. App. 4th 1990).
21. *Id*. at 503.
22. *Id*. at 502.

Even the Florida Supreme Court has recognized the difficulties inherent in amending ballots shortly before a scheduled election. In *Smith v. American Airlines, Incorporated*,[23] the Florida Supreme Court ordered that a proposed constitutional amendment, Proposition 7, be stricken from the general-election ballot approximately three weeks before the election.[24] However, in doing so, the court noted that, "[b]ecause of the shortness of time, it may be that it will be impossible to remove Proposition 7 from all of the ballots. In that event, any votes on Proposition 7 shall be deemed void."[25]

III. HARRIS v. MOORE AS AN EXAMPLE OF THE SUPERVISOR OF ELECTIONS' DILEMMA

The *Harris* court did not discuss the ballot relief issues with which the Broward County Supervisor of Elections was forced to contend in that case. The facts in *Harris* concerning critical dates of hearings and decisions, critical dates in the election timeline for the March 14, 2000 election in Broward County, and the parties' wrangling over the ballot language, provide a case study in a Supervisor of Elections' dilemma. At the time of the hearing and appeal in this case, there were 831,270 registered voters within Broward County, and it was anticipated that 604 precincts would be used during the election.[26] Twelve municipalities were to conduct elections during the March 14, 2000 election.[27] Notwithstanding the fact that the subject referendum question was to be placed on all ballots, the individual municipal elections involved district- and city-wide elections and required their own, distinct ballot styles and forms.[28] The logistics of preparing for an election of this nature are extremely complex.

For the March 14, 2000 election, the overseas-ballot-mailing deadline was January 28, 2000.[29] The circuit court entered its order striking the ballot question on January 19, 2000 — fewer than ten days before that deadline, and within a week of the

23. 606 S.2d 618 (Fla. 1992).

24. *Id*. at 622 (the October 13th decision concerned the ballot in the upcoming November election).

25. *Id*. at 622 n. 3.

26. Ans. Br. of Appellee, *supra* n. 5, at 2.

27. *Id*.

28. *Id*.

29. *Id*. at 3, 5.

printing deadline.[30] That same day, the Secretary of State filed her Notice of Appeal. Because the Secretary of State (and a Supervisor of Elections) is entitled to an automatic stay of the circuit court order,[31] the case actually remained at a status quo. Hence, as of that date, the ballot question was to remain on the ballot for the March 14, 2000 election.

The Supervisor of Elections was now faced with an operational and legal question: How to print the ballots? If the ballots were printed with the question, and the lower court's order was affirmed, the Supervisor of Elections technically would have acted contrary to the order. Further court action would have been necessary following the appellate court's decision to effectuate the relief the lower court intended to grant in its original order. Such relief would have been ordered within days of the election, well into election preparation and after overseas and absentee ballots had been mailed and several hundred thousand ballots for use on election day at the polls had been printed. Should, however, the Supervisor of Elections omit the question, and the appellate court reverse the lower-court order, then thousands of overseas and absentee voters would have been denied the right to vote on the issue. A remedy for those voters, which also would have ensured the integrity of the election, may well have been impossible.

Just four days before the mailing deadline, on January 24, 2000, the plaintiffs in *Harris v. Moore* filed a Motion to Vacate the Stay with the lower court.[32] Two days later, on January 26, 2000, and only two days before the mailing deadline — but after the printing deadline for the overseas ballots — the lower court ordered the Broward County Supervisor of Elections to print the ballots a certain way.[33] As required by state and federal law, the Broward County Supervisor of Elections mailed military and overseas absentee ballots on January 28, 2000.[34] In addition, an estimated 4,000 to 5,000 absentee ballots were to be mailed before the March 14, 2000 election.[35]

The Supervisor of Elections had to take a position relative to the ballots. Therefore, in the interest of preserving the integrity

30. The Supervisor of Elections was to print the overseas ballots on January 25, 2000.
31. Fla. R. App. P. 9.310(b)(2) (2001).
32. Ans. Br. of Appellee, *supra* n. 5, at 3.
33. *Id*.
34. *Id*.
35. *Id*.

of the elections and minimizing disruption of the election process, the Broward County Supervisor of Elections had to argue against any remedy that affected the layout of the ballot, including the striking of the referendum question. Case law provided examples of relief in which issues could not be stricken from the ballot,[36] and the Broward County Supervisor of Elections and her counsel were aware of those cases. Hence, if the lower court's ruling against the validity of the referendum question were affirmed, the Supervisor would argue that appropriate relief could be granted, but not in the form of striking the referendum.[37] This position aligned the Supervisor of Elections with the Secretary of State, who argued that the ballot language was valid, on issues relating to ballot preparation and the stay.[38] An unintended and unfortunate side-effect of this position was the perception that the Supervisor of Elections was taking sides regarding the validity of the ballot referendum, a perception that is not accurate.

IV. CONCLUSION

Courts in Florida will resolve the underlying election dispute first, then address a remedy second. The appellate court's opinion in *Harris v. Moore* does not provide any real guidance to a practitioner defending litigation on behalf of an elections officer such as a Supervisor of Elections. Yet, as outlined above, it provided an excellent case study of the unique problems and issues facing Supervisors of Elections in election disputes. The parties in interest often will focus on the merits of their positions and zero in on one main remedy: the content of the ballot. Undaunted by potential adverse operational and administrative hardship on the part of the Supervisor of Elections, the parties in an election dispute joust over ballot issues that directly affect the Supervisor of Elections.

Counsel for an elections officer must know key dates and facts affecting the election and must be aware of significant legal issues such as court-sanctioned relief, compliance with federal and state election laws, and applicable rules of appellate procedure. Counsel for a Supervisor of Elections is on his or her

36. *See supra* nn. 19–22 and accompanying text.

37. *Id.*

38. The Fourth District Court of Appeal ultimately issued an order reinstating the unconditional automatic stay on February 4, 2000 — seven days *after* the deadline for mailing overseas ballots.

own, and must advance arguments concerning potential relief, even if a perception of favoritism is created. Counsel for a Supervisor of Elections must take on the responsibility of educating a court on the issue of remedy — even if it causes the case to be side-tracked from the underlying merits. The courts, both trial and appellate, must be made aware of the hardships caused by potential remedies. Finally, counsel for a Supervisor of Elections may have to recommend remedies to a court. In the absence of such recommendations, a court may order a remedy that creates an administrative and operational nightmare, requires extreme expense, or one with which it is impossible to comply. Any of these would create quite a dilemma for a Supervisor of Elections and his or her counsel.[39]

39. In May 2001, the Florida Legislature adopted the "Florida Election Reform Act of 2001," which has been signed into law by Governor Jeb Bush. 2001 Fla. Laws ch. 40. The act was an outgrowth of the turmoil following the November 7, 2000 general election in Florida. Although the act significantly revamped the elections process in Florida, its adoption did not resolve any of the issues present in *Harris v. Moore* concerning appropriate relief in election disputes when the administration and operation of a Supervisor of Elections Office are at stake.