

Voting Rights Issues for Adults under Guardianship¹ **By Mitch Hagopian, Managing Attorney**

Disability Rights Wisconsin
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I. Introduction

- A.** The right to vote is a fundamental right of American citizens, guaranteed in the Wisconsin constitution.
- B.** Legal incompetency to vote is one of the few grounds for removing the right to vote from an otherwise qualified individual.
- C.** Basics of Voting Eligibility – Wis. Stats. §§ 6.02, 6.03, 6.05, 6.33
 - 1. U.S. citizen
 - 2. Age 18 years or older on or before day of election
 - 3. Resident at current address in Wisconsin for 28 days prior to election
(if at current Wisconsin address less than 28 days must vote at former address)
 - 4. Not currently serving a sentence for a felony, treason or bribery conviction
 - a. Serving a sentence includes incarceration, parole, probation, or extended supervision (known as being “on paper”)
 - b. Eligible to vote if sentence completed but have not paid court costs, fines, restitution, etc.
 - 5. Not made or benefit from a bet or wager depending on the result of an election
 - 6. Not determined by a court to be ineligible to vote.

II. Wisconsin Law on the Right to Vote for People Alleged to be Incompetent

- A.** Article III of the Wisconsin Constitution covers Suffrage

¹ Thank you to Ellen J. Henningsen, J.D., Director of the Voting Rights and Guardianship Project of Disability Rights Wisconsin, who prepared this outline.

1. Section 1 states:
“Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district.”
2. This broad statement of eligibility is immediately limited in Section 2 of Article III.
In relevant part, Section 2 states:
“Laws may be enacted:
...
(4) Excluding from the right of suffrage persons:
...
(b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is *capable of understanding the objective of the elective process* or the judgment is set aside.” (emphasis added)
3. Codified in Wis. Stats. Ch. 6 (elections law) and in Wis. Stats. Ch. 54 (guardianship law).
 - a. There is no published case law in Wisconsin concerning the relevant statutes.

B. Summary of both Election and Guardianship Law

1. Only a court can remove the right to vote of a person alleged to be incompetent.
2. The standard for removing the right to vote is “incapable of understanding the objective of the elective process.”
3. No one - not a family member, friend, service provider, care facility staff, election official, or activated Power of Attorney - may prevent an individual who wishes to vote and who can indicate, without coercion and with or without assistance, which candidate they want to vote for, from voting.
4. An individual who has lost the right to vote can petition the court to have their right to vote restored.

C. Election Law

1. Wis. Stat. § 6.06 (3) requires an adjudication of incompetency to vote pursuant to Ch. 54 before an individual alleged to be incompetent is denied the right to vote.
2. Sec. 6.03 Disqualification of Electors
 - (1) The following persons shall not be allowed to vote in any election and any attempt to vote shall be rejected:
 - (a) Any person who is *incapable of understanding the objective of the elective process* or who is under guardianship, unless the court has determined that the person is competent to exercise the right to vote. (emphasis added)
 - ...
 - (3) No person may be denied the right to register to vote or the right to vote by reason that the person is alleged to be *incapable of understanding the objective of the elective process* unless the person has been adjudicated incompetent in this state. If a determination of incompetency of the person has already been made, or if a determination of limited incompetency has been made that does not include a specific finding that the subject is competent to exercise the right to vote, and a guardian has been appointed as a result of any such determination, then no determination of incapacity of understanding the objective of the elective process is required unless the guardianship is terminated or modified under sec. 54.64. (emphasis added)
3. Secs. 6.48 (3) and 6.935, Stats., state that challenges to registration or to voting of a person alleged to be incompetent must follow the above quoted language in Sec. 6.03 (3), Stats.

D. Guardianship Law

1. Ch. 54 requires a specific finding, based on clear and convincing evidence, of incapacity to exercise a particular right. Absent a specific finding of incapacity, the right is retained. Rights cannot be removed by a general finding of incompetency and a plenary order. Wis. Stat. §§ 54.25 (2) (a), 54.25 (2) (c) 2, 54.25 (2) (d).

2. Ch. 54's sections on guardianship of the estate – §§ 54.19, 54.20, 54.21 and 54.22 - are silent about the right to vote. References to the right to vote are found only within section 54.25 which covers guardians of the person. Thus, the right to vote cannot be removed in a case where only a guardian of the estate is appointed.
3. Two ways to lose the right to vote, all requiring a judicial process culminating in an order from the court.
 - a. "Petition for a declaration of incompetence to vote" (a/k/a "stand-alone petition") – Wis. Stat. §§ 54.25 (2) (c) 1. g. and 54.25 (4).
 - i. Same procedure as in guardianship case
 - ii. No cases have been filed in Wisconsin
 - a. As part of a guardianship of the person case – Wis. Stat. § 54.25 (2) (c) 1. g.
4. Sec. 54.25 (2) (c) 1. g. states:

(c) *Declaration of incompetence to exercise certain rights.* 1. The court may, as part of a proceeding under s. 54.44 in which an individual is found incompetent and a guardian is appointed, declare that the individual has incapacity to exercise one or more of the following rights:

...

g. The right to register to vote or to vote in an election, if the court finds that the individual is incapable of understanding the objective of the elective process. Also, in accordance with s. 6.03 (3), any elector of a municipality may petition the circuit court for a determination that an individual residing in the municipality is incapable of understanding the objective of the elective process and thereby ineligible to register to vote or to vote in an election. This determination shall be made by the court in accordance with the procedures specified in this paragraph. If a petition is filed under this subd. 1. g., the finding of the court shall be limited to a determination as to voting eligibility. The appointment of a guardian is not required for an individual whose sole limitation is ineligibility to vote. The determination of the court shall be

communicated in writing by the clerk of court to the election official or agency charged under s. 6.48, 6.92, 6.925, 6.93, or 7.52 (5) with the responsibility for determining challenges to registration and voting that may be directed against that elector. The determination may be reviewed as provided in s. 54.64 (2) and any subsequent determination of the court shall be likewise communicated by the clerk of court. (emphasis added)

5. Sec. 54.25 2. (c) (4) is similar and states:

4. Regardless of whether a guardian is appointed, a court may declare that an individual is not competent to exercise the right to register to vote or to vote in an election if it finds by clear and convincing evidence that the individual is incapable of understanding the objective of the elective process. If the petition for a declaration of incompetence to vote is not part of a petition for guardianship, the same procedures shall apply as would apply for a petition for guardianship. The determination of the court shall be communicated in writing by the clerk of court to the election official or agency charged under s. 6.48, 6.92, 6.925, or 6.93 with the responsibility for determining challenges to registration and voting that may be directed against that elector. The determination may be reviewed as provided in s. 54.64 (2) (a) and (c) and any subsequent determination of the court shall be likewise communicated by the clerk of court.

E. Is there a conflict between sec. 6.03 (3) and sec. 54.25 (2) (c) 1.g.?

1. Sec. 6.03 (3) seems to permit the loss of the right to vote with only a general finding of incompetency and without a specific finding about the capacity to vote, while sec. 54.25 (2) (c) 1.g. requires a specific finding about the capacity to vote.
2. Sec. 6.03 (3) refers to guardianships imposed before the passage of 2005 Act 387, which modified these sections of Ch. 6 and created Ch. 54.
3. Under Ch. 54's predecessor, Ch. 880, it was common for plenary guardianships to be imposed without separate findings on specific rights. Some such orders are still in effect.

4. Any ambiguity in Ch. 6 is resolved in Ch. 54 which requires the presentation of evidence addressing the individual's capacity or incapacity to vote, culminating in a specific finding that an otherwise qualified elector is incapable of understanding the objective of the elective process, and thus loses their right to vote. A general finding of incompetency or incapacity does not suffice.
 - a. The court's decision on voting capacity is communicated by the absence or presence of a mark in the appropriate checkbox in the "Determination and Order on Petition for Guardian Due to Incompetency" (GN-3170).
 - b. A blank box means the court has decided that the ward is capable of understanding the objective of the elective process and thus retains the right to vote.
 - c. A checked box means the court has decided that the ward is incapable of understanding the objective of the elective process and thus loses the right to vote.

III. How to Keep the Right to Vote in a Guardianship of the Person Case

A. Consider less restrictive alternatives to guardianship of the person; in other words, don't petition for guardianship of the person.

1. Release forms
2. Supported decision-making – Wis. Stat. Ch. 52
 - a. <https://wi-bpdd.org/index.php/supporteddecision-making/>
3. Representative payee – 20 CFR 404.2001(b)
4. Powers of attorney – Wis. Stat. Chs. 155, 244

B. If guardianship is the best alternative -

1. Often petitions are filed in response to a health or safety emergency and the right to vote is overlooked. Proposed wards can be capable of voting even if they lack the capacity to make other decisions. The issue of voting rights should not be ignored.
2. Petitioners should not check the box in the Petition that alleges the proposed ward lacks the capacity to vote.
3. Try to convince the GAL to agree that the proposed ward has the capacity to vote.

- a. The Report of the Guardian ad Litem Due to Incompetency (GN-3160) asks the GAL to check or leave blank the box before “I recommend that the court declare the individual has incapacity to exercise the following rights to (3) register to vote or to vote in an election.”
- 4. Try to convince the examining physician/psychologist to check “yes” or leave the “yes” and “no” boxes blank in their written report.
 - a. The Examining Physician’s or Psychologist’s Report (GN-3130) asks “Does the individual have the evaluative capacity to register to vote or vote in an election?”
- 5. Hire adversary counsel for proposed ward.
- 6. Present evidence that proposed ward understands the objective of the elective process, regardless of proposed ward’s other alleged incapacities.
- 7. Argue that it’s possible for a proposed ward to have the capacity to vote but lack the capacity to exercise other rights.

IV. How to Restore the Right to Vote

A. Determine if the ward has in fact lost the right to vote.

- 1. Check the Determination and Order for the appropriate checkbox.
- 2. Because the right to vote is not a right that can ever be transferred to the guardian, the Letters of Guardianship are silent about the ward’s right to vote.

B. Wis. Stat. § 54.64 (2) governs the restoration process

- 1. 54.64 Review of incompetency and termination of guardianship.

 (2) (a) A ward who is 18 years of age or older, any person acting on the ward’s behalf, or the ward’s guardian may *petition* for a review of incompetency, to have the ... guardianship limited and *specific rights restored*. (emphasis added)

- (c) After a hearing under par. (a) or on its own motion, a court may ... modify the guardianship, including restoring certain of the ward's rights.
2. The only restriction on filing the petition is timing. At least 180 days (roughly six months) must have passed since the date of the last guardianship hearing before a petition to restore voting rights can be filed.
 3. Irrelevant if the annual (Watts) hearing to review a protective placement order fell within the 180 days since that hearing is conducted under Ch. 55, specifically section 55.18, not Ch. 54, the guardianship statute.
 4. There is an exception to the 180-day filing limitation. A petition to restore voting rights (or any other right previously removed) can be filed "at any time" if the court determines that exigent circumstances, including presentation of new evidence, require a review.
 5. Wards who are also protectively placed have an additional option. Assuming 180 days have passed since the last hearing on the guardianship, the petition could also be filed during the pendency of the annual (Watts) review and the court can agree to combine the two matters.
 6. Form GN-3655 "Petition to Modify Guardianship" can be used to initiate this process. But since this form contains a wide-ranging list of issues unrelated to voting, petitioners who are only seeking restoration of their right to vote may prefer to use a petition limited to requesting a restoration of only that right. Sample forms are available at the websites of Disability Rights Wisconsin (DRW) and the Wisconsin Disability Vote Coalition (DVC).
<https://disabilityrightswi.org/resource-center/guardianship-and-voting/>
<https://disabilityvote.org/2022/guardianship-and-voting-resources/>
 7. Sec. 54.64 (2) (a), Stats., determines the procedure once the Petition is filed. The court shall appoint a guardian ad litem, fix a time and place for hearing, designate who should get notice of the petition and hearing and how notice shall be given, and conduct a

hearing at which the ward is present. The ward has the right to a jury trial, if demanded.

8. Sec. 54.64 (2) (b) states that the ward has the right to an attorney, either of their own choosing or appointed by the court.
“Notwithstanding any finding of incompetence for the ward, the ward may retain and contract for the payment of reasonable fees to an attorney...” The court must approve the ward’s choice (and presumably the fees). If the ward cannot find an attorney, the court can appoint one. If the ward is indigent, the county of jurisdiction must provide counsel at the county’s expense.
9. The appointment of examining physician/psychologist is not required.
 - a. Appointment is clearly required when “appointing a guardian [or] declaring incompetence to exercise a right....”. Wis Stat. § 54.10 (3) (c) 2. And section 54.36 (1) states that “Whenever it is proposed to appoint a guardian on the ground that a proposed ward allegedly has incompetency or is a spendthrift, a physician or psychologist, or both, shall examine the proposed ward and furnish a written report”
 - b. Nowhere in the statutes does it state that the ward must be examined by a physician or psychologist when a petition to restore voting rights is filed.
 - c. Appointment of an examining physician or psychologist is not mentioned in the court’s list of required duties under section 54.64 (2), the statute under which a restoration case is brought.
 - d. Determining a person’s capacity to understand “the objective of the elective process” does not require any medical expertise; there is no medical exam or psych test that objectively measures a person’s understanding of the elective process. Any lay person who understands the elective process would likely be able to determine if the ward did also.

- e. If any type of expertise is required it would be expertise in the form and function of government, an area where the GAL and the judge have more expertise than any physician or psychologist. Medical evaluations are expensive and time-consuming. They should not be used when they are not required and, more importantly, when they provide no value to the trier of fact.
10. Advocacy suggestions –
- a. Argue against appointment of physician/psychologist.
 - b. Attempt to persuade the GAL that the ward’s right to vote should be restored; the GAL’s recommendation will certainly carry weight with the court.
 - c. Identify supporters such as the guardian, a teacher, service provider, family member, the ward’s own physician/psychologist, etc. to write letters of support or to testify at the hearing.
 - d. The ward’s testimony will be critical. Prepare them for both the interview with the GAL and for the court experience.
11. After consideration of the evidence, the court will issue its written decision. A sample Order granting the petition is available at the website of DRW and DVC. A standard Order (GN-3665) granting the petition but covering many other topics not relevant to the petition is available at the website of the Wisconsin Court System.
- <https://disabilityrightswi.org/resource-center/guardianship-and-voting/>
- <https://disabilityvote.org/2022/guardianship-and-voting-resources/>
12. If the petition is granted, the court will also complete a Notice of Voting Eligibility (GN-3180) which the Register in Probate sends to the Wisconsin Elections Commission to update the statewide voter registration database entry for the ward. The blank form is only available to the court and staff; it is not on the Wisconsin Court System’s “forms” website. These documents will supersede the earlier Order and Notice of Voting Eligibility that removed the right to vote.

13. The ward (who can now be called a voter) should ask for and keep a copy of both the completed Order and Notice. The voter may want to bring copies when requesting an absentee ballot or voting at the polls in case the statewide database has not been updated to reflect their eligibility to vote.
14. If the right to vote is restored, the voter will need to register to vote. They may want to request an absentee ballot. Assistance is available from their municipal clerk, or from the Disability Rights Wisconsin (DRW) Voter Hotline at 1-844-347-8683.
15. If the right to vote is not restored, the denial order can be appealed. See Wis. Stat. § 808.03. Or another petition could be filed 180 days after the hearing

V. Crafting a case to retain or restore the right to vote around what understanding “the objective of the elective process” means.

- A.** Evidence must be presented that the ward is not “incapable of understanding the objective of the elective process.” Wis. Stat. § 54. 25 (2) (c) 1. g.
- B.** To state it in the positive, evidence must be presented to establish that the ward is capable of understanding the objective of the elective process.
- C.** There is no definition of this phrase in the statutes and no published caselaw. This author is not aware of any unpublished cases, though is aware that courts in Wisconsin have restored the right to vote for wards previously found to be incapable of voting. The phrase was adopted in 1980, when it replaced “insane or non compos mentis” as part of an effort to “de-latinize” the statutes. Chapter 110, Laws of 1979 (published February 29, 1980, effective March 1, 1980)
- D.** Basic rule of statutory construction - Where words used in a statute are not specifically defined, they should be accorded their ordinary and accepted meaning. This meaning may be established by the definition contained in a recognized dictionary. *Milwaukee Co. v. DILHR*, 80 Wis.2d 445, 259 N.W.2d 118 (1977)
- E.** “Understanding the objective of the elective process” means understanding the purpose of an election.

1. Low standard of cognition.
2. Separate from the standard for appointing a guardian of the person which is concerned with protecting the physical health and safety of the proposed ward.
3. *54.10 Appointment of guardian.*

.....

(3) (a) A court may appoint a guardian of the person ..., for an individual based on a finding that the individual is incompetent only if the court finds by clear and convincing evidence that all of the following are true:

For purposes of appointment of a guardian of the person, because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that *the individual is unable to meet the essential requirements for his or her physical health and safety.* (emphasis added)

4. Legislature did not use other standards to determine mental capacity
 - a. Powers of Attorney for Health Care (Wis. Stat. § 155.05) and testamentary capacity (Wis. Stat. § 853.01) - "of sound mind"
 - b. Powers of Attorney for Finances (Wis. Stat. § 244.02 (7)) - "has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance"
5. Turning to the Merriam-Webster dictionary –
 - a. "objective" means "something toward which effort is directed: an aim, goal, or end of action."
 - b. "elective" means "relating to an election."
 - c. "process" means "a series of actions or operations conducing to an end."
6. Putting those definitions together, **"understanding the objective of the elective process" means to understand the purpose of an election.**

- a. **The purpose of an election is to vote for the candidate that the voter wants to win.**

F. Proving that the proposed ward/ward understands the objective of the elective process.

1. No cognitive standard is imposed on people not alleged to be incapable of voting. They can vote based on a rational analysis of issues and candidates – or on a whim. They are not required to research platforms, or to fact-check speeches, ads, or social media. They are not required to show why they are voting for a candidate. They are not required to show that they understand how the voting process works. The elections and guardianship statutes do not require what is not required of other voters.
2. Only a basic understanding of why there are elections is required.
3. Questions to consider asking the proposed ward/ward.
 - a. Why do you want to vote?
 - b. Why do we have elections?
 - c. How do people vote?
 - d. What offices are on the ballot?
 - e. Do you have a photo ID and proof of where you live?
 - f. How do you decide who to vote for/where do you look for information?
 - g. What experience do you have with voting, such as for school activities or because you belong to a club or group?

VI. Resources

Guardianship and Voting: How to Get Your Right to Vote Back (includes sample forms)

Publication of Disability Rights Wisconsin

<https://disabilityrightswi.org/resource-center/guardianship-and-voting/>

<https://disabilityvote.org/2022/guardianship-and-voting-resources/>

Assisting Cognitively Impaired Individuals with Voting: A Quick Guide

American Bar Association Commission on Law and Aging and the Penn Memory Center

https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-voting-guide.pdf

Bazelon Center for Mental Health Law

<http://www.bazelon.org/our-work/voting/>

Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters

https://www.americanbar.org/content/dam/aba/administrative/law_aging/balch_hurme.authcheckdam.pdf

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/>

Guardianship and the Right to Vote

https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/guardianship-and-the-right-to-vote/

Patient Voting

Voting rights for people who are unexpectedly hospitalized before an election

<https://www.patientvoting.com/>

Vote: It's Your Right: A Guide to the Voting Rights of People with Mental Disabilities

<https://secureservercdn.net/198.71.233.69/d25.2ac.myftpupload.com/wp-content/uploads/2020/10/Bazelon-2020-Voter-Guide-Full.pdf>

Voting Accommodations for People with Mental Disabilities

National Disability Rights Network, March 2022

<https://www.ndrn.org/resource/voting-accommodations-for-people-with-mental-disabilities/>

Voting Rights of Institutionalized People with Disabilities

National Disability Rights Network, June 2, 2022

<https://www.ndrn.org/resource/voting-rights-of-institutionalized-people-with-disabilities>

DRW Voter Hotline

844-DIS-VOTE / 844-347-8683 / info@disabilityvote.org

Wisconsin Guardianship Support Center

Info & assistance on issues related to adult guardianship, protective placement, and advance directives.

(855) 409-9410 / guardian@gwaar.org