The Right To Vote of Persons Under Guardianship –Limited or Otherwise

BY HENRY G. WATKINS

"I am opposed to the granting of suffrage to the incapacitated because I believe it would be a loss to them. They will lose those aspects of their tenderness and fragility by entering the world of politics. And by that transformation they will not only lose the sweet and noble influence of their character, but will be in an arena being asked to take up weapons (the franchise) with which they are unfamiliar and unable to wield. Further, I understand that they don't want to vote anyway. … No sir it is not that the incapacitated are inferior, but it is that they are different; our Maker has created the normal person adapted to the performance of certain functions and the incapacitated adapted to the performance of other functions. The incapacitated don't need suffrage because it is our duty to protect them."[1]

This argument characterizes as protectors those who would deny rights for purportedly benevolent purposes. But on even brief reflection the remarks are seen as condescending and demeaning. Yet the sentiments expressed are held by some who would summarily deny the right to vote to persons with varying degrees of incapacity. Those remarks are actually taken in large part from the Arizona Constitutional Convention and involved debates on whether the franchise should be extended to women who were described as not inferior—just different. Though freely edited, the speech is an accurate depiction and often verbatim representation of the statements of a century ago.

Too often in guardianship proceedings, protected persons are stripped of their right to vote without any discussion or consideration of whether they retain the capacity to exercise that right.[2] The author has spoken to several persons who are the guardians of adult relatives, and they have experienced varying advice as to whether the ward can vote. One parent/guardian reported that the superior court administrators in her county advised that if she reapplied for limited guardianship her son would be able to vote. However, she stated that she cannot afford to pay again the $3,000 it cost her to accomplish the full guardianship.

Some probate officials express the off-the-record view that individuals under any form of guardianship are ineligible to vote. However, the voting rights of wards will not be vindicated, or even addressed, unless the advocates for those placed under guardianship realize that this is an important issue they should raise on behalf of their clients. Furthermore, there must be some consistency of approach in the various Arizona county probate court systems on this issue.

This article considers the legal basis for denying those under limited guardianship the right to vote and argues that the law does not support what is often the reality in some Arizona courts.

Background

From the time of its admission to the Union, Arizona, by constitutional proscription, denied citizens under guardianship the right to vote. However, the intent of that provision, changes in Arizona law, and requirements of the United States Constitution all support the position that citizens under the relatively new mechanism of limited guardianships are not, for that reason alone, ineligible to vote.

Historically, Arizona's constitutional disenfranchisement was aimed only at those deemed incompetent and subject to guardianship at common law. This "plenary guardianship"[3] stripped wards of all their rights because they were considered incompetent or incapacitated in all respects.

Arizona's limited guardianship provisions, enacted in 2003, created a mechanism for individuals who were incapable of managing certain affairs of their lives, though fully capable of managing others. Limited guardianships were designed to promote self-determination and autonomy; the expressed intent of such guardianships was that wards retain those rights and decision-making authorities not granted to the guardian.

Thus, because Arizona's constitutional provision respecting persons under guardianship was directed at the "fully incapacitated," it does not reach those under limited guardianship. The right to vote for those individuals should be presumed, absent clear and convincing evidence that they lack the capacity to do so.

Furthermore, even if Arizona's Constitution intended to reach persons with the capacity to vote, it would be invalid. It is axiomatic that where there is a conflict between a state constitution or statute and rights guaranteed by the United States Constitution, the state provision must yield. The United States Constitution guarantees citizens the right to vote where they are capable of doing so and not otherwise disqualified by a serious criminal conviction.

The Arizona State Constitution

Until the year 2000, Article 7, § 2(c) of the Arizona State Constitution read as follows:

> No person under guardianship, non compos mentis or insane shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.

This language was a part of the original Arizona State Constitution, which was approved by the voters on Nov. 5, 1912, becoming effective Dec. 5, 1912.[4] It is clear that the guardianship mentioned in the State Constitution was plenary guardianship[5] as existed at common law.

The Arizona State Supreme Court has considered the meaning of "guardianship" as that term is used in Article 7, § 2(c). In *Porter v. Hall*,[6] the Court held that American Indians were disenfranchised by Article 7, § 2(c). That Court reasoned that various United States Supreme Court cases had described Indians as "wards" of the government. For example, Chief Justice Marshall in *Cherokee Nation v. Georgia*[7] stated that Indian tribes had a relationship to the United States government that "resembles that of a ward to his guardian." Thus, *Porter v. Hall*, with a strong dissent, concluded that Native Americans were barred from voting by Article 7, § 2, because they were deemed persons under guardianship.

Two decades later, *Porter v. Hall* was reversed in *Harrison v. Laveen*.[8] The Court noted that mere use of the term "guardianship," especially by analogy, did not amount to a guardianship within the meaning of Article 7, § 2(c) of the State Constitution:

> The term "guardianship" has a very definite meaning, both at common law and under the Arizona statutes. Some of the essential features of "guardianship" are: (1) that the guardian has custody of the person of the ward; (2) that the ward is under duty to live where the guardian tells him to live; (3) that the legal title to the property of a ward is in the ward, rather than in the guardian, but the ward may not make contracts respecting his property; (4) that the guardian may also decide what company the ward may keep.[9]

Arizona law provides that a guardian has the same powers over the ward as a parent has over a child.[10] Thus, a guardianship

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within the meaning of the Arizona Constitution is one having the plenary powers described by the court in *Harrison* v. *Laveen*.[11] To be subject to such a guardianship, persons must be found incompetent to conduct any of their personal or business affairs.

In 2000, the following changes were made to Article 7, § 2(c):

> No person ~~under guardianship, non compos mentis or insane~~ [who is adjudicated an incapacitated[12] person] shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.

The term "guardianship, non compos mentis, or insane" was stricken and replaced by the term "who is adjudicated an incapacitated person" as a result of Proposition 101, passed on the Nov. 7, 2000, General Election Ballot. The Arizona Secretary of State's booklet promulgating this ballot proposition, at page 29, sets forth the following brief explanation:

> Analysis by Legislative Council
>
> Proposition 101 would amend several sections of the Arizona Constitution to modernize certain out-of-date language including references to people with disabilities.
>
> Proposition 101 would also amend the Arizona Constitution to change certain voting requirements to conform with the United States Constitution and other federal laws. Proposition 101 would change the minimum voting age to 18 and eliminate the one-year residency requirements for voting. Under Arizona law, there is a twenty-nine day residency requirement, which remains unchanged. These changes are already enforced in Arizona pursuant to federal law.[13]

This change was approved by the electors in the Nov. 7, 2000, General Election as proclaimed by the Governor on Nov. 27, 2000.[14]

Statutory Provisions

Arizona Revised Statutes § 14-5101(1) defines an "incapacitated person" as:

> Any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.

The courts have taken pains to find a proper balance of competing interests in guardianship cases. On the one hand, the extreme remedy of guardianship deprived individuals of their right of self-determination in the most basic areas of their lives—where to live, with whom to associate, when to come and go.[15] On the other hand, failure to order guardianship could imperil those individuals who, lacking such protection, would face dire and possibly life-threatening situations. This challenge was made all the more daunting given that one was either placed totally under guardianship or not—there was no middle ground.[16]

The Evolving Standard of Guardianship

The standard of who is subject to the constraints of guardianship, with its attendant deprivation of the ward's rights, has been an evolving one. Until 2003, no express limited guardianship statute existed in Arizona. Until then, it was widely believed that one was either subject to guardianship or not. The case law recognized that placing an individual under guardianship, although for paternalistic and protective purposes, involved denying the ward the most basic of rights, including self-determination.

The contours of guardianship and the resultant powers of the guardian over the ward evolved over the years. For example, *Harrison v. Laveen* noted that the guardian has custody of the person of the ward, and the ward must live where the guardian tells him to live. However, it was held later that one under guardianship and unable to manage his affairs could nevertheless have the intention and the capacity to change his state of domicile without the consent of the guardian. As the Arizona Supreme Court stated in 1962, "That one is under guardianship does not prevent him from performing the acts of which he is in fact capable."[17]

The Court's statement was prescient in that it expressed a principle that was not much followed at that time, but it is the prevailing rule today.

Further complicating the guardianship process is that courts and practitioners for a variety of reasons tend to prefer plenary guardianship over limited ones.[18] Among other things, plenary guardianships eliminate issues concerning the guardian's authorities and the need for the guardian to return to court seeking expanded authorities.[19] Thus, there are situations in which a plenary guardianship will be ordered even though the ward retains the capacity to exercise certain basic rights, including the right to vote.

The Arizona courts, like others, struggled with deciding which situations were sufficiently extreme to warrant stripping an individual's rights of self-determination. Though the purpose was to protect such individuals, the remedy was extreme. In *Matter of Guardianship of Reyes,*[20] the court adopted the holding and analysis of the Utah Supreme Court's decision in *In re Boyer*[21]:

> [The] determination that an adult cannot make "responsible decisions concerning his person" and is therefore incompetent, may be made only if the putative ward's decision-making process is so impaired that he is unable to care for his personal safety or unable to attend to and provide for such necessities as food, shelter, clothing, and medical care, without which physical injury or illness may occur.[22]

In re Boyer thus determined that the loss of autonomy resulting from placing persons under guardianship could be supported only upon a showing that without such protection their personal health or safety would likely be jeopardized. The Utah Supreme Court in *Boyer* addressed various troublesome issues surrounding guardianship.

The Utah statute defining "incapacitated person" was almost identical to the Arizona statute.[23] Ms. Boyer was found by a jury to be an "incapacitated person" by a "preponderance of the evidence." A guardian was appointed, and no limits were set on the guardian's powers. In appealing this decision, Ms. Boyer challenged the constitutionality of the probate code procedure for the appointment of guardians for incapaci-

tated persons. The court defined the issues as whether:

> [A] determination of incapacity (which) may result in a deprivation of such fundamental rights as the right of privacy, the right to travel, and the right to make various personal decisions … must meet due process requirements and contain well-defined standards. The argument is that the term "responsible decisions concerning his person," … is unconstitutionally vague and overbroad and that, because of the potential infringement of individual liberties, the statutory scheme is deficient in not incorporating the principle of the "least restrictive alternative." Finally, appellant argues that due process is violated because a finding of incompetency may be based on a preponderance of the evidence rather than clear and convincing proof.[24]

The court started by articulating the bedrock premise that there should be no "unjustifiable intrusion upon [the ward's] personal liberties."[25] To avoid such an intrusion, the term "responsible decisions" was narrowly construed:

> The term *"responsible decisions" is reasonably susceptible of a construction giving effect to the statute's basic purpose without improperly impinging on an individual's liberties of self-determination, right of privacy, right to travel, or right to make one's own educational and medical decisions.* … The benign purposes of the statute can be effectively accomplished without improperly trenching on those liberties by defining "responsible decisions" in terms of specific, objective standards for determining the ability of one to care for oneself.[26]

Thus, it would not be constitutional to conclude that simply because one was incapacitated in one area, incapacity is presumed in others.

Next addressed was whether the guardianship statute was unconstitutionally overbroad because "the full scope of powers which may be, and in this case were, conferred on a guardian are not necessary in specific cases"[27]:

> In this case, the least restrictive alternative, is closely allied with the more general overbreadth issue [FN6][28] and, therefore, we address both together. Appellant specifically contends that the State must adopt the alternative least restrictive of the alleged incompetent's liberty and that the Utah procedure sweeps too broadly in permitting a guardian to be invested with wide-ranging powers over the personal decisions of one who has no need of complete supervision, although there may be a need for assistance in handling specific aspects of his or her personal affairs.[29]

The United States Supreme Court has expressed disapproval of state constitutional and statutory disenfranchisement provisions that discriminate against the disabled.

The court continued, "[A] court in appointing a guardian must consider the interest of the ward in retaining as broad a power of self-determination as is consistent with the reason for appointing a guardian of the person."[30]

The nature and extent of powers granted a guardian is for the probate court to decide. The Utah guardianship provisions stated, in pertinent part, that, "A guardian of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting his unemancipated minor child … except as modified by order of the court."[31]

It was thus held that the probate court was authorized to tailor the powers of a guardian to the particular needs of the ward. In discharging this task, the probate court is to make individualized findings as to the powers invested in the guardian, and thus withdrawn from the ward. So construing the guardianship provisions, the court held, would save them from being unconstitutionally overbroad.[32]

Arizona's Adoption of *In Re Boyer*

Arizona's guardianship provisions were challenged in *Matter of Guardianship of Reyes,*[33] which embraced much of *In re Boyer*. The appellant in *Reyes* argued that the Arizona guardianship laws were unconstitutional because (1) the burden of proof should be clear and convincing rather than preponderance of the evidence, (2) the definition of "incapacitated person" was vague and overbroad and (3) the guardian's powers were overbroad.

In a brief decision the court ruled that because of the loss of liberty involved in appointing a guardian and the stigma associated with a judicial finding of incompetence, "the need for appointment of a guardian must constitutionally be by clear and convincing evidence."[34]

"To avoid any constitutional danger," the court adopted the construction of "incapacitated person" set forth in *In re Boyer*. That is, in deciding if one can make "responsible decisions concerning his person," the issue was whether "the putative ward's decision-making process is so impaired that he is unable to care for his personal safety or unable to attend to and provide for such necessities as food, shelter, clothing and medical care, without which physical injury or illness may occur."[35]

Finally, the court responded to the argument that A.R.S. § 14-5312, which lists the powers of the guardian, is overbroad because it grants powers (and deprives the ward of rights) that may be unnecessary in any particular case: "Because the statute by its terms permits these powers to be modified by the trial court and because no request for modification was made in this case, we reject the argument."[36]

2003 Arizona Limited Guardianship Provisions

In April 2003 Arizona statutorily created limited guardianships and expressed a preference for such guardianships over plenary guardianships. In essence, A.R.S. §§ 14-5303 and 14-5304 were amended to provide

that a petition for guardianship must state:

> The type of guardianship requested. If a general guardianship is requested, the petition must state that other alternatives have been explored and why a limited guardianship is not appropriate. If a limited guardianship is requested, the petition also must state what specific powers are requested.[37]

Also, the amendments provided that "In exercising its appointment authority pursuant to this chapter, the court shall encourage the development of maximum self-reliance and independence of the incapacitated person."[38]

The court may appoint a general or limited guardian if it is satisfied by clear and convincing evidence that (1) the person for whom a guardian is sought is incapacitated, (2) the appointment is necessary to provide for the demonstrated needs of the incapacitated and (3) the person's needs cannot be met by less restrictive means, including the use of appropriate technological assistance.[39] The legislation makes clear that in seeking to protect individuals, the least restrictive approach that serves that purpose must be taken.

Representative Peter Hershberger, one of the bill's sponsors, testified before the Arizona House Committee on Judiciary as to the intent of the limited guardianship provisions:

> Mr. Gray [House Judiciary Committee member] asked the difference between a full guardianship and a limited guardianship. Representative Hershberger explained that there is a national trend to allow individuals with disabilities the maximum amount of control over their life. He said there are different kinds of disabilities. A certain citizen might have some disabilities in some areas but be able to participate effectively in decisions for their life in other areas. The courts will determine that they may maintain those decisions and a guardianship will be appointed for other things such as finances.[40]

To conclude that persons under limited guardianships are automatically ineligible to vote would emasculate the basis for the holdings in *Reyes*. As discussed previously, the *Reyes* and *Boyer* courts construed the guardianship provisions to harmonize them with constitutional requirements. Essentially, the courts ruled it necessary to retain basic rights in the ward where there was no showing that the ward was incapable of exercising those rights.

It should be noted that specifying retention of the right to vote in letters of guardianship will not impede the guardian's exercise of required duties. Where the ward retains the capacity to vote, that right should not be denied. This is a matter of constitutional and civil rights, and implicates issues of self-determination and human dignity.

These decisions, as well as the clear language of the limited guardianship provisions, stand for the proposition that unless incapacity to exercise basic rights is shown, wards retain those rights. It would fly in the face of *Reyes* and the limited guardianship provisions to now argue that one with the demonstrated capacity to vote will not be allowed to do so.

Provisions in Other States

Other states with constitutional disenfranchisement provisions similar to Arizona's have construed them not disenfranchising those under limited guardianship.

In *Doe v. Rowe*,[41] Maine's disenfranchisement of persons "under guardianship for reasons of mental illness" was challenged as being unconstitutional and contrary to the Americans With Disabilities Act, among others. The state in defending the action stated that this constitutional prohibition did not apply to limited guardianships[42]; instead, the state's position was that incapacitated persons subject to limited guardianship retain all legal and civil rights except those that have been expressly suspended in the decree or court order.[43] Thus, an incapacitated person under limited guardianship because of mental illness retains the right to vote unless that right is specifically suspended by the probate court.[44]

Massachusetts also has a constitutional provision disenfranchising "persons under guardianship."[45] In *In Guardianship of Hurley*,[46] the probate court, acting on a motion filed by the guardian, issued an order modifying a full guardianship to a limited guardianship. This change was intended to restore the ward's right to vote.[47] The probate court found that the ward was "capable of making informed decisions concerning the exercise of his right to vote," and granted him that right, effectively ruling that a limited guardianship was not the kind of guardianship contemplated by the Massachusetts Constitution.[48]

Prye v. Carnahan[49] interpreted the Missouri State Constitution that bars voting by those under guardianship. The court noted that there was no automatic voting bar as related to persons under limited guardianship.[50] Furthermore, the court found that the Missouri probate courts appropriately engaged in an individualized determination of capacity to vote in both limited and full guardianships.[51]

Thus, even without reaching the issue whether the Arizona constitutional disenfranchisement provision for those under guardianship squares with the U.S. Constitution's protections, the better view is that Arizona's constitutional provision did not intend to automatically disenfranchise persons under limited guardianship.

Running Afoul of the U.S. Constitution

As discussed previously, the courts in *Boyer* and *Reyes* constructed limited guardianships by statutory interpretation. These mechanisms retained in the ward self-determination and their basic rights and liberties consistent with their capacity. This position was taken because, as the courts noted, to do otherwise would likely render the guardianship statutes unconstitutional.

Thus, the Arizona Constitution does not disenfranchise wards under limited guardianship. Moreover, were the provision in question construed to apply to limited guardianships, it could not survive constitutional scrutiny.

Harrison v. Laveen, discussed previously, stressed the fundamental right to vote:

> In a democracy suffrage is the most basic civil right, since its exercise is the chief means whereby other rights may be safeguarded. To deny the right to vote, where one is legally entitled to do so, is to do violence to the principles of freedom and equality.[52]

Likewise, the U.S. Supreme Court in *Dunn v. Blumstein*[53] stated that the right to

vote is a "fundamental political right … preservative of all rights." The Court cited a litany of cases for the proposition that citizens have a constitutional right to participate in elections on an equal basis with other citizens in the jurisdiction.[54] Before the right to vote can be restricted, "[T]he purpose of the restriction and the [claimed] overriding interests served by it must meet close constitutional scrutiny."[55] Furthermore, provisions affecting constitutional rights must be drawn with precision and must be "tailored" to serve their legitimate objectives so as to limit the burden on the exercise of those constitutional rights.[56]

An instructive case is *Doe v. Rowe*,[57] which has been cited with approval by the United States Supreme Court. In this case the court ruled that the provision of the Maine Constitution barring voting by persons under guardianship for mental illness violated the Fourteenth Amendment, Due Process Clause and the Americans With Disabilities Act. Plaintiffs were under full guardianship because of mental illnesses. The parties agreed that persons under limited guardianship for mental illness were not automatically barred from voting despite the constitutional language.[58]

The Court employed the balancing test of *Mathews v. Eldridge*[59] in examining the sufficiency of the procedures used to disenfranchise Maine voters. It weighed (1) plaintiffs' interest in participating in the democratic process through voting, (2) the risk of erroneous deprivation of the right to vote and (3) the state's interest, including any additional administrative or financial burden on the state that may be imposed by requiring additional procedures.[60] The Court found that due process was violated because guardianship proceedings could strip one of the right to vote without even giving notice that this right was in jeopardy. This lack of notice resulted in mentally ill persons being disenfranchised regardless of their capacity to understand the nature and effect of voting. Accordingly, the court found Maine's guardianship procedures violated due process.

The state's voting restrictions were held to violate the Equal Protection Clause. The strict scrutiny analysis was applied because a fundamental right was implicated.[61] The parties agreed that Maine had a compelling state interest in ensuring that "those who cast a vote have the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself."[62] Maine's voting restrictions, it was held, were not narrowly tailored to meet this compelling interest.

Arizona Disenfranchisement

The disenfranchisement provision of the Arizona Constitution suffers the same due process and equal protection difficulties identified in *Doe* v. *Rowe*. That provision, if read to apply to limited guardianships, would be overbroad and deny the vote to persons with the capacity to do so. In guardianship proceedings, there are no procedural safeguards to provide notice of possible disenfranchisement and a specific assessment of wards' capacity to vote before stripping them of that fundamental right.[63]

In addition, there is no consistent or rational scheme of determining which Arizonans under guardianship are rendered ineligible to vote. The Arizona legislature in 1999 conferred upon the probate court power to order retention of civil rights for persons under guardianship.[64] This amendment is found in a provision titled "Inpatient treatment; rights and duties of ward and guardian," and it reads as follows: "The court may decide that the ward's right to retain or obtain a driver license *and any other civil right* that may be suspended by operation of law is not affected by the appointment of a guardian" (emphasis added).

Those civil rights suspended by operation of law are listed, *inter alia*, at A.R.S. § 13-904. That provision states that a conviction for a felony suspends the civil rights there enumerated, the first of which is "the right to vote."

The legislative history is sparse in explaining the intended reach of this provision. For example, was it to apply only to inpatient wards at treatment facilities? If so, why expressly give judges the power to order that inpatient wards retain the right to vote and not wards in a residential or group setting? Did the legislature assume that judges in non-inpatient guardianship cases already had the power to order the retention of the right to vote for wards? Or is this provision intended to apply generally to all guardianship proceedings? If the intent was to give courts the power to retain voting privileges for inpatient wards but not others, this would run afoul of the equal protection analysis in *Doe v. Rowe* and would seem to have no rational basis for excluding other wards ostensibly more capable of voting.

The above-cited cases show that one may be deprived of the right to vote only upon an individualized assessment of the person's capacity.[65] *In re Boyer* ruled that an individualized assessment was constitutionally required so as to withdraw from the ward only those rights the ward was incapable of exercising.[66] *Reyes* embraced the reasoning of *Boyer*. Also, Arizona's limited guardianship provisions require an individualized determination of the ward's capacities so as to impose the least restrictive alternative and deprive the ward of only those rights necessary to achieve the essential purposes of the guardianship.

The United States Supreme Court has expressed disapproval of state constitutional and statutory disenfranchisement provisions that discriminate against the disabled. *Tennessee v. Lane*[67] considered whether Title II of the Americans With Disabilities Act effectively abrogated the state's Eleventh Amendment immunity. That case concluded that (1) Congress unequivocally intended to do so and (2) Title II was a valid exercise of congressional power pursuant to § 5 of the Fourteenth Amendment. With regard to this latter finding, Title II was deemed a "proportional and congruent" remedy to the injury and the means adopted to remedy it:

> It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, "As of 1979, most States … categorically disqualified "idiots" from voting, without regard to individual capacity. [Fn5. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 464, and n. 14 … (Marshall, J., concurring in judgment in part and dissenting in part) (citing Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644 (1970).] *Id.* at 524. The majority of these laws remain on the books, [Fn6. *See* Schriner, Ochs, & Shields, *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with*

Cognitive and Emotional Impairments, 21 BERKELEY J. EMP. & LAB. L. 437, 456-472 tbl. II.] and have been the subject of legal challenge as recently as 2001. [Fn7. *See Doe v. Rowe,* 156 F. Supp. 2d 35 (D. Me. 2001)].[68]

Continuing, the Court pointedly noted:

> The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including … voting. [Fn13. *E.g., Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (disenfranchisement of persons under guardianship by reason of mental illness). *See also*, *e.g., New York ex rel. Spitzer v. County of Delaware*, 82 F. Supp. 2d 12 (N.D.N.Y. 2000) (mobility-impaired votes unable to access county polling places)]. Notably these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice. [Fn omitted].[69]

In *Cleburne v. Cleburne Living Center, Inc*,[70] Justice Marshall (joined by Justice Brennan and Justice Blackmun), concurring in the judgment in part and dissenting in part, noted:

> Prejudice, once let loose, is not easily cabined. *See University of California Regents v. Bakke*, 438 U.S. 265, 395 … (opinion of Marshall, J.) As of 1979, most States still categorically disqualified "idiots" from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." [Fn14. *See* Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644 (1979).[71]

Conclusion

Accordingly, Article 7, § 2(c) of the Arizona Constitution does not deny the vote to persons under limited guardianship.

First, this provision was not intended to reach persons who were not adjudicated fully incapacitated. And the limited guardianship provisions enacted in 2003 do not create the kind of guardianship contemplated by the Arizona Constitution. Moreover, were the constitutional disenfranchisement provision applied to wards under such guardianships regardless of their capacity to vote, this would violate the United States Constitution.

In sum, any provision purporting to deny the right to vote on grounds of presumed incapacity cannot withstand constitutional scrutiny. Instead, there must be an assessment of "the individual capacity" to vote of affected individuals. And, as held in *Rowe v. Doe,* such persons must be given notice of the possible loss of this right, and an opportunity to meet this issue.

endnotes

1. *The Records of the Arizona Constitutional Convention of 1910* (Ed. John S. Goff, Supreme Court of Arizona), at 279-282. The argument for denying women the franchise was specious. On the other hand, some incapacitated persons may not be able to understand the nature and effect of voting. But to deny persons under guardianship the right to vote without an individualized assessment of their capacity to do so is to engage in stereotyping and prejudgment.
2. *See, e.g.,* the Opening Brief of Plaintiffs–Appellants in *Prye v. Carnahan*, 2006WL 1888639 (W.D. Mo., July 7, 2006); 33 NDLR Par. 47. That brief can be viewed at http://ls.wustl.edu/news/documents/OpeningBr.pdf. The record is cited to show that "[e]ven the attorneys appointed to represent individuals subject to guardianship do not discuss voting issues with their clients." *Id.* at 13. Furthermore, it is there noted that defendant state officials do not provide information to probate courts, public administrators, private guardians or wards concerning the effect of guardianship on voting rights.
3. The terms "plenary guardianship," "general guardianship" and "full guardianship" will be used interchangeably.
4. *The Records of the Arizona Constitutional Convention of 1910*, *supra* note 1, has no illuminating discussion concerning this provision. Most of the discussion on suffrage and elections was devoted to a debate on women's suffrage. *See, e.g., id.* at 274-288.
5. The term "plenary guardianship" is sometimes used to refer to a combination guardianship/conservatorship arrangement. Sometimes it is used to refer to a full guardianship where the guardian is empowered to make all decisions for the ward. However, in both cases it is premised on the theory that the ward retains no rights of self-determination.
6. 271 P. 411 (Ariz. 1928).
7. 5 Pet. 1, 8 L. Ed. 25 (1831).
8. 196 P.2d 456 (Ariz. 1948).
9. *Id.* at 462.
10. A.R.S. § 14-5312.A. This provision reads in pertinent part, "A guardian of an incapacitated person has the same powers, rights and duties respecting the guardian's ward that a parent has respecting the parent's unemancipated minor child."
11. *Farnsworth v. Hubbard*, 277 P.2d 252, 258 (Ariz. 1950), held that statutes should be construed consistent with common law where possible. *See also In re Beaumont*, 1 Whart. 52 (Pa. 1836), discussing common law standards for judicial intervention to protect persons who were unable to care for themselves or their estates.
12. The "modernizing" language of Proposition 101 had no intention of expanding the constitutional disqualification of persons under "guardianship." Thus, to the extent that the term incapacitated person is now used it must be construed to apply to one who is fully incapacitated as did as the original provision.
13. Though Article 7, § 2, stated that a qualified voter had to be 21 years of age and have resided in the state one year immediately preceding the election, United States Supreme Court rulings had held such provisions unconstitutional. *See*, *Oregon v. Mitchell*, 400 U.S. 112 (1970) (Court held that in enacting 1970 amendments to Voting Rights Act Congress was empowered to enfranchise 18-year-olds in federal elections, to abolish literacy tests as prerequisite to vote and to abolish durational requirement in presidential elections. But the Court held enfranchising 18-year-olds in state and local elections was beyond Congress' power). The United States Constitution was amended a year later to address *Oregon v. Michell's* conclusion that Congress lacked constitutional authority to enfranchise 18-year-olds in state and local elections. The 26th Amendment, accomplishing this, was formally certified by President Richard Nixon on July 1, 1971. And, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), durational residency requirements in state elections were deemed an unconstitutional burden on the right to vote and the right to travel. Arizona had adopted these constitutional rulings but had not previously amended the State Constitution to so reflect.
14. This amendment was placed on the ballot as a result of House Concurrent Resolution 2004 (2000).
15. As noted previously, the court in *Harrison v. Laveen* ruled that some of the "essential features of guardianship were divesting the ward of the power to make decisions intimately affecting the ward and placing such powers in the guardian. Included among these are the decisions where the ward will live and with whom the ward may associate. 196 P.2d at 462-63.
16. Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 616 (1981) ("[T]he common law … perceived incompetency as a permanent point on the spectrum of mental

ability. … Under common law, one either was or was not competent (in a factual sense)"); Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship,* 31 STETSON L. REV. 735, 747 (Spring 2002) (plenary guardianship involved an "absolute labeling and stripping of rights"). *See also* Neha Patel, *The Homeless Mentally Ill and Guardianship: An Assessment of Current Issues in Guardianship and Possible Application to Homeless Mentally Ill Persons*, 11 GEO. J. ON POVERTY L. & POL'Y 495, 503 (2004) (plenary guardianship, awarded in cases where an individual is completely incapable of making decisions for himself or herself, grants the guardian all responsibility and decision-making authority for the ward).

17. *In re Sherrill's Estate*, 373 P.2d 353, 356 (Ariz. 1962).
18. *See* Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735 (Spring 2002).
19. *Id.* at 742-43.
20. 731 P.2d 130, 131 (Ariz. Ct. App. 1986).
21. 636 P.2d 1085, 1089 (Utah 1981).
22. *Id.*
23. UTAH CODE ANN. § 75-1-201(18) (1953). *See* current Utah Code Ann. § 751-1-201(22) (1953) for slightly revised defining language.
24. 636 P.2d at 1087.
25. *Id.* at 1088.
26. *Id.* at 1089 (emphasis added).
27. *Id.* at 1090.
28. Note 6 in *Boyer* reads as follows: In *Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S. Ct. 2294, 2302, 33 L.Ed.2d 222 (1972), the Court stated: "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." (Footnote omitted.) In *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S. Ct. 247, 252, 5 L.Ed.2d 231 (1960), the court stated:

    > In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose. (Footnotes omitted.)

29. 636 P.2d 1090.
30. *Id.* at 1090-1091 (footnote omitted).
31. *Compare* A.R.S. § 14-5312.A., which reads as follows:

    > A guardian of an incapacitated person has the same powers, rights and duties respecting the guardian's ward that a parent has respecting the parent's unemancipated minor child … except as modified by order of the court.

32. 636 P.2d at 1091.
33. 731 P.2d 130 (Ariz. Ct. App. 1986).
34. 731 P.2d at 131, citing *In re Boyer*, 636 P.2d 1085 (Utah 1981).
35. *Id.*, citing *Boyer*, 636 P.2d at 1089.
36. *Matter of Guardianship of Reyes*, is cited and discussed in *Matter of Guardianship of Hedin*, 528 N.W.2d 567, 580 (Iowa 1995). In *Hedin* the court cited *Reyes* for the proposition that "the liberties and prerogatives of the protected person" should not be intruded upon unless findings of fact showed that such an intrusion was necessary.

    Though *Reyes* seemed to hold that courts could fashion limited guardianships and allow the ward to retain all rights not essential to the purposes of the guardianship the authors of Arizona's limited guardianship provisions stated that there was no limited guardianship procedure prior to 2003 when those provisions were enacted. *See* following discussion.
37. A.R.S. § 14-5303(B)(8).
38. *Id.* § 14-5304.A.
39. *Id.* § 14-5304.B.
40. Arizona State House of Representatives, 46th Legislature, 1st Regular Session, Minutes of Committee on Judiciary, Feb. 13, 2003. *See also* Arizona State House, 46th Legislature, 1st Regular Session, Minutes of Committee on Human Services, Feb. 4, 2003. *See also* Arizona State Senate, 46th Legislature, 1st Regular Session, Minutes of Committee on Family Services, Mar. 6, 2003, stating that the bill would "follow a national trend to allow maximum self determination for [developmentally disabled] citizens and offer an alternative to full guardianship."
41. 156 F. Supp. 2d 35 (Me. 2001).
42. *Id.* at 42, n.9.
43. *Id.*, citing a Maine statutory provision. M.R.S. A. § 5-105.
44. *See also Guardianship of Hughes*, 715 A.2d 919 (Me. 1998). The ward appealed from the appointment of a limited guardian claiming that various due process protections required in the guardianship proceedings were lacking. In arguing for a higher standard of proof of incapacity, among others, she noted that at stake in guardianship proceedings were her basic rights to marry, travel and vote. *Id.* at 922. The court noted that there were safeguards against serious risks of error including the statutory requirement that a court could impose guardianship, and thus deprive the ward of rights, only to the extent of a person's incapacity. *Id* at 923.
45. Mass. Const. Amend. Art III (1979). See also, MASS. ANN. LAWS ch. 51, § 1 (1990).
46. 476 N.E.2d 941 (Mass. 1985).
47. The ward, armed with the limited guardianship, sought to register to vote, but election officials refused to register him because he was under "guardianship." *Id.* at 943.
48. *Id.* at 944.
49. Slip op., 2006 WL 1888639 (W.D. Mo. July 7, 2006); 33 Nat'l Disability Law Rep. ¶ 47 (2006).
50. Slip op. at 4.
51. *Id.* at 6.
52. 459 P.2d at 459. *Harrison v. Laveen* overruled *Porter v. Hall*, which held that Native Americans were akin to wards and the United States their guardian. Based on this analogy the *Porter* ruled that Article 7, § 2 of the Arizona Constitution rendered them ineligible to vote.
53. 405 U.S. 330, 336 (1972), quoting from *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).
54. *Id.*
55. *Id.*
56. *Id.* at 343.
57. 156 F. Supp. 2d 35 (Me. 2001).
58. *Id.* 42, n.9.
59. 424 U.S. 319 (1976).
60. *Id.* at 335.
61. 156 F. Supp. 2d at 51, citing *Dunn v. Blumstein*, 405 U.S. 330 (1972).
62. *Id.*
63. In *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1990), the court ruled that:

    > Because voting is a fundamental right, the right to vote is a "liberty" interest which may not be confiscated without due process. (citation omitted). . . .
    >
    > For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Id* quoting from *Fuentes v. Shevin,* 407 U.S. 67, 81 (1972).

64. A.R.S. § 14-5312.01(N) was added by laws 1999, ch. 83, § 2. 44th, 1st Reg. Sess. (1999), SB 1146.
65. *See e.g., Prye v. Carnahan, slip op.*, 2006 WL 1888639 (W.D. Mo. July 7, 2006).
66. 636 P.2d at 1091.
67. 541 U.S. 509 (2004).
68. *Id.* at 524.
69. *Id.* at 525.
70. 473 U.S. 432 (1985).
71. *Id.* at 464.