Voter Competency and Denying the Right to Vote: Part 1

June 16, 2015
2:00pm-3:30pm EST
Agenda...

- Leanne Roth and Nancy Ward, NTAC for Voting and Cognitive Access
  - Guardianship and voting rights in self-advocacy
- Jason Boylan, Disability Rights Ohio
  - Voter outreach and voter rights training
- Kate Bowden, Rhode Island Disability Law Center
  - Successful voter competency case in Rhode Island
- Q&A following presentations
  - Use the “chat window” for questions during the presentation
Guardianship & Voting
A Self Advocacy Perspective

Leanne Roth, Nancy Ward, and Teresa Moore
National Technical Assistance Center for Voting & Cognitive Access
SABE Voter Project
Guardianship and Voting
A self advocacy perspective

• Make it personal: using our voting stories.

• Many of my friends in Oklahoma who have a guardian are not allowed the privilege to vote.

• People with disabilities who do get to vote know how important it is because so many of their friends do not get to vote.

• Voting is a privilege that if we don’t use may be taken away.
Limited Guardianship

• Many guardians assume that because they have guardianship they can make the decision whether their “ward” can vote even in states where this is not an issue.

  Many tell us “My guardian said no”

• Limited Guardianship allows people to vote and have guardian support.

We believe guardianship should not affect voting rights
Guardianship and Voting Education
Our self advocacy plan

Education is key for the voting rights of a person’s life:

• Future voters
• Schools
• Parents or Guardians
• Provider Agencies
• Poll workers
Make Voting Accessible for ALL!

*Whereas* voting is the most basic right and responsibility of every American citizen, including citizens with disabilities.

*Whereas* protecting the right to vote of citizens with disabilities ensures that the democratic process will work for the benefit of all.
Make Voting Accessible for ALL!

*Whereas* registering to vote and casting a ballot promotes citizen involvement, self-determination and independence.

*Whereas* the majority of states have elections or guardianship laws that take away the right to vote of individuals with developmental and cognitive disabilities.
Make Voting Accessible for ALL!

Be it resolved, it is time for citizens and local, state and federal officials to:

• Remove language in state constitutions and statutes that automatically restricts the right to vote for citizens that are labeled with developmental and cognitive disability. A disability label, by itself, is not a sufficient reason to restrict someone’s right to vote.

• Change state guardianship statutes to say that voting is not restricted.
Make Voting Accessible for ALL!

• Learn from those states that do not have limiting language in their constitutions, elections and guardianship statutes, regulations and forms.

• Require that all persons who are going to have a guardian be informed about the impact of guardianship on their right to vote.
Make Voting Accessible for ALL!

• Build coalitions that increase guardianship awareness and bring about change in guardianship laws and statutes. Ensure that the leadership for coalition activities comes from self-advocacy and disability leaders.

• Promote new policies that provide for alternatives to guardianship, such as power of attorney and supported decision-making.

• Ensure that all young people with disabilities in high school receive information about voting and have opportunities to register to vote.

www.sabeusa.org policy statements, also check the govoter tab
Voter Outreach and Rights Efforts

Jason C. Boylan
Attorney at Law
Disability Rights Ohio
What we’ll cover

• Voter education and outreach planning
• Informal advocacy
• Litigation efforts
Why devise a voter action plan?

• **Help America Vote Act** – Charge to make voting accessible for people with disabilities.

• **Clear need** - People with disabilities are 12% less likely to vote than people without disabilities.
Why devise a voter action plan?

• Barriers to voting:
  • Misinformation v. education
  • Physical accessibility
  • Transportation/polling place hours
  • Voting machine accessibility
  • Board of Elections inflexibility
Why devise a voter action plan?

- Increases awareness of voter rights and the P&A’s resources
- Collaborate with other advocacy organizations
- Protect the right to vote for people with disabilities
Voter action plan methods

• Educational materials
• Site visits for voter education efforts:
  • Target high-need/high-impact groups
• Trainings/workshops
• Voter alerts/website posts
• Client advocacy
• Litigation
Educational materials

• Develop an FAQ:
  • Most commonly asked questions about voting rights answered
  • Include important voting dates and deadlines
  • Include additional useful resources
  • Distribute through social media, website, agency newsletter, events and meetings, partner organizations, and outreach efforts
Outreach and presentations

• Visit locations throughout the state
• Pick high-need groups on which to focus efforts
• Opportunity not only to educate voters and staff, but also view facilities and be seen
Outreach and presentations

• Focus on voters who are institutionalized:
  • Many barriers to voting in hospitals/institutional settings

• Focus on young voters with cognitive impairment:
  • Young voters with disabilities (Age 18-34) had a voter turnout rate 11 percentage points lower than young voters without disabilities in the 2010 election
  • Lowest disability category for turnout is cognitive impairment – 27%
2014 outreach effort – 78 visits

PAVA Presentation Participants n = 2,109

- Development Center, 625
- Independent Living Center, 150
- Residential Facilities, 229
- Schools, 43
- State Psychiatric Hospital, 193
- State Support Team, 193
- Outreach Events, 230
- TOPS Program, 87
- ICF/IID, 181
- Hospital, 178
- State Support Team, 193
Training/Collaboration

• Partner with the disability community to encourage people with disabilities to vote
• Attend community events to inform people with disabilities and encourage voting
• Examples: ID/DD-specific college education programs, transition-age youth high school programs, and independent living centers, advocacy organizations
Voter alerts

• Pick topics/reminders
  • Examples: understanding how to register to vote, the different methods of voting, voting deadlines, early voting, voting by mail, and in person voting on Election Day
• Post to agency website
• Email blasts from contacts list
• Social media
• Agency newsletter
• DRO reached more than 1,400 individuals throughout the 2014 election season
Voter hotline

- Staff attorneys on dedicated intake line on Election Day while polls are open
  - Quick reference materials of commonly-asked questions
  - Refer to a second attorney not on call for the line if more assistance needed
  - Creates opportunities to hear needs/issues from voters
  - Drives advocacy efforts
Right to vote when subject to guardianship

*Glancy Consent Order*

- Voter registration creates a presumption of competency to vote
- Presumption remains absent a finding by a probate court that the person is specifically incompetent to vote after a record hearing on that issue
- Electors can seek assistance from person of choice for sign-in and voting
- Cannot challenge right to vote on mental capacity at the polling location
Advocacy example

- Site visits can bring to light underlying misconceptions or problems
- Ask questions to clients and staff about voting practices
- Effectuate change with follow-up communications
Assistance at the polls

• Ohio statutory right for people with disabilities to have help from a person of choice at their polling location
• Alternative: 2 poll workers from different parties provide assistance
• Secretary of State form had to be filled out to protect against voter fraud
Litigation

Ray v. Franklin County Bd. of Elections (2008)

• Directive that voters with deficient absentee ballots must be granted permission to visit the local board of elections to correct the deficiency

• Title II of the Americans with Disabilities Act

• **Finding**: Board of Elections must provide reasonable accommodation to homebound persons with disabilities, which includes delivering an absentee ballot to the person at home to correct a deficiency
Litigation

*Mooneyhan v. Husted*

- Person with a disability was hospitalized at a state institution in a different county, timely requested absentee ballot but did not receive it on Election Day

- Title II of the Americans with Disabilities Act

- **Finding:** Secretary of State could have reasonably accommodated hospitalized voter with a disability by having home Board of Elections fax ballot to hospital Board of Elections to then hand deliver it to voter
References

Rhode Island P&A Voter Capacity Case

Kate Bowden, Esquire
Rhode Island Disability Law Center
Introduction

- In 2007-2008, the RI P&A defended the voting rights of two patients at the State’s psychiatric hospital who had been acquitted of murder charges based on court rulings of Not Guilty by Reason of Insanity (NGRI).
- The case highlighted misperceptions about mental illness, hospitalization and NGRI.
- Perceived incapacity was a theme.
Mental capacity, voting, federal law

Rhode Island Constitution

• States that “no person who has been lawfully adjudicated to be non compos mentis shall be permitted to vote.”
• No RI statute defines non compos mentis.
Definition of Non compos mentis

• Meaning in Black's Law Dictionary (8th ed. 2004), non compos mentis adj. [Latin "not master of one's mind"]
  1. Insane. 2. Incompetent.
Other State Disqualifications

- State constitutions vary widely on disqualifications.
- Some ban people from voting if they have been deemed an “idiot” “mentally incompetent,” “of unsound mind,” or “incapacitated.”
RI Case – How it started …

• A local politician challenged the voting rights of two NGRI patients at a state psychiatric hospital.

• The challenge was filed pursuant to a statute that allows any elector to “challenge the registration of a registered voter by submitting to the local board an affidavit ....”
Challenge of Registration

• The voter registration statute addresses ineligibility based on issues such as residence, citizenship, or felony conviction.

• The local board may strike a voter from the rolls if the board determines that the voter is not eligible to vote. RI Gen. Laws §17-9.1-31
The Clients

• Clients had been charged with murder in the 1980s.
• Each was deemed competent for trial.
• Each stood trial and was acquitted based on a judicial determination of Not Guilty By Reason of Insanity (NGRI).
• The patients had been voting with support of the hospital using RI’s mail ballot process.
The Challenge

• The patients’ right to vote was based on an interpretation of the RI constitution.

• The challenge asserted that a ruling of Not Guilty By Reason of Insanity disqualifies a person from voting pursuant to the provision of the RI Constitution which says “no person who has been lawfully adjudicated to be non compos mentis shall be permitted to vote.”
Legal Question

- Is an NGRI ruling sufficient to void a person’s voting rights? or

- Does non compos mentis for voting = Not Guilty By Reason of Insanity (NGRI) in a criminal case?
About NGRI in RI

• To face trial, a person must first be deemed competent for trial.
• At trial, the jury or court looks back to the time of the alleged crimes to determine if, at the time of the alleged crimes, the person was “insane” and should therefore not be held accountable for otherwise criminal conduct.
Post NGRI

• If a person is acquitted on a ruling of NGRI, the person is not convicted of crime.
• The person becomes a patient and is committed to the RI psychiatric hospital.
• The person will remain in the hospital until a determination that the unsupervised presence of the person in the community will not create a likelihood of serious harm.
Tackling the Legal Question

• Mental Health Law concerning civil commitment contains a presumption of competence and patients retain the right to vote.
• Guardianship law contains preservation of civil rights.
• Criminal Law provides competence standard.
• Constitutional law
Tackling the Legal Question

• Personal injury tolling statute. § 9-1-19 “If any person at the time any such cause of action shall accrue to him or her shall be [a minor] or of unsound mind ...the person may bring the cause of action, within the time limited under this chapter, after the impediment is removed.”
Tackling legal question

• Case law interpreting the tolling statute said that if a person has been found competent to stand trial, this is a factor indicating that person is of SOUND MIND and not entitled to a tolling of the statute of limitations.
Tackling the Legal Questions

• Case law recognizing that competency is fluid and can be restored. *In re Anthony Tavares*, 885 A.2d 139, 149 (2005).

_We arrived at the conclusion that the City’s position was wrong and we agreed to defend before the local voting board._
Unfriendly forum

• The Chairman of the Local Voting Board was very publicly vocal about the matter and actively pursued press coverage.

• Prior to hearing, he was interviewed by the New York times and said...
Bias Revealed in Print

• “I just think if you are declared insane you should not be allowed to vote, period,” said Joseph DeLorenzo, chairman of the Cranston Board of Canvassers. “Some people are taking these two clowns and calling them disabled persons. Is insanity a disability? I have an answer to that: no. You’re insane; you’re nuts.”
Challenge at the Local Level

• The local board held a hearing and unanimously moved to strike the patients from the voting rolls. They relied on the RI Constitution for support and the fact that the patients had not been discharged from the hospital.

• Capacity assumptions were implicitly made without any specific evidence of capacity to vote.
Appeal

• The case went to appeal at the RI Board of elections.
• At the BOE, we worked hard to focus the case on legal arguments and to avoid factual capacity assessments.
• We proposed an Agreed Statement of Fact and Law.
Arguments

• Voters had been found competent by court and no court had ever assessed their capacity vote.
• To use NGRI status to disqualify voting would violate the equal protection clause because the NGRI ruling only refers to a specific period of time, the voters were deemed competent after that period and the criminal case was not about voting capacity.
More Arguments

• **Constitutional Due Process** requires that a person receive notice that a fundamental right may be denied and a meaningful opportunity to be heard. Since the voters had never received a notice or had a court hearing regarding their capacity to vote, stripping voting rights based on a proceeding unrelated to voting would be unconstitutional and an unfair and arbitrary violation of their Due Process rights. Relying on *Doe v. Rowe* (2001) U.S. District Court Maine
Strategy

- Expert to explain competence for trial and NGRI in RI.
- Defending versus pursuing affirmative action.
- Steered testimony and arguments away from individualized capacity assessments always taking the position that such assessment should only happen in a court.
Larger Issues Raised

• What is capacity to vote?
• How do you assess? Who decides?
• Can the assessment be abused?
• To be non-discriminatory a capacity assessment would have to be applied to all people. How would that be managed?
• Will attempts at clarity about voting capacity procedures hurt your constituency?
Resources

• Article: *Voting Rights and the Mentally Incapacitated*, 121 Harv. L. Rev. 1179,


• American Bar Association Resolution 121, August 2007.
Resources

• RI Case Defining NGRI: *State v. Johnson*, 399 A.2d 469 (1979)
• Mental Health Law on Patient’s Rights: 40.1-5-5
• Guardianship Law on Legislative Intent for Adjudication of Incapacity: 33-15-1
Outcome

• The Board of Elections unanimously ruled in favor of our clients and ordered the City of Cranston to put our clients back on the voting list. The City did not appeal. Appeal would have been to RI Supreme Court.

• The Board seemed to understand the larger issues raised and were concerned about the “slippery slope” of making challenges based on disability.
Prologue

• In 2012, the Chair of the local board took back to talk radio saying he would not certify the mail ballots of our former clients citing the reasoning presented in 2008.

• The Executive Director of the BOE of elections, ordered the local board to certify the ballots, resign, or face criminal charges of dereliction of election duties.

• 2 of 3 board members resigned.
Lessons Learned

• Cases based mental capacity or perceived mental capacity arise in unpredictable ways.
• Be prepared – know the legal landscape in your jurisdiction.
• Look to voting and constitutional law, civil commitment, guardianship, forensic commitment, and tolling statutes.
• What does your state say about challenges at the polls?
Lessons Learned

• Interaction with the press is tricky and can be manipulated.
• If the other side goes to the press, you will be contacted.
• Can you sum up your position in the one sentence they will show in commercials for the 6 o’clock news?
Don’t forget to register:

Voter Competency and Denying the Right to Vote: Part 2

June 30, 2015
2:00pm-3:30pm EST