

Voting Rights of People Subject to Guardianship

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In this presentation, we will cover:

- Basic overview and terminology regarding guardianship and voting
- Legal landscape for voting rights of people subject to guardianship
- Standards for determining mental capacity and desire to vote
- Accommodations for voters with disabilities including Supported Decision-Making
- Arkansas case example
- Tips and strategies for asserting voting rights for people subject to guardianship

A word about terminology (1)

- **Guardian/Conservator:** Appointed by court to make personal and/or property decisions when court finds person cannot make decisions for themselves.
 - Frequently but not always, a “guardian” refers to personal decisions, and “conservator” refers to financial decisions.
 - This presentation and materials use the term “guardian” generically.
- **Ward vs. Person Subject to Guardianship:** Ward is disfavored in disability community
- **Full (plenary) vs. limited guardianship:**
 - Full (plenary) guardianship may take away all legal rights including voting
 - Limited guardianship may remove or retain enumerated rights

A word about terminology (2)

- **Mental Disability** as used by presenters encompasses the broadest definitions including intellectual/developmental disabilities, psychiatric disabilities, brain injuries, and dementia
- **Mentally Incompetent/Mentally Incapacitated:**
 - State laws vary terminology, but may have a legal distinction (e.g., Arkansas)
 - Both terms may be seen as demeaning to persons with mental disabilities
 - Other terms (e.g., “idiots,” “non compos mentis”) are outdated and derogatory
 - National Voter Registration Act (NVRA) permits disenfranchisement based on “mental incapacity.” 52 U.S.C. § 20507(a)(3)(B)

LEGAL LANDSCAPE

People with disabilities have the same right as other citizens to vote

- **Generally:** Over 18, citizen of the U.S., resident of the jurisdiction
- **Exceptions:** As permitted by National Voter Registration Act, 52 U.S.C. § 20507(a)(3)(B)):
 - Some people with criminal convictions
 - **Nebraska:** Voting rights restored 2 years after completion of probation for felony conviction. Neb. Rev. St. § 29-2264(1).
 - People who are legally determined to lack “mental capacity”
 - **Delaware:** No person adjudged mentally incompetent... or incapacitated under the provisions of this Constitution from voting, shall enjoy the right of an elector. DEL. CONST. art. 5, § 2.

People are disenfranchised by state voter capacity standards

- **NVRA does not define "mental incapacity" or set standards for disenfranchisement. State restrictions vary:**
 - **In state constitution or statute**
 - **Utah:** “Any mentally incompetent person... may not be permitted to vote at any election...until the right to vote... is restored as provided by statute.” Utah Const. art. IV, § 6
 - **Tennessee:** Court may remove voting rights in guardianship proceeding. Tenn. Code Ann. § 34-3-104
 - **In Practice**
 - **Alabama:** Voting rights removed if “mentally incompetent (Ala. Const. , § 177(b)) but court may order limited guardianship and only enumerated rights are removed. Ala. Code § 26-2A-105
 - Guardians or others may illegally “determine” someone is incapable of voting

Categorical bans on voting by people subject to guardianship

- **Some state constitutions or laws prohibit anyone subject to guardianship from voting**
- **Prohibiting all people subject to guardianship from voting may violate:**
 - Equal Protection Clause
 - Due Process Clause
 - Voting Rights Act
 - Americans with Disabilities Act/Section 504 of the Rehabilitation Act of 1973
- *Doe v. Rowe* 156 F. Supp.2d 35 (D. Maine 2001) "A person under guardianship for reasons of mental illness may not register or vote at any election."
- *Missouri Protection & Advocacy v. Carnahan* 499 F.3d 803 (8th Cir. 2007) "No person who has a guardian...by reason of mental incapacity...shall be entitled to vote."

Judicial determinations of capacity or incapacity

- **Some states require judicial determination of capacity or incapacity to vote:**
presumption and standards vary by state and jurisdiction

Alaska: "An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited by court order..." AK Stat § 13.26.201. A guardian may not prohibit a person subject to guardianship from registering or voting. AK Stat. § 13.26.316.

- The judicial determination of unsoundness of mind necessary to disqualify a mentally impaired individual from voting must be specifically raised in a guardianship hearing or raised in a separate proceeding. Alaska Att'y Gen. Op. (Inf.) No. 123 (Aug. 28, 1992).

No capacity requirement

- Colorado, Idaho, Illinois, New Hampshire, North Carolina, Pennsylvania, Vermont
- Kansas and Michigan: constitution permits legislature to impose restrictions, but legislature has not

Determining Mental Capacity

How is mental capacity to vote established?

- Typically, guardians are appointed when a court determines that an individual is at risk because they cannot make decisions for themselves and there is no less restrictive way to meet the individual's needs. Guardianship may remove a broad spectrum of personal and/or property rights from the individual.
 - Voting may or may not be a right that is explicitly considered in the guardianship process.
 - Individuals may or may not get notice that voting rights may be removed.
- **Individualized assessment of capacity and desire is required by law and Constitution.**
 - But, "functional" or capacity tests are disfavored, rarely used, and likely illegal

American Bar Association Legislative Policy (2007)

“State constitutions and statutes that permit exclusion of a person from voting on the basis of mental incapacity, including guardianship and election laws, should explicitly state that the right to vote is retained, except by court order where...:

- (1) The exclusion is **based on a determination by a court** of competent jurisdiction;
- (2) Appropriate **due process protections** have been afforded;
- (3) The court finds that the **person cannot communicate, with or without accommodations, a specific desire to participate** in the voting process; and
- (4) The findings are established by **clear and convincing evidence.**”

Advancements towards a legally valid standard

- A person subject to guardianship retains the right to vote unless they can't:
 - Communicate, with or without accommodations
 - A choice whether to participate in the voting process
- Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA)
- **State Examples**
 - California: Cal. Elec. Code § 2208
 - Maine: Me. Rev. Stat. tit. 18-C, § 5-310(2)
 - Maryland: Md. Code, Elec. Law § 3-102(b)(2)
 - Nevada: Nev. Rev. Stat. § 293.5415
 - New Mexico: N.M. Const. Art. VII, § 1
 - Washington: State Wash. Rev. Code §§ 11.130.310 and 11.130.655

Accommodations and Supported Decision-Making

People with mental disabilities are entitled to accommodations in the guardianship and voting processes

- Communicating a desire to participate in the voting process
- Establishing capacity to vote
- Registering and casting a ballot

ADA regulations: “A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7)

Voting Rights Act § 208: “Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.” 52 U.S.C. § 10508

Accommodations for Voters with Mental Disabilities

- Assistance by person of choice in all aspects of voting process (Voting Rights Act § 208)
- Auxiliary aids and services (technology or assistive devices) for effective communication
- Outreach/education in accessible format and language
- Verbal or non-verbal prompts, picture board, video, graphics
- Other modifications that will enable a person with a mental disability to demonstrate capacity and a desire to vote, to register, and to cast a ballot
- Supported decision-making principles

What is Supported Decision-Making (SDM)?

- "Supported decision-making" means a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult. Tex. Est. Code § 1357.002(3)
- Supported decision-making is generally an alternative to guardianship. However, supported decision-making principles are ideally suited to assisting anyone with a mental disability in the voting process.

How can supported decision-making principles assist (potential) voters with mental disabilities?

- Just like the way most other voters become informed, using supported decision-making principles can involve:
 - Seeking advice, input, and information from knowledgeable and trusted individuals (family, friends, politically engaged community members)
 - Relying on information produced by campaigns and other sources
 - Finding and utilizing appropriate and accessible materials (plain language, videos, alternative formats)

Arkansas Case Example



**Disability
Rights
Arkansas**

Arkansas Law (1)

- Previous status of Arkansas guardianship code:
 - No guardian shall make any of the following decisions without filing a petition and receiving express court approval:
 - [. . .] Prohibit the incapacitated person from voting.
- **State representative routinely visited large intermediate care facility in his district to meet and speak with the residents.**
- **Criticized by opposing party as unduly influencing the residents.**

Arkansas Law (2)

- Current status of Arkansas guardianship code (2001):
 - No guardian shall make any of the following decisions without filing a petition and receiving express court approval:
 - [...] ~~Prohibit~~ Authorize the incapacitated person from voting.
- Amendment 51 to Ark. Const. § 9:
 - All persons may register who:
 - [...] Have not been adjudged mentally incompetent by a court of competent jurisdiction.

Arkansas Law (3)

Incompetent

- A court order establishing a guardianship shall contain findings of fact that the respondent is an incapacitated person and is in need of a guardian for the person or estate, or both. The order may limit the power and duties of the guardian and may define the legal and civil rights retained by the incapacitated person.

Ark. Code Ann. § 28-65-214(a).

- “Incapacitated person” means a person who is impaired by reason of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs, or chronic intoxication, to the extent of lacking sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his or her health or safety or to manage his or her estate.

Ark. Code Ann. § 28-65-101 (5)(A).

Arkansas Law (4)

Incapacity

- A person who is impaired by reason of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs, or chronic intoxication.
- Can be transient.
- “Have not been adjudged mentally incompetent.”
 - Consider an individual who was injured in a car wreck.
 - Incapacitated due to physical illness for one year.
 - Interim guardianship terminated upon recovery.
 - Individual has been adjudged mentally incompetent – but is no longer.
 - Constitution does not require that an individual is presently “incompetent.”
 - Individual was never ruled “incompetent” – simply incapacitated.

Arkansas Law (5)

- Other constitutional provisions authorize restoration of the right to vote.
- Amendment 51 § 9(1):
 - Have not been convicted of a felony unless the person's sentence has been discharged or the person has been pardoned.

Arkansas Law (6)

- Creates an irreconcilable conflict:
 - An individual adjudged incapacitated and appointed a guardian.
 - Circuit judge may permit the guardian to authorize the individual to vote.
 - This does not remove the “incapacity.”
 - This also does not rescind whether the individual has been “adjudged mentally incompetent” if the terms are considered interchangeable.

Arkansas Law (7)

- Eighth Circuit would seem to agree:
 - “If, as plaintiffs contend, appointment of a full guardian categorically prohibited the ward from voting because he or she was “adjudged incapacitated” within the meaning of § 115.133.2 of the election laws, these statutes would not withstand close equal protection scrutiny when challenged, for example, by a person whose guardian was appointed solely because of a physical disability. However, as the district court recognized, Scaletty's full guardianship order expressly preserved his right to vote, confirming that Missouri probate courts retain the authority to preserve a ward's right to vote as part of the statutory mandate to minimize deprivation of a ward's liberty. Thus, plaintiffs' primary facial challenge fails for lack of proof.”

Missouri Prot. & Advoc. Servs., Inc. v. Carnahan, 499 F.3d 803, 808–09 (8th Cir. 2007)

Arkansas Example (8)

Disability Rights Arkansas client interview: https://youtu.be/2Q_NPGoFwB8

Arkansas Example (9)

- Individual cases

- Client is an individual with a mild intellectual disability who has been under the guardianship of his parents since becoming an adult.
- Client has always expressed interest in issues of political importance.
- Client previously voted in his home state of Oklahoma without issue.
- Client moved to Arkansas and, upon registering to vote, learned that the law would not allow his guardian to authorize him to vote without a court order.
- Client was motivated to attack the constitutionality of the statute.
- Timing became an issue due to the impending election, in which he wanted to participate.
- DRA assisted in restoring Client's individual right to vote prior to the election.

Arkansas Example (10)

- Individual cases
 - Creates a matter of standing to assert injury.
 - There is no requirement in the guardianship code for a court render findings regarding an individual's right to vote at the time of establishing a guardianship.
 - Have not identified an individual who has:
 - Been denied the right to vote after moving the court OR
 - Expressed interest in attacking the constitutionality of the guardianship code.

Arkansas Example (11)

- Individual cases
 - Have not had any individual cases that did not include support of guardian.
 - Joint Motion to Restore Voting Rights.
 - Motion is verified or incorporates affidavit from guardian/individual.
 - Have never been required to justify reasoning.
 - Have never been required to attend hearing.

Practice Tips and Strategies

1. Learn your state's election, guardianship, mental health/developmental disabilities laws
2. Consider your forum for possible litigation (individual guardianship proceeding, impact litigation in state or federal court)
3. Research and explore asking for Attorney General or Secretary of State opinion
4. Find supportive legislators
5. Work with community partners to identify clients and supportive guardians
6. In individual guardianship cases, raise right to individualized assessment and accommodations
7. Contact your P&A and/or NDRN for assistance

Getting help and answers

- Presenters can be reached at:
 - Elissa.Gershon_contractor@NDRN.org
 - tnichols@disabilityrightsar.org
- If you have case-specific questions, please contact: votingrights@ndrn.org
- Find your state's [protection and advocacy agency](#): <https://www.ndrn.org/about/ndrn-member-agencies/>.

Guardianship Resources and Voter Competency Laws

About guardianship:

- <https://www.justice.gov/elderjustice/guardianship#:~:text=Guardians%20are%20appointed%20when%20a,of%20rights%20from%20the%20individual>
- https://www.americanbar.org/groups/law_aging/publications/bifocal/vol44/vol44issue4/guardianshipcases/
- <https://www.guardianship.org/what-is-guardianship/>

Find your state voter competency laws

- [Bazelon Center Voting Page](http://www.bazelon.org/our-work/voting/): <http://www.bazelon.org/our-work/voting/>
- [ASAN Voter Guide](https://autisticadvocacy.org/policy/toolkits/voting/) (Easy Read and Plain Language): <https://autisticadvocacy.org/policy/toolkits/voting/>

Model Standards for Establishing Voter Competency

- **American Bar Association House of Delegates, *Adopted Recommendations*, 2007:** https://www.americanbar.org/groups/public_interest/election_law/policy/07a121/
- **Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA), 2017:** <https://www.uniformlaws.org/committees/community-home?communitykey=2eba8654-8871-4905-ad38-aabbd573911c>

Resources to Assist Individuals to Retain or Restore Voting Rights in Guardianship Proceedings

- NDRN and Bazelon Center, March 2022, *Enfranchisement of People Subject to Guardianship: A Toolkit for Retaining and Restoring the Right to Vote*: <https://www.ndrn.org/resource/enfranchisement-of-people-subject-to-guardianship/>
- NDRN, July 2023, *Voting Rights of Individuals Subject to Guardianship: A Primer for Practitioners*: <https://www.ndrn.org/resource/voting-guardianship/>

Voting Accommodations and Assistance Resources

- NDRN, March 2022, *Voting Accommodations for People with Mental Disabilities*:
<https://www.ndrn.org/resource/voting-accommodations-for-people-with-mental-disabilities/>
- NDRN, June 2022, *Voting Rights of Institutionalized People with Disabilities*:
<https://www.ndrn.org/resource/voting-rights-of-institutionalized-people-with-disabilities/>
- https://www.americanbar.org/content/dam/aba/administrative/law_aging/Bazelon_Center_Providing_Help_to_Voters_with_Disabilities.pdf
- American Bar Association webpage on voting and cognitive impairments:
https://www.americanbar.org/groups/law_aging/resources/voting_cognitive_impairments/
- ABA, *Assisting Cognitively Impaired Individuals with Voting: A Quick Guide*:
https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-voting-guide.pdf

Supported Decision-Making Resources

- States with SDM: <https://supporteddecisions.org/resources-on-sdm/state-supported-decision-making-laws-and-court-decisions/>
- National Council on Disability, *Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination*: https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf
- Disability Vote California (Supported Decision-Making for supporters): <https://files.constantcontact.com/eb101a2f101/a86a4824-2c2e-4e06-b783-a4ee97818276.pdf>

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