

Allegations of Incompetency and The Right to Vote: The Legal Standard

By: Ellen J. Henningsen, J.D.

Part III of III

This article concludes the series on the law on voting by individuals alleged to be incompetent. The first article was published in the June 2022 (Vol. 32, Issue 1) issue of the *Elder Law and Special Needs Journal of Wisconsin*, a publication of the State Bar of Wisconsin. The second article will be published in the *Journal* in 2023. This article will also be published in the *Journal* in 2023. This article explores the history and meaning of the legal standard for voting. A resource list is also included.

Wisconsin's Constitution, Statutes and Case Law

The legal standard for adjudicating whether an individual alleged to be incompetent should retain or lose their right to vote is set forth in Wisconsin's constitution, elections statutes and guardianship statutes. The standard in each authority is the same, though the phrasing in the constitution is slightly different than the phrasing in the statutes.

Wisconsin's constitution states that the right to vote can be removed if a person is "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." Wis. Const. art. III, § 2 (4) (b), emphasis added. The elections and guardianship statutes both state that the right to vote can be removed if the individual "is incapable of *understanding the objective of the elective process*." Wis. Stat. §§ 6.03 (1) (a) and (3) and 54.25 (2) (c) 1.g. (2021-2022), emphasis added.

Thus, "understanding the objective of the elective process" is the standard that a court applies to determine if an individual alleged to be incompetent should retain or lose the right to vote.¹ The standard is not defined in the constitution or either statute, and there are no published or unpublished decisions discussing its meaning.

The first and only use of a similar, but not identical, phrase occurred in *Town of Lafayette v. City of Chippewa Falls*, 70 Wis.2d 610, 235 N.W.2d 435 (1975). In order to decide whether an annexation was legal, the Wisconsin Supreme Court had to determine whether residents of a state-owned facility for "mentally deficient persons" in the annexed area were eligible voters.

At the time, the Wisconsin constitution and section 6.03 (1) of the elections statutes disqualified persons from voting who were "under guardianship, non compos mentis or insane".² (No standard was included in guardianship law – see below). The Court reviewed the guardianship

¹ The statutes provide two ways to lose the right to vote – as part of a proceeding to appoint a guardian of the person or pursuant to a "petition for a declaration of incompetence to vote" (informally known as a "stand-alone case"). Wis. Stat. §§ 54.25 (2) (c) 1. g. and 54.25 (2) (c) 4. The stand-alone case is limited to an adjudication of the capacity to vote. The author is not aware of any such cases in Wisconsin. This article focuses on the issue of voting as it may arise in guardianship cases.

² From 1848 to 1986, Wisconsin's Constitution stated: "No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election".

<https://content.wisconsinhistory.org/digital/collection/tp/id/71780>

In 1986, the above language was repealed and replaced with the current standard. Wis. Const. art. III, § 2 (4) (b).

status of the residents, and whether they met the definition of “non compos mentis.” It mentioned but did not review whether the residents met the definition of “insane”.

Even though none of the residents were under a court-appointed guardianship pursuant to Ch. 880 (now Ch. 54), the Court determined that the state was effectively their guardian because of their confinement at the facility.

The Court then turned to an evaluation of whether the residents were “non compos mentis.” Because the term was not defined in the statute, the Court used the same analysis it used when determining the meaning of “guardianship.” “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.” The Court turned to Webster’s Third International Dictionary which defined “non compos mentis” as “not of sound mind: wholly lacking mental capacity to understand the nature, consequences, and effect of a situation or transaction.” The Court concluded that “non compos mentis” meant “mentally incapable of knowing or understanding the nature and objective of the elective question.”

Reviewing the evidence regarding the capacity of the residents, the Supreme Court agreed with the lower court’s conclusion that there was insufficient evidence in the record to overcome the presumption of incompetency pursuant to the statute then in effect (and since repealed) on admission to the facility. Thus, the patients were not qualified electors.

The Supreme Court did not discuss how to apply the voting standard to an individual who claims competency to vote or how to prove that an individual knows or understands the nature and objective of the elective question.

The holding regarding the standard used to determine competency to vote has never been cited in any published case or any unpublished case that the author is aware of. More interestingly, it was not cited in the legislative history of the current standard, discussed below.

Legislative History

As noted in *Town of Lafayette*, the constitution and election law stated that “No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election”. This language had been in the constitution since 1848 and in chapter 6 of the election statutes since 1849.³ The statute stayed essentially the same⁴ until 1978 when a comprehensive election bill was passed which added a definition. In an apparent nod to *Town of Lafayette*, “insane” and “non compos mentis” were defined to mean “the incapacity to know or understand the nature and objective of [the] elective process.”⁵

³ Wis. Stat. § 2 (1849)

⁴ In 1967, the statutory language was moved to its current location in section 6.03 (1) (a). 1965 Act 666 (published September 24, 1966, effective July 1, 1967). In 1974, it was amended to read “Any person under guardianship, non compos mentis, or insane except that a court determination under s. 880.33 (3) is required in the case of a limited guardianship.” 1973 Act 284, Section 1 (published June 15, 1974, effective June 16, 1974)

⁵ 1977 Act 394, Section 5 (published May 24, 1978, effective July 1, 1978). Section 5 also added the “stand-alone case”. Sections 5 and 46 established the requirement that the procedure in the guardianship statute be followed before a person alleged to be incompetent could lose their right to vote.

Although the election statute has always included a standard to determine competency to vote, the guardianship statute has not. The current guardianship statute, Chapter 54, was once numbered Chapter 880 and before that Chapter 319.⁶ Prior to 1974, Ch. 319 and Ch. 880 were silent about the authority of the court to remove the right to vote from a proposed ward.⁷ Presumably, that authority was subsumed within the broad grant of authority to appoint a guardian. In 1974, the court's authority to address and remove the right to vote was expressly included, but no standard was provided to guide the court, although of course it could refer to the election statutes.⁸

In 1978, in the election bill noted above, Chapter 880 was amended to include the standard that had already been in elections law for over a century. The newly created definition of "insane" and "non compos mentis" that the bill added to election law was incorporated by reference in the guardianship statute – the "incapacity to know or understand the nature and objective of [the] elective process".⁹

However, this standard was only included in the section that applied to "stand-alone cases" for determining capacity to vote, not to the statutes covering appointment of a guardian.¹⁰ It seems unlikely though that a court would ignore the definition of "non compos mentis" or "insane" when determining capacity to vote within a guardianship case, particularly when elections law had been amended to state "when a person is under limited guardianship, the court may determine that the person is competent to exercise the right to vote"¹¹

Removing Latin Terms from the Statutes

Shortly thereafter, the Wisconsin legislature created the Special Committee on Constitutional and Statutory Review at the Legislative Council to recommend ways to make the statutes "more comprehensible."¹² One recommendation was to remove Latin terms.¹³ Fifty-one Latin terms were initially identified for replacement by their English equivalents, and twenty-nine were ultimately recommended for replacement. "Non compos mentis", found in both the election and guardianship statutes, was one of those terms.¹⁴

Committee staff looked to the drafting manual of the Legislative Reference Bureau and several dictionaries to find an English equivalent. The drafting manual defined "non compos mentis" as "of unsound mind." Webster's New Collegiate Dictionary (1973 edition) translated the phrase as "not of sound mind." Webster's Third New International Dictionary (1976) translated the phrase

⁶ Chapter 319 was renumbered Chapter 880 in 1971 Act 41; Chapter 880 became Chapter 54 in 2005 Act 387

⁷ See Wis. Stat. ch. 319 (1969-70) and Wis. Stat. ch. 880 (1971-72). Voting in transactions relating to securities is mentioned in each chapter, but there are no references to voting in elections for public office.

⁸ 1973 Act 284, section 31 (published June 15, 1974, effective June 16, 1974)

⁹ 1977 Act 394, sections 50 and 51 (published May 24, 1978, effective July 1, 1978)

¹⁰ *Ibid.*

¹¹ *Ibid.*, section 4.

¹² "Methods for Making the Statutes More Comprehensible", Wisconsin Legislative Council Staff, Discussion Paper 78-52, dated November 21, 1978

¹³ "Recommendations of Legislative Council Special Committee on Constitutional and Statutory Review", Committee Report No. 14 to the 1977-79 Legislative Council, dated April 5, 1979

¹⁴ *Ibid.*, p. 6

as “not of sound mind: wholly lacking in mental capacity to understand the nature, consequences and effect of a situation or transaction.”¹⁵ (No mention was made of the term “insane.”).

The legislation that resulted from the Special Committee’s work replaced “insane or non compos mentis” in both Chapters 6 and 880 with the phrase that is contained in current law – “incapable of understanding the objective of the elective process”.¹⁶ That standard, which went into effect in 1980, has remained unchanged for over 40 years.

The records containing the legislative history¹⁷ do not include any documents which would explain how the Latin phrase “non compos mentis” or its English equivalent “not of sound mind” were replaced by “incapable of understanding the objective of the elective process.” A memo by Legislative Council staff which might have provided an explanation is referenced in the historical record, but a copy no longer exists.¹⁸ Perhaps *Town of Lafayette* is the source, although the phrase used in that case is not identical to the phrase actually adopted, and there is no reference to *Town of Lafayette* in the available legislative history.

The standard was then carried over into current Ch. 54 when the guardianship statutes were renumbered and recreated.¹⁹ The standard was included in the section covering “stand-alone cases” and added to the section involving appointment of a guardian of the person, so it is now clear that the standard applies in all guardianship of the person cases.²⁰

Applying the Standard

What does “understanding the objective of the elective process” mean? How do you apply it in a guardianship case? It’s important to note that the legislature did not choose the various other decisional standards already part of Wisconsin case and statutory law. This indicates that the legislature intended an analysis wholly independent from these other decisional standards. For instance, it did not choose “of sound mind”, the standard for executing a will and a Power of Attorney for Health Care.²¹ It did not choose “informed consent”, the standard for making medical decisions.²²

And the legislature did not choose the standard for appointing a guardian of the person.²³

The standard for appointing a guardian of the person focuses on the physical health and safety of the proposed ward. The statute requires that the risk to the individual’s personal health and

¹⁵ “Methods for Making the Statutes More Comprehensible”, Wisconsin Legislative Council Staff, Discussion Paper 78-52, dated November 21, 1978, pages 5, 9, 23.

¹⁶ 1979 Act 110, sections 1, 2, 3, 4, 53 and 54 (published February 29, 1980, effective March 1, 1980)

¹⁷ The records are housed at the Wisconsin State Law Library, the Wisconsin State Historical Society, the Wisconsin Legislative Council and the Wisconsin Legislative Reference Bureau. This author appreciates the assistance of staff at all four agencies in researching this legislative history.

¹⁸ “Removing Latin Terms from the Statutes” by Mark. C. Patrosky, dated February 15, 1979, referenced in the Agenda and the Summary of Proceedings for the February 19, 1979 meeting of the Special Committee.

¹⁹ 2005 Act 387 (published May 10, 2006, effective May 24, 2006)

²⁰ *Ibid*, sections 100 and 476

²¹ Wis. Stat. §§ 853.01 and 155.05

²² Wis. Stat. § 448.30

²³ As noted in the first article in this series, the right to vote is only reviewed when a guardian of the person is appointed. It is never at risk when only a guardian of the estate is appointed.

safety be established by clear and convincing evidence before their rights can be removed and a guardian of the person appointed. Section 54.10 (3) (a) states: “A court may appoint a guardian of the person ... for an individual only if 2. 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].

The emphasis on health and safety when appointing a guardian of the person is underscored by the definition of “meet the essential requirements for physical health or safety”, found in section 54.01 (19). The definition mentions certain actions “*without which serious physical injury or illness will likely occur.*”

Obviously voting does not implicate a person’s physical health or safety. Thus, the voting standard requires a different analysis than the analysis for appointing a guardian of the person.

The difference in the two standards demonstrates that the proposed ward may have insufficient capacity in certain areas so that the appointment of a guardian is appropriate yet have sufficient capacity to retain the right to vote.

If “understanding the objective of the elective process” requires a different analysis, what does it mean? *Town of Lafayette* notes that when a term isn’t defined in the statute, one can apply the “ordinary and accepted meaning” of the words by turning to a recognized dictionary. The 1978 Special Committee on Constitutional and Statutory Review did the same when it recommended replacing “non compos mentis” with the current voting standard.

The Merriam-Webster dictionary provides the following definitions -

“objective” means “something toward which effort is directed: an aim, goal, or end of action.”

“elective” means “relating to an election.”

“process” means “a series of actions or operations conducing to an end.”

Putting those definitions together, “understanding the objective of the elective process” means understanding the purpose of an election. And the purpose of an election is to vote for the candidate that the voter wants to win.

When proving that the individual understands the objective of the elective process²⁴, it’s important to remember that 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 listen to or read a variety of news sources or analysis, research platforms, or fact-check speeches, ads, or social media. They are not required to articulate why they are voting for a candidate. They are not required to explain how the voting process works. The elections and guardianship statutes do not require what is not required of other voters.

²⁴ In the initial guardianship proceeding, the proposed ward should not have to prove that she or he has the capacity to vote; rather the burden is on whoever is asserting that the right to vote should be lost to prove incapacity to vote. However, in practice, the proposed ward may need to assert their right to retain the right to vote.

Only a very basic understanding of why there are elections is required. The standard is not a civics or citizenship test, requiring, for instance, an understanding of the three branches of government, the various amendments in the Bill of Rights or the difference between the Declaration of Independence and the U.S. Constitution.

Questions to ask are: why do you want to vote?; why do we have elections?; what is the purpose of voting? Additional questions to consider are: how do people vote?; what offices are on the ballot?; do you have a photo ID and proof of where you live?; how do you decide who to vote for/where to look for information?; what experience do you have with voting, such as for school activities or because you belong to a club or group? One question that should not be asked is who the person wants to vote for.

In conclusion, the standard for voting is a low standard of cognition which merely requires that the individual understand the purpose of voting, that is, that they want to vote for a particular candidate so that the candidate will win.

About the Author: Henningsen is Director of the Voting Rights and Guardianship Project at Disability Rights Wisconsin (DRW). A 1975 graduate of the University of Wisconsin Law School, she formerly staffed the Wisconsin Guardianship Support Center at the Coalition of Wisconsin Aging Groups (CWAG). She served as a registered lobbyist for the passage of 2005 Act 387 (Chapter 54) and provided state-wide training to social service professionals and attorneys on the new law. She then worked at DRW, providing technical assistance for Disability Benefit Specialists. The Project can be reached at info@disabilityvote.org and 844-347-8683.

About Disability Rights Wisconsin: DRW is the federally mandated Protection and Advocacy agency for Wisconsin and is mandated to help “ensure the full participation in the electoral process for individuals with disabilities, including registering to vote, casting a vote, and accessing polling places.” Help America Vote Act, 42 U.S.C. § 15461 (2002). The DRW Voting Rights and Guardianship Project seeks to preserve and restore the voting rights of individuals under guardianship by preparing and distributing training materials and publications, and by creating a pro bono network to assist individuals in restoration cases.