Voting Rights of People with Guardians

October 2008

Question: Does the appointment of a full guardian deprive an adult ward with a disability of the right to vote?

Short Answer:

Under Montana law, the appointment of a full guardian alone **does not** deprive the adult ward with a disability of the right to vote. For this deprivation to occur: 1) the court must at the very least notify the respondent of the potential for his or her right to vote to be terminated during the guardianship proceeding well before any such proceeding occurs; 2) during such a proceeding, the state must prove by at least a preponderance of the evidence that the ward does not understand the "nature and effect" of voting; and 3) any deprivation or limitation of this right must be explicit on the part of the court.

Based on the discussion and analysis below it is our opinion that adults with disabilities that have been appointed guardians have the right to vote unless the guardianship order specifically states otherwise.

Discussion:

A qualified elector in Montana must be 18 years old or older, a citizen of the United States, and have lived in Montana and in the county where the person intends to vote for at least 30 days.[1] The Montana Constitution provides two ways to be disqualified as an elector. The first is if the elector is a convicted felon and serving a sentence in a penal institution. The second if the person "is of unsound mind, as determined by a court." Mont. Const. art. IV, § 2.

Montana statutory law also includes these disqualifying conditions, but adds additional language providing that "[n]o person adjudicated to be of unsound mind has the right to vote,

[1] Except that those voters registered in Montana who moved to another county in Montana within 30 days of the election may register in the new county of residence after the deadline for regular registration up until the day of the election.

unless he has been restored to capacity as provided by law." Mont. Code Ann. §13-1-111. There is no legislative history that provides insight into the significance of the phrase "restored to capacity as provided by law." However, the guardianship laws, sections of law regarding people with developmental disabilities and mental illness, are referenced at the end of this provision.

The state courts have not interpreted how these terms apply to voters. The term "unsound mind" is an antiquated and inexact term. It is rarely, if ever, used in involuntary commitment proceedings, competency hearings, or criminal proceedings wherein a defendant is found not guilty by reason of mental disease or defect. "Capacity" is also not a term that is used in these determinations. Thus, the individuals involuntarily committed, found not competent to stand trial, or found not guilty by reason of mental disease or defect would have strong arguments that they cannot be legitimately prohibited from voting.

The only other prominent place where the inverse term "incapacitated" is used is the guardianship provisions of the state code, where it describes the status of a person who is to be appointed a guardian. Although such a determination appears to be a statement of the total absence of capacity, that determination alone does not deprive a person appointed a guardian of every legal right they enjoy as adult Montanans. It is only where each of those legal and civil rights have been "expressly limited by a court order or have been specifically granted to the guardian by the court" that a ward is deprived of each respective right. Mont. Code Ann. § 72-5-306.

This provision is consistent with a relatively recent interpretation of the manner in which guardianship impacts the federal right to vote, striking down a state constitutional provision denying the right to vote to people with mental illness who had been appointed guardians. *Doe v. Row*, 156 F. Supp.2d 35 (D. Me. 2001). There, a federal court found that the state has a compelling interest in ensuring that voters understand "the nature and effect of voting." Although the Court did not set forth that sort of procedure is necessary to determine whether a person facing a guardianship understands the "nature and effect of voting," such a proceeding would, at the very least, require notice to the respondent that the right to vote could be impacted by the guardianship, and that the state prove by a preponderance of evidence that the respondent does not have ability to understand the nature and effect of voting. A proceeding that fails to include these features would not establish the state's compelling interest in limiting voting and thus be insufficient to deprive the ward of the right to vote.

As a matter of federalism, the Montana constitution can offer no less protection than the U.S. constitution. It is now well established that the Montana Supreme Court will interpret state constitutional provisions in a manner that results in greater protection of individual rights than similar or nearly identical provisions of the U.S. Constitution. For this reason, there is good

reason to believe that the Montana Supreme Court would follow such an analysis, and very possibly require a higher standard of proof in such proceedings, and other safeguards to protect the due process, equal protection rights and voting rights of persons subject to guardianship proceedings.

Finally, state law limits the powers of a guardian to those that an adult has with regard to an unemancipated minor child. Mont. Code Ann. § 72-5-321. The Montana Supreme Court has applied this provision strictly, and found in the most prominent example, that it prohibited a guardian of an incapacitated adult from dissolving his marriage. *In re Marriage of Denowh ex rel. Deck*, 2003 MT 244, 317 Mont. 314, 78 P.3d 63. In *Denowh*, the Court reasoned that as an unemancipated child cannot be married given that the definition of emancipation includes marriage, an adult's guardianship would end at the point that the child becomes married. Thus, an adult guardian would never have the right to bring a dissolution for their unemancipated child. As a consequence then, a guardian cannot bring such an action on behalf of their adult ward.

A similar analysis can be applied to voting. Given that unemancipated children under state law are under the age of 18, and that persons cannot vote until they are 18, an adult guardian of an unemancipated child would never have the right or authority to make any decision regarding their child's right to vote and would not be able to vote on their behalf. As a consequence then, a guardian of an adult ward would not have that authority either. As this provision limits only the guardian's rights with respect to the ward, its impact is limited to the relationship of guardian to ward and would not have an impact upon the separate question of the state's power to limit the rights of the ward.

Analysis:

Although the various state law provisions about this issue do not appear to be written to provide much clarity to this issue, they can be read together to come to a relatively certain result:

An adult person who has been appointed a full guardian does not loose the right to vote as a result of the guardianship alone. For this deprivation to occur: 1) the court must at the very least notify the respondent of the potential for his or her right to vote to be terminated during the guardianship proceeding well before any such proceeding occurs; 2) during such a proceeding, the state must prove by at least a preponderance of the evidence that the ward does not understand the "nature and effect" of voting; and 3) any deprivation or limitation of this right must be explicit on the part of the court.

Clearly, too, a guardian does not have the power to exercise a ward's right to vote, nor does a guardian have the power to prevent a ward from voting pursuant to Montana Code Annotated § 72-5-321.

If you have any questions, please call Disability Rights Montana's toll free number: 1-800-245-4743, or direct line: 406-449-2344.