
THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
WEST JORDAN DEPARTMENT

MIA LOVE, a Utah resident; and FRIENDS OF
MIA LOVE, a Utah corporation,

Petitioners,

v.

SHERRIE SWENSEN, Salt Lake County Clerk
and election officer,

Respondent.

ORDER

Case No. 180908585

Judge James D. Gardner

THIS MATTER is before the Court on a Verified Petition under Utah Code Section 20A-1-404 and Rule 65B of the Utah Rules of Civil Procedure (Petition) filed by Petitioners Mia Love and Friends of Mia Love (collectively, the Love Parties).¹ Respondent Sherrie Swensen opposes the Petition and asks that it be summarily dismissed. Intervenor Ben McAdams also opposes the Petition and asks that it be dismissed.

As required by statute, the Court held a hearing on November 15, 2018. Robert P. Harrington appeared and argued on behalf of the Love Parties; Bridget K. Romano appeared and

¹ Although the Petition cites both section 20A-1-404 and Rule 65B as providing paths for judicial review, the Love Parties acknowledge that Rule 65B is merely an alternative avenue that is triggered only if the Court were to determine that the Petition was not procedurally proper under section 20A-1-404. The Court determines that election controversies are properly raised by a petition under section 20A-1-404. Thus, a “plain, speedy and adequate remedy” exists for the Love Parties. Accordingly, Rule 65B is not available. *See* Utah R. Civ. P. 65B(a) (remedy under Rule 65B is available only “[w]here no other plain, speedy and adequate remedy is available”).

argued on behalf of Ms. Swensen; and D. Loren Washburn appeared and argued on behalf of Mr. McAdams. Although Ms. Swensen was present at the hearing, the Love Parties elected not to have her “answer, under oath, to the petition.” *See* Utah Code Ann. § 20A-1-404(2)(a). Instead, the Love Parties agreed to have their questions answered by proffer. Following the hearing, the Court took the matter under advisement. Having carefully reviewed the record and considered the arguments of counsel, the Court now issues the following Order.

BACKGROUND

Congresswoman Mia Love is involved in a hotly-contested race for re-election to Utah’s Fourth Congressional District in the United States House of Representatives against Salt Lake County Mayor Ben McAdams. The race remains too-close-to-call more than a week after Election Day. Ballots in Salt Lake County (the County) continue to be processed and votes counted. According to the Petition, poll monitors have been allowed to “observe the process by which the signature verifiers for the County determine whether signatures on the ballot envelopes match signatures that the County has on file, but [Ms. Swensen] has denied poll monitors a process to challenge those verifiers’ determinations.” (Petition at 2.) The Love Parties desire a more active role in verifying signatures and ask the Court to improve the process.

Ms. Swensen contends that she has complied with all applicable statutory requirements under Title 20A of the Utah Code (Election Code) and that the Love Parties are not entitled to the relief requested in the Petition. Mr. McAdams agrees with Ms. Swensen. He also raises constitutional concerns with the timing and nature of the Petition.

STANDARD

When an election controversy is presented to the Court, the Court “shall ... summarily hear and dispose of any issues raised by the petition to obtain: (i) strict compliance with all filing deadlines for financial disclosure reports ... [and] (ii) substantial compliance with all other provisions of [the Election Code] by the parties to the controversy[.]” Utah Code Ann. § 20A-1-404(2)(b).

DISCUSSION

Ms. Swensen and Mr. McAdams argue that the Petition fails because the Love Parties are not entitled to the relief requested in the Petition. The Court agrees.

A verified petition seeking judicial review of an election controversy “shall identify concisely the nature of the controversy and the relief sought.” Utah Code Ann. § 20A-1-404(1)(b). Here, the only relief sought by the Love Parties in the Petition is an order providing the following six remedies:

1. granting Petitioners a meaningful opportunity to analyze and challenge the County’s determinations on whether the signatures on ballot envelopes match the signatures on file with the County;
2. precluding the County from separating any ballots from their respective ballot envelopes while such analysis is pending and where the signature verification had been challenged after such analysis;
3. precluding the County from validating signatures based on Voter Affidavits that it receives until Petitioners have had a chance to receive and review copies of those affidavits along with the corresponding ballot envelopes, and lodge and resolve challenges;

4. granting Petitioners a meaningful opportunity to analyze and challenge the County's determinations on whether provisional ballot envelopes or forms are valid and sufficient;
5. precluding the County from de-linking the unique number on the provisional ballot envelopes or forms from the corresponding electronic voting record until Petitioners have had an opportunity to analyze the provisional ballot envelopes or forms, and lodge and resolve challenges; and
6. precluding the County from tabulating ballots until Petitioners have had an opportunity to analyze the provisional ballot envelopes or forms, and lodge and resolve challenges.

(Petition at 1-2.)

Although the Love Parties identified specific relief sought in the Petition, they failed to show an entitlement under Utah law to the relief sought. In other words, the Love Parties failed to point the Court to a single statute, rule or case that would entitle them to any of the relief sought in the Petition. Instead, the Love Parties effectively ask the Court to create expansive new rights for campaign involvement in ballot processing.² While the Love Parties appear to acknowledge that the Election Code is "silent" as to the relief requested, they argue that the requested relief is consistent with the Legislature's intent. As argued by Ms. Swensen and Mr. McAdams, however, the rights of candidates and campaign officials to watch polls are set forth

² Presumably, the new rights of oversight and challenge sought by the Love Parties would apply to every candidate and group with an issue on the ballot. It is not difficult to imagine the potential for chaos that this would create. And it raises substantial concerns about what the process for handling challenges would look like. Courts are ill-suited to construct the type of detailed framework that the Love Parties' requested relief would entail. *See, e.g., Jones v. Barlow*, 2007 UT 20, ¶ 36, 154 P.3d 808 ("Unlike the legislature, which may craft a comprehensive scheme for resolving future cases and then may repeal or amend it at any time should it prove unworkable, courts are not agile in developing social policy.").

in the Election Code and are limited by statute. *See* Utah Code Ann. § 20A-3-201(4) & (5) (respectively describing what a poll watcher may and may not do). And by the Love Parties' own account, those rights are being met, not infringed, by Ms. Swensen. Neither a poll watcher nor a candidate enjoys a statutory right to challenge, override or re-do the type of work by an election official at issue in this case. And the Court declines the Love Parties' invitation to create new rights not found in the Election Code.³ In the Court's view, the Love Parties' arguments for increasing candidate involvement in the signature verification process is better directed at the Legislature. *See, e.g., Tasker v. Lopez*, 674 P.2d 127, 128 (Utah 1983) (a party's argument for creating a right to recovery not recognized by statute "must be directed to the Legislature"). Accordingly, the Court determines that the Petition fails because the Love Parties are not entitled to the relief requested in the Petition.

In their memorandum in opposition to Ms. Swensen's motion to dismiss, the Love Parties attempt to add another item of relief not previously mentioned in the Petition. Specifically, the Love Parties request "a determination from this Court that all such Voter Affidavits are deficient and an order from this Court precluding the County from verifying ballots on the basis of those Voter Affidavits." (Love Parties' Mem. in Opp'n to Mot. to Dismiss at 4.) The Love Parties

³ The Court notes that granting the Love Parties the relief they seek could actually constitute a violation of the Election Code. *See* Utah Code § 20A-3-203(1) ("It is unlawful for an election official or watcher to reveal to another person the name of a candidate or ballot proposition for whom a voter has voted or to communicate to another person the election official or watcher's opinion, belief, or impression regarding for whom or what a voter has voted."). Thus, it is difficult to understand how the requested relief could be consistent with the Legislature's intent.

acknowledge that they did not seek this relief in their Petition. And they fail to provide the Court with any authority that would allow them to do so for the first time in an opposition memorandum. As set forth above, Utah Code Ann. § 20A-1-404(1)(b) requires the petitioner to identify the relief sought *in the Petition*. On this issue, the Love Parties failed to do so. The Love Parties note in their opposition memorandum that they would “be willing” to amend their Petition, but they never formally sought leave of the Court to do so. Simply adding a new item of relief along with a mere suggestion of willingness to amend the Petition in an opposition memorandum is insufficient to satisfy Utah’s pleading requirements. *See Harper v. Evans*, 2008 UT App. 165, ¶ 14 (“A plaintiff cannot amend the complaint by raising novel claims or theories for recovery in a memorandum in opposition to a motion to dismiss or for summary judgment because such amendment fails to satisfy Utah’s pleading requirements.” (citation omitted)).⁴ The Court declines to consider the item of relief newly-raised in the opposition memorandum.

In addition to the Petition’s failure to seek relief available under Utah law, the Court determines that the Petition suffers from two other problems. First, the Petition was brought so late in the process that it would be difficult, if not impossible, to grant the relief requested. Section 20A-1-404 contemplates that an election controversy will be brought to the court’s attention early enough in the process that the court can direct an election official to come into

⁴ The requirement that a petitioner identify all the relief sought in the petition is especially critical in cases like this where the proceedings are expedited. Here, the Love Parties filed their opposition memorandum just hours before the November 15 hearing. In the Court’s view, this did not give the other parties sufficient time to fairly address the newly-raised issues.

substantial compliance with the Election Code.⁵ A petition under section 20A-1-404 is not designed to challenge the result of an election.⁶ The Court is authorized only to order substantial compliance with the provisions of the Election Code. *See* Utah Code Ann. § 20A-1-404(2)(b)(ii). But, here, much of the relief requested in the Petition relates to election work that has already been performed; and, in most respects, cannot be undone.⁷ The Love Parties offer no persuasive explanation for their delay in bringing the Petition. Having waited so long to bring the Petition, the Love Parties have effectively destroyed the Court's ability to provide the relief sought.

Second, the Court notes that the relief requested in the Petition raises significant concerns under the Equal Protection Clause of the United States Constitution and the Uniform Operation of Laws Provision of the Utah Constitution. *See* U.S. Const. amend XIV, § 1; Utah Const. art. 1, § 24. As argued by Mr. McAdams, if the Court were to grant the Love Parties the relief they seek in the Petition, it would result in a ballot challenge procedure that would only be applied to voters in Salt Lake County and only to ballots that have not yet been counted. The Court

⁵ As noted above, relief under section 20A-1-404 is circumscribed: faced with an election controversy, a court may order "(i) strict compliance with all filing deadlines for financial disclosure reports," and "(ii) substantial compliance with all other provisions of [the Election Code] by the parties to the controversy." The statute provides for no other relief.

⁶ Election contests are governed by chapter 4 of Title 20A, which, conveniently, also houses the procedures for recounts.

⁷ For example, the vast majority of ballots have been separated from their envelopes and it is undisputed that they cannot be reunited. Thus, there would be no way for the Court to order Ms. Swensen to allow challenges to the signature verification of those ballots and envelopes. There is a similar problem related to the voter affidavits. The unrebutted testimony is that the vast majority, if not all, of the voter affidavits have already been sent out.

recognizes the potential constitutional problems that could result from applying different rules to different voters. But because the Court determines that the Love Parties are not entitled to the relief they seek as set forth above, the Court need not decide whether the relief sought in the Petition also violates the United States and Utah Constitutions. *See I.M.L. v. State*, 2002 UT 110, ¶ 9 n. 3, 61 P.3d 1038 (“Generally, we avoid reaching constitutional issues if a case can be decided on other grounds.”).

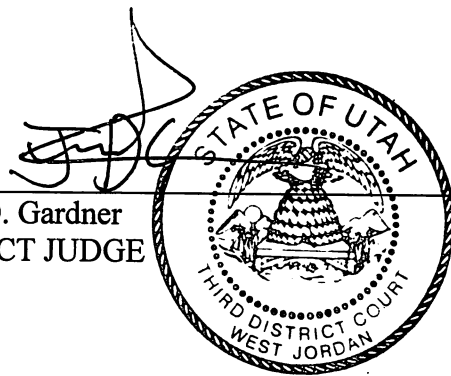
CONCLUSION

Based on the foregoing, the Court concludes that the Love Parties are not entitled to the relief set forth in the Petition. Accordingly, the Petition is dismissed with prejudice.

DATED this 16th day of November, 2018.

BY THE COURT:

James D. Gardner
DISTRICT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 180908585 by the method and on the date specified.

MANUAL EMAIL: ROBERT P HARRINGTON rharrington@rqn.com

MANUAL EMAIL: BRIDGET K ROMANO bromano@slco.org

MANUAL EMAIL: D LOREN WASHBURN lwashburn@smithwashburn.com

11/16/2018

/s/ LISA MUNK

Date: _____

Deputy Court Clerk