

## Allegations of Incompetency and the Right to Vote

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*Editor's Note: This article is intended to be one in a series of articles related to the rights of individuals with disabilities to vote.*

The right to vote is a fundamental right of American citizens, guaranteed in the Wisconsin constitution. Legal incompetency to vote is one of the few grounds for removing the right to vote from an otherwise qualified individual. Because the right of people alleged to be incompetent to vote has been in the news of late, a review of the law in this regard is in order.

Article III of the Wisconsin Constitution covers suffrage. 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.

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.

These constitutional provisions are codified in Wisconsin's election law governing the qualifications of electors, found in Wis. Stat. chapter 6, and in guardianship law, found in Wis. Stat. chapter 54. There is no published case law in Wisconsin concerning the relevant statutes.

The relevant provisions in chapter 6 are:

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.

...

Section 6.03 continues:

- (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 s. 54.64.

Wis. Stat. sections 6.48(3) and 6.935 state that challenges to registration or to voting of a person alleged to be incompetent must follow the above quoted language in Wis. Stat. section 6.03(3).

These sections are clear on two points. First, the only way to prevent an individual from voting due to allegations of incompetency is for a court to have removed that right. Second, the standard for that decision is whether or not the individual can understand the “objective of the elective process.” (What that standard means and how it compares to other decisional standards is a topic for another article).

Section 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. However, this author believes this is a reference to guardianships imposed before the passage of 2005 Act 387, which modified these sections of chapter 6 and created chapter 54. Under chapter 54’s predecessor, Wis. Stat. chapter 880, it was common for plenary guardianships to be imposed without separate findings on specific rights. Moreover, chapter 54 resolves that lack of clarity, as will be noted below.

Turning to Wisconsin’s guardianship statute, it should first be noted that rights may no longer be removed by a general finding of incompetency and a plenary order. Removal of any right now requires a specific finding of incapacity to exercise that particular right. Absent a specific finding of incapacity, the right is retained. Any finding of incapacity to exercise a specific right, including voting, must be based on clear and convincing evidence. Ultimately, the court must, after applying the requisite burden of proof, make a specific finding regarding the capacity to vote (see Wis. Stat. section 54.25(2)(c)2).

The right to vote is found within section 54.25 which covers guardians of the person. There is no reference to the right to vote in any of the sections of chapter 54 covering guardians of the estate. Thus, the right to vote cannot be removed in a case where only a guardian of the estate is appointed.

The issue of voting rights within a guardianship of the person case is addressed in section 54.25(2)(c)1.g. The same section also addresses what is elsewhere called a “petition for a declaration of incompetence to vote,” but which this author will call a “stand-alone case.” Subsection 4 also addresses stand-alone cases. Section 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.

Subsection 4 is similar to subsection 1.g., 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.

This subsection provides that the same procedures apply in a stand-alone case as apply in a guardianship case. The first sentence of the subsection implies that it's possible to have a guardianship of the person case that results in a finding of incapacity in only the area of voting, so that a guardian of the person would not be needed. However, this author is not aware of any such case and believes it unlikely that any such case would ever arise.

In a guardianship case, the judge or court commissioner determines if the individual should lose their right to vote, among other issues. The right to vote will be lost if the court determines that the individual is "incapable of understanding the objective of the elective process." Even if a guardian of the person is appointed, the individual will retain the right to vote if the judge or commissioner determines that the individual is capable of understanding the objective of the elective process. The court must make an affirmative decision one way or the other. The court's decision in a guardianship of the person case that an individual should lose their right to vote is found in the Determination and Order on Petition for Guardianship Due to Incompetency (GN-3170). Paragraph 3A lists several rights that can only be removed "in full" – meaning the right is extinguished altogether if the ward lacks capacity to exercise it personally. The guardian is not permitted to exercise the right on the ward's behalf. The right to vote is one of these rights. Checkboxes are next to each of these rights. If box 3A(3) is checked, the right to vote is lost; if that box is not checked, the right is retained. Thus, the court's decision on voting capacity is communicated by the presence or absence of a mark in the appropriate checkbox.

Because the right to vote is not a right that can ever be transferred to the guardian, there is nothing in the Letters of Guardianship related to it. One must look at the Determination and Order to find out if the person has lost or retained the right to vote. (An individual who has lost the right to vote may later request that their right be restored, but that's a topic for another article).

In a stand-alone case, the same standard applies – incapable of understanding the objective of the elective process – but the outcome is limited to a decision on that sole issue, and no guardian of the person is appointed. This author is not aware of any such cases filed in Wisconsin.

In either case, if the court determines that the elector is incapable of understanding the objective of the elective process, the court completes a Notice of Voter Eligibility (GN-3180). The completed form is either transmitted to the municipal clerk who forwards the information to the Wisconsin Elections Commission (WEC,) or to the WEC, which then forwards the information to the municipal clerk.

A reading of both chapter 54 and chapter 6 leads to several conclusions. First, there are only two ways that an individual may lose their right to vote. Both require a decision by a court in either a guardianship of the person case or a stand-alone case. A family member, friend, service provider, or staff of a care facility cannot prevent from voting an individual who wishes to vote and who can indicate, with or without assistance, which candidate they want to vote for. Likewise, the activation of a Power of Attorney for Health Care does not prevent an individual from voting. Obviously, neither of these situations is an adjudication by a court.

Second, the standard for deciding incapacity to vote is whether the individual is incapable of understanding the objective of the elective process.

Third, any ambiguity in chapter 6 is resolved in chapter 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.

As the federally mandated Protection and Advocacy system for Wisconsin, DRW is charged with protecting the voting rights of people with disabilities and 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," via the Help America Vote Act, 42 U.S.C. § 15461 (2002). As part of this charge, 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. A brochure on voting rights and competency is available on the website of the [Wisconsin Disability Vote Coalition](#).

*Readers who have represented individuals in preserving or restoring their right to vote, or are interested in doing so, or have served as GALs in such cases, are encouraged to contact the author at [ellenh@drwi.org](mailto:ellenh@drwi.org).*