
Barriers to Voting: Individuals under Guardianship for Mental Disability

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Barriers to Voting: Individuals under Guardianship for Mental Disability

Overview

Article 1, § 4 of the State Constitution gives the General Assembly the authority to “regulate or prohibit the right to vote of a person ... under care or guardianship for mental disability.” The General Assembly exercised this authority through § 3-102(b) of the Election Law Article which states that an individual under guardianship for mental disability is not qualified to be a registered voter. During the 2009 session, Senate Bill 984 would have established a task force to study whether the State Constitution or the Election Law Article should be changed. Without voting on the bill, the Senate Education, Health, and Environmental Affairs Committee referred the issue for interim study. This report discusses various aspects of Maryland law, the law in other states, case law regarding the exclusion of individuals with mental disabilities from voting, applicable federal law, and other issues.

Maryland Law

Guardianship of Individuals with Mental Disabilities

The exclusion of individuals with mental disabilities from voting is limited to those individuals who are under guardianship because of the mental disability.¹ Title 13, Subtitles 2 and 7 of the Estates and Trusts Article sets forth the process for appointing a guardian of the property of a person or of the person, respectively.

Appointment of a Guardian

Guardian of the Property of a Person: A court may appoint a guardian of the property of a mentally disabled individual if the court finds that the individual is unable to manage his or her property and affairs effectively because of the disability and the individual has or may be entitled to property or benefits which requires proper management. The guardian is appointed on petition and after notice is given. A hearing is held if the individual objects to the petition. If the individual does not have counsel, the court is required to appoint counsel.

¹ The term mental disability is used generally to describe two different types of disabilities: cognitive disabilities and mental illness. Cognitive disabilities are any disabilities that affect mental processes, such as genetic disorders (*e.g.*, Down Syndrome), traumatic brain injuries (*e.g.*, shaken baby syndrome), or neurological impairments (*e.g.*, autism). Mental illness or psychiatric disabilities are characterized by alterations in thinking, mood, or behavior that are mediated by the brain. People with mental illnesses are usually of normal intelligence. Mental illnesses include schizophrenia, bipolar disorder, obsessive-compulsive disorder, severe anxiety disorders, and borderline personality disorder.

Guardian of the Person: A court may appoint a guardian of the person of a mentally disabled individual on petition and after notice is given. A hearing is held if the individual objects to the petition. The notice must include the rights of the mentally disabled individual, such as the right to be present at the hearing. If the mentally disabled individual does not have counsel, the court must appoint an attorney to represent the individual in the proceeding. A guardian will be appointed if the court determines from clear and convincing evidence that the individual lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the individual's person, including provisions for health care, food, clothing, or shelter, because of any mental disability. The court must also find that the guardianship is the least restrictive form of intervention available which is consistent with the individual's welfare and safety.

A petition for guardianship of the person of a mentally disabled individual must include signed and verified certificates of competency from two licensed physicians who have examined the disabled individual or one licensed physician who has examined the disabled individual and one licensed psychologist who has evaluated the disabled individual. At least one of the examinations or evaluations must have been performed within 21 days before filing the petition.

Responsibilities of a Guardian

Once appointed, the guardian has a duty to act according to the instructions set by the court during the guardianship proceeding. If the court grants guardianship over the ward's property, the guardian has a fiduciary duty to manage the ward's assets properly. The court may grant the guardian of a person only those powers necessary to provide for the demonstrated need of the disabled person, including the same rights, powers, and duties that a parent has with respect to an unemancipated minor child.

Number of Individuals under Guardianship

After contacting the State Administrative Office of the Courts and a limited number of individual circuit courts, information on the total number of people in the State who are under guardianship for mental disability, or under adult guardianship in general, does not appear to be readily available. Directors of local social services departments, which serve as public guardians for individuals age 18 to 64 at the time of appointment, served as guardians for 588 individuals as of July 31, 2009. The Secretary of the Department of Aging and directors of area agencies on aging, which serve as public guardians for individuals age 65 and older at the time of appointment, served as guardians for 786 individuals in fiscal 2009. It is uncertain how many of those guardianships are for mental disability and how those numbers of public guardianships compare to the number of private guardianships in the State.

Administration of the Prohibition

The voting prohibition is primarily implemented through the requirement that a voter registration application be signed by an applicant, subject to the penalties of perjury, swearing or

affirming that the individual is, among other things, not under guardianship for mental disability. State law does not require that courts provide information to the State Administrator of Elections regarding individuals for whom a guardian is appointed due to mental disability (as it does for name changes and individuals convicted of felonies) and the State and local boards do not receive information directly from the courts.

Based on a search by State Board of Elections (SBE) staff of cancelled voter registration records, since January of 2006, a total of 53 records were cancelled due to the individual being under guardianship for mental disability. To the best of SBE staff's knowledge, these cancellations were made at the request of the guardian.

Case Law and Attorney General Opinions

There are no court cases discussing the State's voting prohibition. A 1975 Attorney General's opinion discussed the election law provision. However, the opinion did not address the legality of the prohibition; rather, it discussed an apparent conflict between the prohibition and certain provisions of the Health-General Article that guarantee the civil rights of individuals who are either in facilities because of mental disorders or are developmentally disabled or receive services from the State due to the developmental disability. This opinion is more fully discussed in the next section.

Civil Rights of Individuals with Mental Disabilities

There are three statutory provisions that preserve the civil rights of individuals with mental disabilities. Under § 13-706 of the Estates and Trusts Article, appointment of a guardian is not evidence of incompetency of the disabled individual and does not modify any civil right of the disabled individual unless the court so orders. An individual who is appointed a guardian because of a mental disability, however, does lose the right to vote automatically under the Election Law Article. There are no court or Attorney General opinions that address the apparent conflict.

Section 10-704 of the Health-General Article states that an individual who is in a facility or Veterans Administration Hospital due to a mental disorder may not be deprived of the right to vote just because the individual is in a facility.² A similar provision appears in § 7-1004 of the Health-General Article. The provision specifically prohibits an individual from being deprived of the right to vote solely because the individual has a developmental disability or receives services from the State under Title 7 of the Health-General Article. The apparent conflict between the Health-General provisions and the voting prohibition was addressed in a 1975

² Mental disorder is defined in § 10-101 of the Health-General Article as "a behavioral or emotional illness that results from a psychiatric or neurological disorder." It includes "a mental illness that so substantially impairs the mental or emotional functioning of an individual as to make care or treatment necessary or advisable for the welfare of the individual or for the safety of the person or property of another." Mental retardation is specifically excluded from the definition.

Attorney General's opinion. The opinion found no conflict between the provisions of law because the protection afforded by the Health-General provisions is limited to those individuals in facilities who are not under guardianship.

The Law in Other States

Constitutions and Statutes

The state constitutions and/or the election statutes of 38 of the other states prohibit the mentally disabled from voting.³ Some states use broad terminology such as “idiot,” “*non compos mentis*” or “mentally incompetent” with no indication that any type of determination be made by a court. Others require some type of determination by a court through the use of terms such as “adjudged” and “adjudicated.” Still others limit the prohibition to individuals who are under guardianship. Of the 38 states, a determination regarding the capacity to vote is required in the constitutions or election law provisions in 13 of those states.⁴ Massachusetts also requires a judicial determination regarding the capacity of an individual under guardianship to vote because of an opinion by its Secretary of the Commonwealth. One other state, Tennessee, through its guardianship code, authorizes a court to remove the right to vote if an individual is placed under conservatorship, but does not specifically mention mental disability. The remaining 10 states do not restrict the ability of individuals with mental disabilities to vote, although some of these states have the constitutional authority to impose such restrictions.⁵

Tests Used to Determine Capacity to Vote

Of the 14 states where a determination regarding the individual's capacity to vote is required, the election laws or state constitutions of five states prescribe a test to determine whether an individual is competent to vote. The test in Section 2208 of the California Election Code consists of the court determining whether the individual is able to complete the voter registration affidavit. The Delaware Code requires a finding “based on clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic

³ The states are: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Included in those states is Maine; however, Maine is no longer enforcing its restriction because the restriction was struck down as unconstitutional. *Doe v. Rowe*, 156 F.Supp.2d 35 (2001). See p. 6-7 of this report for a discussion of the case.

⁴ The states are: California, Delaware, Florida, Hawaii, Iowa, Louisiana, Minnesota, New Jersey, Ohio, Oklahoma, Oregon, Washington, and Wisconsin.

⁵ The states are: Colorado, Idaho, Illinois, Indiana, Kansas, Michigan, New Hampshire, North Carolina, Pennsylvania, and Vermont.

voting judgment.”⁶ Hawaii law places the responsibility of determining capacity to vote on the county clerks. The county clerk is required, after receiving notice that an individual has been adjudicated incapacitated, to determine whether the individual “lacks sufficient understanding or capacity to make or communicate responsible decisions concerning voting ...”⁷ The New Jersey Constitution provides, “[n]o person who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting shall enjoy the right of suffrage.”⁸ The Wisconsin Constitution prohibits an individual who has been adjudged incompetent from voting unless there has been a finding that the individual is “capable of understanding the objective of the elective process.”⁹

Another two states, Iowa and Washington, prescribe a test in the states’ guardianship statutes. An Iowa court appointing a guardian based on the mental incapacity of the proposed ward is required to determine whether the individual “lacks sufficient mental capacity to comprehend and exercise the right to vote.”¹⁰ In appointing a guardian, Washington courts are required to determine whether the individual “lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice.”¹¹

Case Law

There appears to be a relatively limited number of state court cases addressing state restrictions on voting by individuals with mental disabilities. The New Jersey case of *Carroll v. Cobb*¹² is an example. In 1976, the New Jersey Constitution and statutory provisions denied the right of suffrage to “idiots” and “insane” individuals. Five residents of a school for the mentally retarded sought to register to vote in New Jersey by completing and signing voter registration forms but were not permitted to register by the local board of elections. In the suit that followed, the Superior Court of New Jersey found that the five plaintiffs answered the questions on the registration form and that the clerk had no authority to question the individuals further. The lower court heard evidence on each of the plaintiffs’ mental capacity, and noted that none had court-appointed guardians. Without making a specific finding, the trial court concluded that the plaintiffs were not so mentally deficient as to be disenfranchised, a conclusion shared by the Superior Court of New Jersey. It should be noted that in 2007, the New Jersey state constitution was changed so that an individual is only prohibited from voting if a court has determined that the individual lacks the capacity to understand the act of voting.

⁶ 15 Del. Code Ann. § 1701.

⁷ Haw. Rev. Stat. § 11-23(a).

⁸ NJ Const. art. 2, § 1, ¶ 6.

⁹ WI Const. art. 3, § 2(4)(b).

¹⁰ I.C.A. § 633.556.

¹¹ RCWA 11.88.010(2) and (5).

¹² 354 A.2d 355, 359 (N.J. 1976).

Relevant Federal Law and Court Cases

Federal Law

There are two provisions of the federal constitution and two provisions of federal statutory law that are relevant and have been used to challenge the legality of voting prohibitions such as that in Maryland. The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying the “equal protection of the laws” to any of its citizens. The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving “any person of life, liberty, or property, without the due process of law.” The Americans with Disabilities Act (ADA) and the Rehabilitation Act prohibit the exclusion of individuals with disabilities from government services, programs, or activities if the exclusion is based on the fact that the individual has a disability.

Court Cases

In the past decade, two cases have challenged states’ voting prohibitions relating to the mentally disabled on federal constitutional grounds. Missouri’s law was challenged under the Equal Protection Clause. Maine’s law was challenged under both the Equal Protection Clause and the Due Process Clause. Both laws were also challenged under ADA and the Rehabilitation Act.

Maine

In 2001, the U.S. District Court for the District of Maine, in *Doe v. Rowe*,¹³ found the clause of Article II, § 1 of the Maine Constitution disenfranchising individuals under guardianship for reasons of mental illness to be a violation of both federal constitutional and federal statutory law. Three women under the guardianship of the Maine Department of Human Services and the Disability Rights Center of Maine challenged the state constitution and enacting statute for depriving mentally ill individuals under guardianship the right to vote. In each case, the probate court did not specifically consider whether the individual being placed under guardianship had the capacity to vote, nor did the court notify the individual that, as a result of the guardianship proceedings, the individual might lose the right to vote.

Two of the plaintiffs sought modifications of their guardianship orders to reinstate the right to vote. The first plaintiff was granted the modification, making her eligible to vote, while the second plaintiff’s modification request was denied based on the constitutional prohibition. The final plaintiff was unable to seek modification of her guardianship order because she was hospitalized, but the District Court noted that it would have been heard by the same judge that heard the second plaintiff’s request, and would likely have been denied on the same grounds.

¹³ 156 F.Supp.2d 35 (D. Me. 2001).

The court noted that examinations of the plaintiffs indicated that the plaintiffs were able to understand the act of voting.

The court noted that individuals who are the subject of guardianship proceedings are not specifically advised that they may be disenfranchised and that there was no requirement for probate judges to consider the capacity to vote when an individual is facing disenfranchisement. This, combined with the disparate outcomes of the modification hearings, resulted in the court finding that whether an individual under guardianship for mental disability would be allowed to vote depended on the judge assigned to the case, rather than whether the individual was competent to vote. The court concluded that the Maine prohibition violated the Due Process Clause.

The court also evaluated whether the Maine prohibition violated the Equal Protection Clause. The court held that, while ensuring the voting population understands the act of voting would be a compelling reason to restrict voting, the restriction at issue did not allow incapacitated individuals to vote regardless of whether or not they possessed the ability to understand the nature and effect of voting. There was no requirement that a determination be made during the guardianship proceedings regarding whether the individual actually lacked the ability to understand voting. For this reason, the court found that the prohibition violated the Equal Protection Clause.

In addition to federal constitutional violations, the court in the Maine case found that Maine's disenfranchisement of individuals under guardianship for mental illness violated the ADA and the Rehabilitation Act. The plaintiffs had been prohibited from voting because they had been diagnosed with a mental illness and were under guardianship. Because the exclusion was only based on the fact that the individuals were under guardianship for mental illness, the court found that the exclusion was based on the fact that the individuals had a disability. The exclusion was categorical because no individual determinations regarding an individual's capacity to vote were required. Therefore, federal law was violated.

Missouri

The Missouri Constitution prohibits an individual from voting if the individual has a guardian because of a mental incapacity. Missouri election law prohibits an individual from voting if the individual has been judged to be incapacitated. The plaintiff ward in the 2007 case of *Missouri Protection and Advocacy Services, Inc. v. Carnahan*¹⁴ was adjudged incapacitated and placed under full guardianship, under an order which expressly provided that the ward retained the right to vote. The suit was brought after polling officials did not permit the ward to vote in the 2004 election because he was under a guardianship order. The plaintiff argued that the election law provision violated the Equal Protection Clause because it prohibited individuals from voting who were not prohibited under the state constitution.

¹⁴ 499 F.3d 803 (8th Cir. 2007).

The Eighth Circuit of the U.S. Court of Appeals noted that the guardianship order at issue expressly preserved the ward's right to vote, evincing that Missouri law does not categorically disenfranchise individuals under full guardianship. The equal protection claim failed because the plaintiffs did not show that every individual under full guardianship lost the right to vote. The court also noted, however, that a categorical ban may call for an investigation into whether such a ban violates the Equal Protection Clause.

The court also did not find any violation of ADA or Rehabilitation Act. As shown by the facts of the case, judges had the ability to preserve the right to vote in a guardianship order; therefore, the court concluded the ban was not categorical. The court did not address the question of whether the exclusion would violate ADA or the Rehabilitation Act if the ban was categorical.

The View of Advocacy Organizations and Independent Research

Advocacy Organizations

The American Bar Association (ABA), the American Civil Liberties Union of Maryland (ACLU-MD), and the Maryland Disability Law Center (MDLC) believe that the blanket disenfranchisement of the mentally disabled, even if limited to those under guardianship, should be removed. In 2007, the ABA House of Delegates adopted recommendations regarding the disenfranchisement of individuals based on mental incapacity. The recommendations stated that state constitutions and statutes should explicitly preserve the right to vote unless certain criteria are met and there is a court order that specifically addresses the individual's right to vote. The criteria that must be met are:

- the exclusion is based on a determination by a court of competent jurisdiction;
- appropriate due process protections have been afforded;
- the court finds that the individual cannot communicate, with or without accommodations, a specific desire to participate in the voting process; and
- the findings are established by clear and convincing evidence.

ACLU-MD advocates the adoption of the ABA's recommendations, as well. MDLC would like there to be no restriction regarding the ability of individuals with mental disabilities to vote; however, if that is not done, MDLC urges the adoption of the ABA recommendations. The ABA recommendations were also supported by the participants in a University of the Pacific, McGeorge School of Law symposium that was held in 2007. The participants concluded that a determination that an individual lacks the capacity to vote should only be made if the individual cannot communicate a desire to vote. Other findings of the participants are discussed below.

The Governor's Transition Election Work Group Report also recommended modifying the State's disenfranchisement of individuals under guardianship for mental disability. This recommendation was based on *Rowe*. It was also based on changes that other states made to their constitutions and statutes in the wake of the Maine decision. For example, Washington changed its guardianship law to include a voting capacity test.

Independent Research

There has been limited research on the capacity of individuals with mental disability to vote. The majority of the research has focused on individuals with dementia or Alzheimer's disease. To determine whether an individual retained the capacity to vote, researchers working on the Dementia Voting Project, based at the University of Pennsylvania's Alzheimer's Disease Center, developed the Competence Assessment Tool for Voting. The tool assesses the understanding, appreciation, reasoning, and choice of the individual. The understanding and choice portions of the tool were based on the finding of the court in *Rowe* that a state has a legitimate interest in excluding individuals who lack the capacity to understand the nature and effect of voting. The appreciation and reasoning components were included to give a comparison to the *Rowe* standard. The research indicates that those with mild Alzheimer's or dementia were capable of voting under the understanding and choice components of the test while individuals with severe cases were not. The results for individuals with moderate cases were mixed. The researchers found that a structured interview can determine the capacity of an individual to vote. They also found, however, that the comparative reasoning and appreciation of voting questions included in the assessment tool would disenfranchise some individuals who retained the capacity to vote under the *Rowe* standard. Therefore, the researchers do not advise including the appreciation and reasoning components in a voting capacity test.

Other Issues

Potential Fiscal Impacts of Changing Current Law

Changing the current prohibition prior to the 2010 elections, whether by eliminating it or amending it, could result in one-time expenditure increases for SBE and the Motor Vehicle Administration (MVA) to make necessary modifications to voter registration materials and processes and notify affected individuals. To the extent a change in the law would condition an individual's loss of the right to register to vote by reason of mental disability on a specific court finding regarding the individual's capacity to vote, the workload of the circuit courts could also be affected.

State Board of Elections

SBE orders and supplies local boards of elections with voter registration applications. SBE advises it expects to place an order of voter applications after the 2010 legislative session,

prior to the 2010 elections. If a change in the law would take effect prior to the 2010 elections, SBE and the local boards of elections would lose the ability to make use of any existing inventories of voter registration applications when the law takes effect. However, with a printing already planned for after the 2010 legislative session, it appears SBE may be able to make revisions to reflect a change to voter registration qualifications during that printing and not incur significant increased costs to make revised applications available. For contextual purposes, SBE's last order of 250,000 voter registration applications cost roughly \$27,000, and SBE advises a reprint prior to the 2010 elections could cost roughly \$30,000.

SBE is uncertain at this time what specific actions would be taken to notify affected individuals of a change in the law, though it appears as though notification could possibly be accomplished with relatively minimal expenditures. Actions could include modifying voter education materials in some manner and/or direct mailings. Any local board costs associated with accounting for a change in the law should be minimal based on discussions with representatives of four local boards of elections.

Motor Vehicle Administration

MVA costs may increase to reprint forms and make computer programming changes to reflect a change in voter registration qualifications. Two previous estimates provided by MVA to make other changes to voter registration qualifications reflected one-time expenditure increases of \$10,000 and \$35,000.

The Courts

A change in the law that would condition an individual's loss of the right to register to vote by reason of mental disability on a specific court finding regarding the individual's capacity to vote could potentially lengthen guardianship hearings and/or result in additional hearings. The extent of any increase in the courts' workload would be difficult to estimate and would likely in part depend on specifically how the law was changed. The circuit courts are funded by both the State and local governments, with the State covering costs associated with the circuit court judges and their law clerks, clerks of the circuit courts and their offices, and certain information systems activities.

Other Barriers to Voting

Beyond state constitutional or statutory law restrictions on the ability of individuals with mental disabilities to vote, individuals with mental disabilities may face other barriers to voting. A voting rights guide published in 2008 by the Bazelon Center for Mental Health Law and the National Disability Rights Network (Bazelon/NDRN guide) indicates the possibility of election officials, poll workers, or service providers of residential or other services for individuals with disabilities, such as nursing home or hospital staff, restricting access to voting for individuals with mental disabilities. A symposium, "Facilitating Voting as People Age: Implications of Cognitive Impairment," held at the University of the Pacific, McGeorge School of Law, also

identified various potential barriers outside of state constitutional or statutory restrictions.¹⁵ The results of the symposium were published in a 2007 issue of the *McGeorge Law Review*. These additional potential barriers primarily result from the difficulty individuals with mental disabilities may have in independently participating in the voting process and their consequent dependence on others in order to do so.

Long-term Care Facilities

The Bazelon/NDRN guide, various articles written for the McGeorge symposium, and the symposium's recommendations, give a significant amount of attention to the potential challenges faced by residents in long-term care facilities such as nursing homes and assisted living facilities. The concerns raised range from practical limitations, such as the potential for limited access to transportation to get to polling places or limited access to voter registration and absentee voting mechanisms, to the potential for facility staff to act as "gatekeepers" by conditioning a resident's access to voting or assistance on some assessment of voting capacity. There may also be the potential for ballot manipulation by those assisting the resident, whether facility staff or others, though evidence of ballot manipulation does not appear to go beyond anecdotal accounts.

There is limited data on the prevalence of "gatekeeping"; however, in a survey of nursing homes and assisted living facilities in Philadelphia, conducted after a November 2003 city municipal election, nearly two-thirds of respondents indicated that residents' capability of voting was assessed before the election.¹⁶ The authors of the survey cautioned generalizing its findings to the nation and encouraged broader and more detailed studies.

A survey conducted in Baltimore City and Anne Arundel County, published in 2001, also indicated some evidence of screening of nursing home residents for voting capacity, based on responses from a limited number of staff.¹⁷ At the time, Anne Arundel County followed an earlier version of the procedures described below for outreach to nursing homes and assisted living facilities by election officials. Baltimore City, however, did not follow the procedures which were not a State law requirement at the time.

To guard against barriers in long-term care facilities, a number of the articles and recommendations of the McGeorge symposium suggest outreach by election officials to assist long-term care facility residents with voter registration and voting (referred to as mobile voting/polling in some cases), a practice currently undertaken in one form or another in a number

¹⁵ Although the report focuses on the Bazelon/NDRN guide and the McGeorge Symposium, some of the same or similar concerns and suggestions are raised by: Colker, Ruth, *Anti-Subordination Above All: A Disability Perspective*, 82 Notre Dame L. Rev. 1415 (2007) and Schrauben, Mary, *Ensuring the Fundamental Right to Vote for Elderly Citizens in the United States*, 9 T.M. Cooley J. Prac. & Clinical L. 307 (2007).

¹⁶ Karlawish, Jason H.T., et al., *Identifying the Barriers and Challenges to Voting by Residents in Nursing Homes and Assisted Living Settings*, *Journal of Aging & Social Policy*, 20:1, 65 – 79 (2007).

¹⁷ O'Sullivan, Joan L., *Voting and Nursing Home Residents: A Survey of Practices and Policies*, 4 *Journal of Health Care Law and Policy* 325 (2001).

of states, including Maryland. Under Maryland's procedures, established by the State Board of Elections and required by State law, local boards of elections must contact each nursing home and assisted living facility in their jurisdiction and encourage the facility to allow election officials to visit and offer the residents the opportunity to register to vote and vote by absentee ballot. While local boards must contact each facility, they are not required to visit facilities with less than 50 residents. Election officials visiting facilities work in teams of two and the members of each team must be registered with different political parties or be unaffiliated. The procedures include requirements for training of team members and general guidelines for assisting nursing home or assisted living facility residents in registering to vote or voting.

Some of the articles and the recommendations of the McGeorge symposium also suggest imposing affirmative responsibilities on long-term care facilities. Those responsibilities could include requiring that information on registering to vote, or changing an individual's address for the purpose of voting, be provided to a resident upon admission, and requiring that the facilities actively assist residents with voter registration, requesting absentee ballots, and completion of absentee ballots under certain circumstances, if such assistance is not provided by election officials.

Training for individuals assisting voters and safeguards to ensure that a ballot reflects the voter's intent, including an affirmation signed by the individual providing assistance, are also recommended by the symposium. In Maryland, an individual assisting an absentee voter must sign a certification that they did not attempt to influence the voter to vote for or against any candidate or question. A similar certification must be made by an individual assisting a voter at a polling place.

Election Officials/Poll Workers

The possibility that election or other officials administering voter registration or absentee balloting may in some manner perform a gatekeeping function not in line with State law is also raised by the Bazelon/NDRN guide and articles from the McGeorge symposium, but evidence of such occurrences beyond anecdotal information is not provided. The Bazelon/NDRN guide also raises the possibility of poll workers improperly turning away individuals with mental disabilities.

An article written for the McGeorge symposium by an election administrator notes the difficulty of maximizing access to voting while preserving the integrity of an election and the difficult questions election officials can face with respect to voting by individuals with mental disabilities. An election official, for example, may worry about whether or not to provide an absentee ballot to a family member of an individual with a cognitive impairment that they believe is not capable of making voting choices, thinking that the family member may vote for them in some manner. The election administrator's advice to election officials confronted with similar situations was that it was not the official's role to screen out voters and that people are entitled to assistance. It was also advised, however, that the individual assisting the voter be informed that the ballot must reflect the voter's intent. Poll workers presumably could face

similar uncertainty about the type of assistance an individual may provide a voter with a mental disability.

The election administrator's article noted the need for training of election officials and those serving the elderly population to maximize access to voting by people with cognitive impairment. The McGeorge symposium also recommended that states and localities create poll-worker recruitment and training programs that specifically address the needs of voters with cognitive impairments.

Expanded Access

A few of the articles and the recommendations of the McGeorge symposium also suggest ways to make the voting process more accessible to voters with disabilities in general, including those with cognitive impairments, presumably lessening their dependence on the assistance of others to participate in the voting process. The suggestions include increased registration opportunities, such as election day registration or automatic registration; allowing for some form of "permanent absentee" or "vote-at-home" status, where a voter could choose to automatically receive an absentee ballot prior to each election rather than having to request a ballot each time; and providing voting and election materials, including ballots, in language and formats accessible to people with all disabilities, including cognitive impairments, even if multiple formats are required to do so.

In relation to expanded access for voters with mental disabilities, a provision of Maryland law allowing for polling place assistance may be worth noting in that it appears to exclude voters with mental disabilities. Section 10-310(c)(3)(i) of the Election Law Article of the Annotated Code allows for a voter who "requires assistance in marking or preparing the ballot because of a *physical* disability or an inability to read the English language" to choose an individual to assist him or her. State Board of Elections regulations contain similar language. The statewide election judge training manual, however, does not instruct election judges to deny any voter the ability to have assistance and refers to voters with cognitive disabilities having the choice to have someone assist him or her while voting. As a result, the specific references to "physical disability" in the law and regulations, while possibly meriting clarification, appear likely to not have resulted in voters with mental disabilities being denied the ability to have assistance of an individual of their choice at a polling place.

Although the Election Law Article limits assistance to those with physical disabilities or who are unable to read English, the federal Voting Rights Act requires states to allow assistance in voting by an individual of the voter's choice, with some restrictions, if assistance is needed because of a disability. The term "disability" is not limited to individuals with physical disabilities.

Conclusion

Although State law prohibits an individual who is under guardianship because of mental disability from registering to vote, the courts are not required to provide the State Board of Elections or local boards of election with any information when an individual is placed under guardianship for a mental disability. The prohibition, therefore, is mainly enforced through the perjury statement on the voter registration application.

The majority of other states prohibit individuals with mental disabilities from voting to one extent or another, but only a minority of those states requires that a court make a determination regarding the individual's capacity to vote. Only seven states prescribe the test that must be used to determine voting capacity. Although the wording of the tests varies, the tests revolve around the idea that the individual must understand the act of voting to retain the right to vote. Also, the legality of Missouri and Maine's prohibitions were challenged on federal constitutional and statutory grounds. Missouri's statute survived the challenge because the plaintiff's right to vote was preserved by the guardianship order. Maine's prohibition did not survive the challenge because Maine did not require an individualized determination to be made regarding an individual's capacity to vote.

Several advocacy organizations advocate for the removal of the prohibition or, in the alternative, for a modification of the ban which would require a determination of the individual's capacity to vote. If a change to the law occurred before the 2010 elections, there could be a fiscal impact to the State Boards of Elections and MVA, though the impact may be relatively minimal. The workload of circuit courts could potentially increase if a determination of an individual's capacity to vote was required; however, the extent to which an increase in workload may cause a fiscal impact cannot be determined at this time. There are also other potential barriers to voting an individual may encounter if the law is changed. These barriers range from lack of transportation to a polling place to either caretakers or election workers making an independent assessment of the individual's capacity to vote and thereby preventing the individual from voting.