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Restoring the Right to Vote for People Under Guardianship

By Ellen J. Henningsen, Disability Rights Wisconsin

Editor's Note: This article is the second in a multipart series of articles related to the rights of individuals with disabilities to vote.

In the June 2022 issue of this journal, I discussed Wisconsin law on removing the right to vote of people alleged to be incompetent. In this article, I discusses Wisconsin law on restoring the right to vote for people who lost that right[1] in a guardianship proceeding.[2]

A note on vocabulary: this article uses the term "ward" to refer to the person under guardianship, because that is the term used in the guardianship statute.

Why try to convince the court to change its earlier decision removing the right to vote? Because the original decision could have been wrong. Or, the original decision may have been right, but circumstances have changed.

How could the court have made the wrong decision? The petitioner in the original case may have checked the box in the "Petition for Permanent Guardianship Due to Incompetency" (Form Number GN-3100) to take away the right to vote without thinking it through. Many petitions are filed by family members who are not prepared to argue the issue. The psychologist or physician who examined the proposed ward and completed the written report for the court may not have understood the legal standard for voting.[3] The guardian ad litem (GAL), judge, or court commissioner may not have considered the issue carefully. Initial petitions are often filed in response to a health or safety emergency, and the right to vote is not the highest priority and may get overlooked.

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[1] The Determination and Order on Petition for Guardianship Due to Incompetency (GN-3170) indicates by the presence or absence of a checkmark in paragraph 3. A. (3) of the Findings whether the right to vote has been lost (box will be checked) or retained (box will be empty).

[2] It is also possible to lose the right to vote in what this author calls a "stand-alone case" brought for this sole purpose. Wis. Stat. § 54.25 (2) (c) 1. g. The author is not aware of any such cases, and this article does not address them. This article also does not address the loss or restoration of the right to vote for any other reason, such as conviction of a felony.

[3] To remove the right to vote, the court must determine, by clear and convincing evidence, that the "individual is incapable of understanding the objective of the elective process." Wis. Stat. §§ 54.25 (2) (c) 1. g. and 54.25 (2) (c) 2. The meaning of this phrase will be reviewed in the next issue of this newsletter.

Regardless of the reason for the initial finding, if the person under guardianship wants to vote and believes they have the capacity to vote, Wisconsin law permits them to ask the court to reexamine the issue.

It's also possible that the court's initial decision was correct – the ward did lack the capacity to vote when the court made its decision. But, with the passage of time and additional life experience, education, and medical treatment, the ward may have sufficiently matured or medically improved so that they now have the capacity to vote. Again, if the person under guardianship wants to vote and believes they have the capacity to vote, Wisconsin law permits them to ask the court to reexamine the issue.

Restoring the Right to Vote: Procedure

The procedure for restoring the right to vote is contained in Wis. Stat. section 54.64, entitled "Review of incompetency and termination of guardianship."

The process to request restoration begins by filing a petition. Section (2) states that the ward, or anyone acting on the ward's behalf such as the guardian, may petition the court "to have … specific rights restored."

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. It is irrelevant if the annual (Watts) hearing to review a protective placement order fell within the 180 days, since that hearing is conducted under Wis. Stat. chapter 55, specifically section 55.18, not chapter 54, the guardianship statute. In other words, if the last guardianship hearing was seven months ago and the annual hearing to review a protective placement one month ago, the petition to restore voting rights can be filed.

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.

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.

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).

Wis. Stat. section 54.64(2)(a) 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.

The ward has the right to an attorney, either of their own choosing or appointed by the court. Section 54.64(2)(b) states:

> 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.

Evidence must be presented that the ward is no longer "incapable of understanding the objective of the elective process" per Wis. Stat. section 54. 25(2)(c)1.g. Or, 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. The meaning of this phrase will be discussed in the next journal. There is no definition of this phrase in the statutes and no published case law. I am 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.

Ideally, the ward and attorney (if any) should 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. And the ward and attorney should identify supporters, such as the guardian, a teacher, service provider, family member, the ward's own physician or psychologist, etc., to write letters of support or to testify at the hearing.

The ward's testimony will be critical – suggestions for testimony will be discussed in the section's next journal.

A key issue is whether the testimony, either in person or by written report, of a physician or psychologist is required. This author argues that it is not. Such testimony is clearly required in Wis. Stat. section 54.10(3)(c)2 when "appointing a guardian [or] declaring incompetence to exercise a right." And Wis. Stat. 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. …

However, 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 – and the 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.

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 layperson who understands the elective process would likely be able to determine if the ward did also.

If any type of expertise is required, it would be expertise in the form and function of government – an area where the GAL, an attorney, and the judge actually have more expertise than any physician or psychologist possesses. 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.

After consideration of the evidence, the court will issue its written decision. A sample Order granting the petition is available on the DRW and DVC websites. A standard Order (GN-3665) granting the petition but covering many other topics not relevant to the petition is available on the Official Forms page of the Wisconsin Court System website.

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.

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.

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 (844) 347-8683.

If the right to vote is not restored, the denial order can be appealed (see Wis. Stat. section 808.03), or another petition could be filed 180 days after the hearing. Obviously, a new petition would have to be accompanied by new facts that were not considered in the earlier attempt.

Conclusion: The Right Can Be Restored

Wisconsin statutes provide a process for restoring the right to vote previously removed in a guardianship case. The right to vote can be restored if the person is capable of understanding the objective of the elective process.

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.

Editor's Note: Disability Rights Wisconsin (DRW) has recently updated its website to include a page entitled "Guardianship and Voting – Resources for Attorneys." This page includes outlines, videos, articles that are featured in this Journal, and sample forms.

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An Elder Abuse Case Presented as Attorney Discipline: *Schwefel*

By Carol Wessels, Wessels & Liebau, Mequon

"Can I name you as my power of attorney?" asks my client, in our first meeting to discuss her estate plan, "I don't have anyone I trust."

"I really can't do that," I reply. "Let's see if we can figure out something else for you."

For me, this is the standard answer when a client wants to name me as a fiduciary. I simply won't agree to it. I take the guidance in *Disciplinary Proceedings Against Felli* seriously. In *Felli*, the attorney who named himself as trustee, nominated guardian, power of attorney agent, and personal representative in a client's estate plan, having no prior relationship with the client, was found to have drafted a legal document which required that the lawyer's services be used in relation to that document, in violation SCR 20:7.3(f), among other violations.[1] Yet, even where the

[1] *Disciplinary Proceedings Against Felli,* 291 Wis. 2d 529, 551 (Wis. 2006). *See also State vs. Gulbankian*, 54 Wis. 2d. 605, 196 N.W.2d 733(1972). (Declining to impose discipline or infer solicitation where attorneys had practice of naming themselves as executors, yet emphasizing that while an attorney is discussing the identity and the duties of an executor, he must especially be careful that his conversation does not