

Voting by Residents of Nursing Homes and Assisted Living Facilities: State Law Accommodations

By Amy Smith and Charles P. Sabatino

A visit to any state elections division Web site reveals an abundance of information about voter registration, absentee balloting, upcoming elections, and voter outreach initiatives. Ensuring that every person who is eligible to vote can vote is a fundamental goal of a democratic society, yet the reality is that, even in presidential elections, only about 50 percent of the electorate vote.¹ With the passage of the Help America Vote Act of 2002 (HAVA),² many states have increased their

attempts to make voting more convenient and accessible for voters. Still, too often overlooked are the barriers to voting encountered by frail older persons and persons with disabilities who are residents of nursing homes, assisted living facilities, and other similar residential health care institutions. Ambulatory limitations, chronic illnesses, diminished capacity, and

institutional isolation all pose potential barriers to the exercise of one's right to vote. This article examines states' efforts to accommodate voters who reside in nursing homes and other residential facilities for older persons and persons with disabilities.

Although some has been written about voting accessibility for elderly and disabled persons, little work has specifically touched on voting among the nation's nursing home population. As the number of elderly Americans increases, so too will the need to address this issue. U.S. Census data reveals that approximately 1.6 million people age 65 years and older live in nursing homes on any given day.³ But it is not just the elderly and their caregivers who need to be concerned about voting accommodations for nursing home residents. The Centers for Medicare and Medicaid Services (CMS) estimates that of the approximately 3 million people

Continued on page 2

Guardianship and Voting Rights

By Kyle Sammin and Sally Balch Hurme

Persons under guardianship lose many of the rights they may have exercised before the court judged them to be incapacitated. These basic rights include choosing where to live, consenting to health care, determining how to spend money, and retaining privacy in personal affairs.

Another right that wards may lose is the right to vote. "In some states, voting rights are automatically revoked when an individual enters guardianship, for which incompetence is a prerequisite."¹ This article examines the intersection of the right to vote and the reasons for guardianship. It concludes that legislatures and courts can take measures to better preserve the right of persons under guardianship to vote. Not every person who has a guardian should vote, but those who can should be able to exercise their voting rights. The presumption advocated is that persons under guardianship can vote unless the court specifically determines that they cannot.

The need for guardianship centers on the ability of the allegedly incapacitated person to manage his or her own affairs. "The principal issues in involuntary guardianship are the extent to which an individual's right to self-determination must be recognized, and the reasons and procedures for limiting that right."² During this involuntary process of stripping rights from the individual, the right to vote is frequently summarily presumed to vanish without consideration of the indi-

Continued on page 11

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See back page

INSIDE

3 ABA Commission Welcomes Three Distinguished New Members

10 Bar Profile: Elder Law Section of the Alaska Bar Association

16 Mini-Conference on Legal Services To Be Held in Preparation for 2005 White House Conference on Aging

Voting in Nursing Homes

Continued from page 1

in nursing homes in 2001,⁴ about 324,000 of those persons were under the age of 65.⁵

Survey

Methodology

The American Bar Association's Commission on Law and Aging conducted a survey to determine the extent to which states have established, either by legislation or policy, specific procedures for absentee voting in nursing homes and assisted living facilities, and to assess the nature and extent of those procedures. Initially, a written request was mailed to each state election board, and the District of Columbia,⁶ requesting information about the existence of any state voting registration or absentee balloting policies and procedures that specifically address residents of nursing homes or assisted living facilities.⁷ Twenty-five states responded.

Follow-up was conducted for the non-responding states. The law in those states was independently scanned for any relevant policies or procedures. Where it appeared a state had no relevant language, the appropriate election officials were contacted by phone or email to confirm that no special policies or procedures exist at the state or local level. Through this process, the existence, or non-existence, of nursing home voting procedures was determined in all of the 50 states and the District of Columbia, although the findings were confirmed by state officials in only 42 states and the District of Columbia.⁸ Local voting district policies and procedures were not systematically collected or analyzed.

Results

Twenty-three states were identified as having absentee voting procedures expressly addressing residents of nursing homes or other similar health care facilities. In 21 of these states, the procedures are mandatory statewide. In several of the states with mandatory procedures, the law also provides for discretionary procedures that local county election boards may, but are not required to, follow. Two states—Maryland and West Virginia—provide procedures that are purely discretionary. Maryland is particularly noteworthy, however, as it does not provide for its procedure in the state election law or officially promulgated regulation. Instead, its fairly detailed policy, established by the Maryland State Board of Elections, serves as a model guideline for local election boards that wish to facilitate the absentee voting process for residents of nursing homes and assisted living facilities.⁹ Every jurisdiction except Baltimore City has adopted the procedure.¹⁰

It should be noted that most of the states with nursing home voting procedures apply those procedures to other types of similar facilities, such as senior citizen housing, mental health facilities, facilities operated by the Veteran's Administration, and hospitals. (See Table 1, pages 6-7.)

Continued on page 4

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Inside the Commission

ABA Commission Welcomes Three Distinguished New Members

The Commission on Law and Aging is composed of fifteen members who are appointed on an annual basis by the president of the American Bar Association. As a multi-disciplinary group, the commissioners represent aging experts from a broad spectrum of professions, including law, health care, social work, gerontology, advocacy, and public service. The fundamental diversity of the group ensures a stimulating forum for discussion of the law-related issues facing older Americans. Cooperative efforts between the commissioners and the commission staff have produced numerous publications, as well as research and demonstration projects of considerable value to the public at large. To provide our readers with an abbreviated view into the strengths and expertise of the commission, each fall issue of BIFOCAL features brief profiles of the most recent appointees.

Stuart Cohen is the director of legal advocacy of the AARP Foundation Litigation Unit. The foundation is the affiliated charity of AARP. The litigation unit represents clients nationwide in cases impacting the rights of AARP's members and other older Americans and prepares amicus briefs on behalf of AARP. Mr. Cohen is the former executive director of Regional Legal Services, located in Camden, New Jersey, and chief of litigation of the Legal Aid Bureau in Maryland. He earned a B.A. from Michigan State University in 1970 and a J.D. from Wayne State University in 1973.



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Since 1997, Ms. Kampmann has been board certified in estate planning and probate law by the Texas Board of Legal Specialization. In 2002, she was elected as a fellow to the American College of Trust and Estate Counsel. She is a past chair of the San Antonio Bar Foundation, a past president of the Bexar County Women's Bar Association and Foundation,

and a past officer of the Texas Young Lawyers Association. She was inducted into the San Antonio Women's Hall of Fame in 2001 and was elected to be a member of the Texas Women's Forum in 2003. Ms. Kampmann was selected as one of the "Top 40 Under 40" by the *Texas Lawyer* in 2001 and was named a "Texas Super Lawyer for 2004" by the *Texas Monthly*.

In June of 2004, Ms. Kampmann was honored to receive the "Judge Sam Williams Leadership Award" from the State Bar of Texas. The award is presented to an individual who has proved to be an outstanding leader of their local bar and who has contributed significantly to maintaining the local bar's relationship with the State Bar of Texas.

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Voting in Nursing Homes

Continued from page 2

Access to Voting

Most states with mandatory procedures require some triggering circumstance, such as a request for an absentee ballot by a resident, or a threshold number of absentee ballot applications. In New York, for example, local election boards must provide on-site absentee balloting at any covered facility from which the board receives at least 25 applications for absentee ballots from residents who are eligible to vote by absentee ballot in the city or county.¹¹ South Dakota has a procedure that requires representatives of the county auditor's office to visit any covered facility in the county from which there might reasonably be expected to be five or more absentee applications.¹²

Once triggered, these procedures impose duties on the states' local election officials to follow a specified protocol for absentee balloting. In only four states—Maine, Rhode Island, Tennessee, and Washington—are the voting procedures mandatory for all covered facilities without a triggering event.¹³

The typical voting protocol requires one or more election official to deliver the absentee ballots at a time prior to the election, and to supervise and assist residents with the casting of ballots. Virtually all of the states that have procedures follow this outreach model to some degree.¹⁴ Ten of the states with mandatory procedures require a bipartisan team of election officials to conduct the voting.¹⁵ The two states with purely discretionary procedures call for a similar method. Other states direct the election authority—such as the municipal clerk or the local registrars of voters—to conduct the balloting. As discussed in the next section, the officials designated to conduct voting may not be the only persons involved in facilitating voting by residents.

Assistance in Completing the Ballot

Considerably more variation was found in the provision of assistance to nursing home and other covered facility voters. Of the 23 states that address nursing home voting, eight states include in their provisions rules or guidance for assisting the residents with voting.¹⁶ Most of the other states also have ballot assistance rules, but they are applicable to all voters or to all absentee voters.¹⁷ In three of the states with nursing home procedures, voters may receive assistance by election officials only.¹⁸ Eight states provide for election officials or a person of the voter's choice.¹⁹ Eleven states simply permit voters to be assisted by any person the voter selects.²⁰

Five of the states that allow someone other than an election official to assist voters place limitations on whom that person can be.²¹ Illinois, Louisiana, and Minnesota, for example, prohibit a candidate on the ballot from assisting voters. However, Illinois does make exception if “the voter is the spouse or a parent, child, brother, or sister of the candidate. . . .”²² Louisiana also expressly prohibits “the owner, operator, or administrator of the nursing home or an employee” of those facilities from rendering assistance to voters residing in the home; it is the only state with such limitation.²³ In addition, all five states prohibit a voter from being assisted by the voter's employer or agent of that employer or officer or agent of the voter's union.

Additional Voting Support Efforts

While virtually all of the states with nursing home voting procedures seem to follow a similar framework, a few states go above and beyond the basic model to provide additional support for voting. The prevailing absentee model requires residents first to request an absentee ballot before any special procedure has to be carried out. The problem with this practice is that many residents may not be aware of an election, know that they can vote absentee, or realize that there are accommodations available to help them with the voting process. A procedure that instructs local election boards to initiate contact with covered facilities helps mitigate these issues.

Maryland's guidelines are illustrative.²⁴ For those counties that use the procedure, the county election board contacts nursing homes and assisted living facilities in its jurisdiction before an election to determine if the facility has residents who wish to register to vote or to vote by absentee ballot.²⁵ The facility is expected to provide the board with a list containing the names of such residents.²⁶ Additionally, the board follows up with each facility that does not respond to the first contact to determine if it wants to offer its residents the opportunity to register to vote or to vote by absentee ballot.²⁷ The shortcoming of the Maryland protocol is that it is optional for local voting boards.

The prevailing model also fails to consider other aspects of the voting process, such as registration and ballot application. In only six states do the procedures expressly address ballot application in addition to voting.²⁸ In Missouri, for example, the procedure contemplates at least two visits to the covered facility by election officials—one for delivery of applications and another for delivery of ballots.²⁹ The downside of Missouri's procedure is that it is an emergency procedure, and, as such, only applies to residents who have been confined to the covered facility after five o'clock p.m. on the Wednesday before an election.³⁰ Of the states with proce-

dures, Maryland is the only state that seems to offer support in all phases of voting—from registration to casting ballots.

Another additional support provided in a few states addresses individuals who are admitted to covered facilities close to, or on the day of, the election. These individuals could miss the opportunity to take advantage of voting accommodations if procedures do not provide for “emergency” situations. In Iowa, the procedure permits a registered voter who becomes a resident in a covered facility as late as election day to request an absentee ballot.³¹ The voter can make the request directly to the election officers who are delivering ballots to the facility, or by phone to the office of the commissioner of the election board no later than four hours before the polls close.³² If the person is found to be a registered voter in the county, the election officers will deliver the absentee ballot to the voter.³³

Minnesota has a procedure that makes substantially the same accommodation. It permits election officials to deliver a ballot, as late as election day, to a voter who becomes a resident of a covered facility located in the municipality in which the voter maintains residence on the day before an election and who has applied for an absentee ballot.³⁴ The voter must request an application by phone from the municipal clerk no later than five o’clock p.m. on the day before election day, or submit an absentee ballot application to the election judges engaged in delivering absentee ballots to the facility.³⁵

In addition to its emergency voting accommodations, Iowa’s procedure is the only one that expressly addresses the situation where a voter is discharged from the facility. It provides that where an absentee ballot applicant has been dismissed from the nursing home, the election officials may take the ballot to the voter if the voter is currently residing in the county.³⁶

Along with accommodating newly admitted and dismissed residents of covered facilities, consideration may be given to residents who are unable to vote on the date scheduled for election officials to visit. Illinois, Indiana, and Connecticut have procedures for this type of situation. In Illinois, the election officials must “report to the election authority the name of any applicant in the facility who, due to unforeseen circumstance or condition or because of a religious holiday, was unable to vote.”³⁷ The election authority is given permission to appoint an election staff member to deliver the ballot to the applicant on election day.³⁸

Indiana’s procedure allows the county absentee voting traveling board to make an additional visit to a covered facility if a voter is unavailable at the time of the board’s visit due to medical emergency, or at the board’s discretion.³⁹ Connecticut has a procedure that permits election officials to revisit a covered facility where supervised voting has taken

place if a resident of the facility applies for an absentee ballot after supervised voting has been conducted but before the election.⁴⁰

Regarding general information access, the survey identified only seven states, of the 23, that outline the procedures on their state elections division Web site.⁴¹ While Web access may not be an ideal medium for reaching this particular target audience, it has become the expected baseline information resource for the public at large.

Relationship to General Absentee Balloting Procedures

In 27 states and the District of Columbia, no nursing home or health care facility voting protocols were identified. Many of these states rely on general absentee procedures to accommodate elderly and disabled voters. While the survey did not include a comprehensive analysis of those procedures, the simplicity or difficulty of those procedures undoubtedly helps or impedes voting by nursing home residents.

In states that have no-excuse absentee balloting, any registered voter may apply and vote absentee without a reason required. The National Conference of State Legislatures reports that 26 states have no-excuse absentee voting.⁴² Voters apply, receive, and return the absentee ballot in the manner prescribed by the absentee provisions. Presumably, residents of covered facilities in these states are able to obtain absentee ballots with relative ease. In some no-excuse states, the simplicity of absentee procedures is enhanced by additional accommodations. In North Dakota, for example, any voter may have an absentee ballot mailed or personally delivered to him or her or to the voter’s agent.⁴³

In states that require absentee ballot applicants to provide a reason for their request, the extent of those requirements will affect ballot accessibility. In Pennsylvania, a voter who requests an absentee ballot because of illness or physical disability is required to include with the application a physician’s declaration stating the nature of the voter’s disability or illness, and the name, office address and telephone number of the voter’s physician.⁴⁴ To be placed on the permanently disabled absentee ballot list to receive future absentee ballots automatically, the applicant must file a physician’s certification of disability along with the application.⁴⁵ While this requirement may not be altogether prohibitive, it is an additional hurdle in the ballot application process.

Discussion

At least 23 states have established some type of special voting procedure designed to accommodate residents of nursing

Continued on page 8

Table 1: State Voter Absentee Procedures for Nursing Homes

State	Applicable to	Trigger	Procedure
Colorado Colo. Rev Stat. Ann. §1-8-112 (West 2004)	Group residential care facilities	When more than five absentee ballots are sent	A committee of one employee of the county clerk and recorder and, where available, a representative of each of the major political parties shall deliver the absentee ballots.
Connecticut Conn. Gen. Stat. Ann. §9-159r(a); §9-159q(g)	Any institution with patients	When 20 or more patients in an institution are voters	Registrars of voters, or their designees, shall jointly deliver the ballots and supervise the voting.
Florida Fla. Stat. Ann. §101.655 (West 2004)	Nursing homes and assisted living facilities	Written request for supervised voting made by facility where five or more residents wish to vote absentee	Supervised voting team, consisting of representatives of more than one political party, shall deliver the ballots and jointly supervise voting.
Illinois 10 Ill. Comp. Stat. Ann. §5/19-12.2 (West 2004)	Licensed and certified nursing homes	“Physically incapacitated” electors have made proper application for absentee ballots	Two election judges, from different political parties, must arrange a time with facility to conduct voting on the premises on the Friday, Saturday, Sunday, or Monday before election.
Indiana Ind. Code Ann. §3-4-18; §3-11-10-25 (West 2004)	Health care facilities	Upon request by qualified confined or disabled voters	An absentee voting travelling board, consisting of one Democrat and one Republican, shall deliver ballots 12 days immediately before election day, during regular office hours of the circuit court and at a time agreed upon by the board and the voter.
Iowa Iowa Code Ann. §53.22; §53.22.1.b (West 2004)	Health care facilities and hospitals	Upon request by registered voter who is a resident or patient in such facility	Two election officials shall deliver the absentee ballot to the voter and jointly supervise the casting of the ballot.
Louisiana La. Rev. Stat. Ann. §18:1333 (West 2004)	Nursing homes	Upon written request by confined voters who are participants of special program for handicapped voters	Registrar must notify voter by letter of the date the registrar will visit the nursing home with the voter’s absentee ballot and provide voter with an absentee voter number.
Maine Me. Rev. Stat. Ann. tit 21, §753-B (West 2004)	All licensed nursing homes, residential care facilities, and assisted housing	N/A	Municipal clerk must be present in facility one or more times during the 30-day period before an election for the purpose of conducting absentee voting by the residents.
Maryland Md. Regs. Code tit. 33, subt. 11, ch. 2 (2004)	All nursing homes and assisted living facilities	Facility provides names to election board of residents who wish to register to vote or to vote by absentee ballot	[Non-mandatory] Teams, consisting of one registered Democrat and one registered Republican, provide voter registration and absentee ballot applications directly to resident; teams return, on date chosen by the facility, to conduct the voting.
Massachusetts Mass. Gen. Laws Ann. ch. 54, §91B (West 2004)	Health care facilities	Facility has been designated as place for supervised voting 28 days before primary or election	An election official must hand-deliver the absentee ballot to the patient or resident.
Minnesota Minn. Stat. Ann. §203B.11 Subdivision 1 (West 2004)	Health care facilities and hospitals	Eligible voter is a temporary or permanent resident or patient of such facility, located in the municipality in which the voter maintains residence	Ballot shall be delivered by two election judges, each affiliated with different political parties, who must be present when the voter completes the ballot.
Missouri Mo. Ann. Stat. §115-287.2 (West 2004)	Adult boarding, intermediate care, residential care, or skilled nursing facilities	Applies after absentee request period has ended. After 5:00 p.m. on the Wednesday before an election, any voter who becomes hospitalized or is confined to a covered facility	Election authority shall appoint a team, consisting of two registered voters, one from each political party, to deliver, witness the signing of, and return the voters’ application and deliver, witness the signing of, and return the voters’ absentee ballot.

Table 1: State Voter Absentee Procedures for Nursing Homes, *Cont'd*

State	Applicable to	Trigger	Procedure
Nebraska Neb. Rev. Stat. §32.944 (2003)	Nursing homes or hospitals	Upon request for absentee ballots	Absentee ballots shall be administered by 2 registered voters who are not affiliated with the same political party.
Nevada Nev. Rev. Stat. §293.2735 (2003)	Residential development exclusively for elderly	1. More than 100 residents are registered to vote 2. Common area available 3. Owner consents to establish polling place	County clerk shall establish at least one polling place for a precinct in such residential development.
New York N.Y. Elec. Law §8-407 (McKinney 2004)	Mental hygiene facility, nursing home, residential health care facility, adult care facility, and hospitals or other facilities operated by the VA	Election board receives at least 25 applications for absentee ballots from voters in the facility who are eligible to vote by absentee ballot	Bipartisan boards, composed of two inspectors, shall conduct voting in the facility no earlier than 13 days before and no later than the day of the election.
Ohio Ohio Rev. Code Ann. §3509.08 (West 2004)	Public or private institutions	Applicants are voters confined to public or private institutions	Two county board of elections employees belonging to two major political parties will deliver absentee ballots; each employee shall be present when ballots are delivered, when assistance is given, and when ballots are returned to office of the boards.
Oklahoma Okla. Stat. Ann. tit. 26, §14-115 (West 2004)	Nursing facilities	Written request from an incapacitated voter confined to a nursing facility	On the Thursday, Friday, Saturday, or Monday before an election, the absentee voting board shall deliver ballots. Both members of the board must witness the voter sign the affidavit on the ballot envelope.
Rhode Island R.I. Gen. Laws §17-20-14 (2003)	Hospitals, rest/nursing/convalescent homes, or similar type facility	N/A	State board of elections shall appoint as many bipartisan pairs of supervisors as are necessary to visit such facilities within 7 days before an election, supervise casting of votes by persons using mail ballots, and take acknowledgements or serve as witnesses.
South Dakota S.D. Codified Laws §12-19-9.1 (Michie 2004)	Nursing facilities, assisted living centers, and hospitals	Five or more absentee ballot applications	County auditor must arrange a date and time at which representatives of the auditor's office will be present to assist the residents of that facility to vote, utilizing the absentee procedure.
Tennessee Tenn. Code Ann. §2-6-601(a) (West 2004)	Licensed nursing homes, homes for the aged, or similar licensed institutions	N/A	Two absentee voting deputies, one representing the majority party and one representing the minority party, shall assist voters entitled to assistance and to attest absentee applications and ballots.
Washington Wash. Admin. Code §434-240-120 (2004); Wash. Rev. Code Ann. §29A.40.080 (West 2004)	Health care facilities	Registered voter in such facility	County shall provide applications to voters who are residents of a health care facility to apply for an absentee ballot by messenger on election day. The messenger may pick up the voter's absentee ballot and deliver it to the voter and return it to the county auditor's office.
West Virginia W.Va. Code §3-3-5c (West 2004)	Hospitals and other licensed health care facilities or nursing homes	Request for emergency absentee ballot	[Non-mandatory]. A bipartisan team shall deliver materials to the voter, wait for the voter's completion of the application and ballot, and return the application and the ballot to the official designated to supervise and conduct absentee voting.
Wisconsin Wis. Stat. Ann. §6.875(4); §6.875(6) (West 2004)	Nursing homes, qualified retirement homes, and qualified community-based residential facilities	Application for an absentee ballot by one or more qualified voters in such facility	Clerk or board of election commissioners shall send two special voting deputies (affiliated with different political parties) to visit the facility for the purpose of supervising absentee voting procedure.

Voting in Nursing Homes

Continued from page 5

homes and other similar health care facilities for older persons and persons with disabilities. The majority of those states follow a procedural model that clearly enhances access to voting through outreach, yet fails to address some of the practical needs of the residents.

A major weakness of the prevailing model is its reliance on residents to initiate the process. As previously noted, residents may not be aware of elections. Those who are, and who wish to vote, may not know that they can vote absentee, or that there are special accommodations available to them. Even in states with outreach procedures, some residents might not necessarily have better access to voting.

Another shortcoming is the model's failure to address voter registration and absentee ballot application. States that make accommodation for voting without providing support during other necessary phases of the process do not fully address the voting needs of older persons or persons with disabilities, and may ultimately undermine attempts to make voting available to residents of nursing homes and other health care facilities.

Apart from the conventional outreach model, particular state practices also raise issues of access and support. In Louisiana, for example, the nursing home voting procedure is limited to residents who are enrolled in the special program for handicapped voters.⁴⁶ Enrollment in this program is fairly cumbersome. Individuals file a request for an application in writing or by phone.⁴⁷ They are required to list the names and addresses of at least two individuals residing in the precinct who can give oath, if required, to the voter's physical disability.⁴⁸ In addition, applicants must have their physician sign and complete a medical certificate.⁴⁹ The physician must state his or her diagnosis of the disability, provide a description of the disability, offer a prognosis of the condition and its probable duration, and certify that in his or her professional opinion the applicant's disability prevents the applicant from appearing in person before the registrar to vote absentee or at the polling place.⁵⁰

This procedure not only poses an additional obstacle for physically disabled nursing home residents by the reference and medical certification requirements, it also effectively excludes those who are frail, cognitively impaired, or chronically ill, but who are not considered handicapped under the program's criteria.

General information access is also an issue. As mentioned earlier, only seven states were identified that outline the procedures on their state elections division Web site. Particularly for states with procedures that rely on residents

to initiate the process, it is important to promote those procedures as much as possible so that residents and caregivers are aware of their existence.

Despite shortcomings, there are positive trends among the states, and favorable elements in many of their procedures. A significant number of the state procedures require, or suggest, that ballots be delivered by bipartisan teams of election officials. Presumably, this is a fairly simple practice that goes a long way in avoiding the appearance of abuse by a political group, as well as in discouraging fraud. In addition, the procedures in states such as Maryland, Iowa, and Illinois reflect an effort to make voting procedures available to all residents of nursing homes and similar health care facilities.

The fact that many states do not have special voting policies or procedures for nursing homes and other similar health care facilities may not be quite as troubling if a resident's ability to cast his or her vote is effectively supported by the general absentee provisions in those states. The reality is that the simplicity and user-friendliness of absentee voting rules varies significantly across the states. A nursing home resident can more easily vote in a no-excuse absentee state, such as North Dakota, than in a state that attaches cumbersome requirements to its nursing home voting procedures, such as Louisiana. Moreover, several states with no special procedures reported efforts at the local level to facilitate voting in nursing homes and other similar health care facilities. These states include Montana, New Hampshire, North Dakota, and South Carolina.

None of the protocols identified in this survey addressed the issue of capacity to vote by nursing home and other health care facility residents who have diminished capacity. We are aware of no regulatory guidelines that address the issue of what capacity is needed to vote. [A Sept. 14, 2004, article in the *Washington Post* raises the issue of voting by persons with some level of dementia. Shankar Vedantam, *Dementia and the Voter*, Wash. Post, Sept. 14, 2004, at A01. See also sidebar, next page]. However, whether the absence of standards or procedures for determination of capacity is a virtue or fault is not entirely clear. On the one hand, a capacity screen of any type could pose a troublesome barrier to voting in institutional settings that already present barriers to voting. On the other hand, the absence of a clear standard of capacity to vote may itself perpetuate a misperception that elderly and disabled residents of long-term care facilities have no interest or ability to vote. Such a perception may undermine interest in systematic outreach to these groups.

While none of the states with nursing home procedures had a model that appeared to address all of the foreseeable needs of nursing home and other health care facility residents, Maryland's procedure embodies many of the key elements of an ideal model, including:

- ◆ Responsibility placed on local election boards to initiate the outreach procedure (without requirement of a trigger circumstance);
- ◆ Applicability to all nursing homes and assisted living facilities; and
- ◆ Support at all phases of the voting process, including registration, absentee ballot application, and casting of ballots.

One key element that is missing from Maryland's procedure, but that a few states such as Iowa include is:

- ◆ Provision of additional outreach to residents who are not available on the date designated for voting in the covered facility (including newly admitted and dismissed residents). These are sometimes referred to as emergency voting procedures.

Conclusion

The survey provides a wide-angle lens through which one can view how the right to vote is supported or neglected in nursing homes and related settings where diminished health, diminished capacity, and institutional strictures can all pose formidable barriers to the exercise of one's civil rights. The survey identified those states with protocols, outlined the basic strategies common to those protocols, and provided a glimpse of how voting in such settings may be administered

A recent review paper addresses the emerging policy problem of participation in the electoral process by citizens with dementia. The paper, which is part of the efforts of the multi-disciplinary panel "**Developing practical guidelines for voting by persons with dementia,**" was published in the September 15, 2004, issue of JAMA. The paper focuses on three issues: development of a method to assess capacity to vote; identification of appropriate kinds of assistance to enable persons with cognitive impairment to vote; and formulation of uniform and workable policies for voting in long-term care settings. The paper makes the case for the *Doe* standard as the best standard to determine the capacity to vote. A person who understands the nature and effect of voting and can express a choice is competent to vote. The paper also discusses what constitutes appropriate voter assistance and the case for uniform guidelines for voting in long-term care. The panel's Web site, www.uphs.upenn.edu/adsc, presents other issues raised by voting by persons with cognitive impairment.

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throughout the country. How these legislative or regulatory strategies are carried out in real life is a question for further research. The survey also revealed elements that exist in certain state protocols that suggest themselves as models for other states to emulate. Finally, the survey shed light on issues that all states should consider as they continue their efforts to make voting more accessible for the elderly and persons with disabilities.

Notes

1. See Voter Registration and Turnout 2000, at <http://www.fec.gov/pages2000turnout/reg&to00.htm>.
2. Help America Vote Act of 2002, (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301-15545) (aims to improve the administration of elections in the United States).
3. See U.S. Census Bureau, The 65 Years and Over Population: 2000, Table 8 (Oct. 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-10.pdf>.
4. See Centers for Medicare & Medicaid Services, U.S. Department of Health & Human Services, Nursing Home Data Compendium 2001, at 51, Table 1.7. (2001), available at <http://www.cms.hhs.gov/medicaid/survey-cert/datacomp.asp>.
5. *Id.*
6. The U.S. territories were not included in our survey.
7. The states were also asked to identify any local election boards they were aware of that had developed any such policies or procedures at the local level.
8. Several states did not respond to our written request or follow up efforts. Those states include Alabama, Delaware, Kentucky, Michigan, New Jersey, North Carolina, and Wyoming.
9. The State Board of Elections first distributed procedures in October 1999. Those procedures were revised in April 2004 to reflect current law, regulations, and policies.
10. Joan L. O'Sullivan, *Voting and Nursing Homes Residents: A Survey of Practices and Policies*, 4 J. HEALTH CARE L. & POL'Y 325 (2001).
11. N.Y. ELEC. LAW § 8-407 (McKinney 2004).
12. S.D. CODIFIED LAWS § 12-19-9.1 (Michie 2004).
13. Washington's procedure requires the counties to provide absentee ballot application forms to registered voters in nursing homes. Presumably, every nursing home will have at least one registered voter present.
14. Exceptions include Nevada and Washington.
15. Those states are Florida, Illinois, Indiana, Minnesota, Missouri, Nebraska, New York, Ohio, Rhode Island, and Tennessee. Colorado and Wisconsin direct that whenever available the voting teams be bipartisan in nature. South Dakota permits any political group to assign a person to accompany the representatives.
16. Those states are Connecticut, Florida, Louisiana, Maryland, New York, Ohio, Rhode Island, and Wisconsin.
17. Minnesota, Tennessee, and West Virginia provide explicit reference to the applicable assistance provisions that apply to all voters. For a summary of state laws addressing assistance to disabled voters and polling place accessibility, see National Conference of State Legislatures, Voting in America: Final Report of the NCSL Elections Reform Task Force (July 2001), available at: http://www.ncsl.org/programs/press/2001/electref0801.htm#_Toc522012607.
18. Connecticut, Ohio, and Rhode Island.

Continued on page 10

Voting in Nursing Homes

Continued from page 9

19. Florida, Iowa, Maryland, Minnesota, Nebraska, New York, Washington, and Wisconsin.
20. Colorado, Illinois, Indiana, Louisiana, Maine, Massachusetts, Missouri, Nevada, Oklahoma, South Dakota, and Tennessee.
21. Illinois, Louisiana, Maine, Minnesota, and Oklahoma.
22. 10 ILL. COMP. STAT. ANN. 5/19-5 (West 2004).
23. LA. REV. STAT. ANN. § 18:1333G.(4)(a).
24. *See* Maryland State Bd. of Elections, Absentee Ballot and Voter Registration Procedures for Licensed Nursing Homes and Assisted Living Facilities (Orig. Issued Oct. 6, 1999; Revised Apr. 2004).
25. *See id.* at 3.
26. *See id.*
27. *See id.* at 4.
28. Maryland, Minnesota, Missouri, Tennessee, Washington, and Wisconsin.
29. MO. ANN. STAT. § 115.287.2 (West 2004).
30. *See id.*
31. IOWA CODE ANN. § 53.22.2 (West 2004).
32. *See id.*
33. *See id.*
34. MINN. STAT. ANN. § 203B.11 Subd. 3 (West 2004).
35. *See id.* § 203B.04 Subd. 2.
36. IOWA CODE ANN. § 53.22.2.1.b (West 2004).
37. 10 ILL. COMP. STAT. ANN. 5/19-12.2 (West 2004).
38. *See id.*
39. IND. CODE ANN. § 3-11-10-25(b).
40. CONN. GEN. STAT. ANN. § 9-159q(e).
41. Iowa, at <http://www.sos.state.ia.us/elections/voterreg/voterguidefiles/Absentee.html>; Louisiana, at <http://www.sos.louisiana.gov/elections/elect-voting.htm#absentee>; Massachusetts, at <http://www.sec.state.ma.us/ele/eleifv/howabs.htm>; Minnesota, at <http://www.sos.state.mn.us/election/assist.html>; Missouri, at <http://www.sos.mo.gov/elections/faqs.asp>; Oklahoma, at <http://www.state.ok.us/~elections/absentee.html>; and Washington, at http://www.secstate.wa.gov/elections/register_absentee.aspx.
42. Alaska, Arizona, California, Colorado, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See* <http://www.ncsl.org/programs/legman/elect/absent-tearly.htm> (accessed August 30, 2004).
43. N.D. CENT. CODE § 16.1-07-08.1 (2003).
44. 25 PA. CONS. STAT. ANN. § 3146.2(e)(2) (West 2004).
45. *Id.* at (e)(1).
46. LA. REV. STAT. ANN. § 18:1333.D.(1) (West 2004).
47. *See id.* § 18:1332.B.(1).
48. *See id.* § 18:1332.B.(1)(a)(i).
49. *See id.* § 18:1332.B.(1)(a)(ii).
50. *See id.*

Bar Profile

Elder Law Section of the Alaska Bar Association

By Kenneth Kirk

The Elder Law Section of the Alaska Bar Association was formed in 1995 by a handful of Anchorage-based lawyers who were interested in expanding the scope of topics offered at bar luncheons and CLE offerings. The association already had an estate planning and probate section, but that group tended to focus on tax planning and general probate issues. The founders of the elder law section wanted, rather, to emphasize Medicaid planning, assisted living, guardianship, and other such elder law issues. As an elder law CLE offered a few years prior had been well attended, the bar association granted permission to found the new section.

Since then, the section has hosted regular lunch meetings, usually with a featured speaker. The meetings are held once a month at the Bar Association in Anchorage. Typically, eight to fifteen members attend (as well as some associate members, who are non-attorneys). Routinely, out-of-town members attend by speaker phone. This puts attendance in the norm for Alaska Bar sections. The typical mix is a group of private practice attorneys, several court visitors (including the social workers who make recommendations to the court in guardianship actions), and at least one person from the state Medicaid office. Like other Alaska Bar groups, this section does not hold meetings in the summer—in Alaska it is impossible to get any one to meet in the few sunny days of summer.

The section has sponsored several CLEs, most notably one in 2003 with author and former NAELA president Clifton Kruse. This particular CLE was presented live in Anchorage and the following week in Juneau. This was a rare treat for Juneau lawyers; almost all CLEs in Alaska are offered in Anchorage, where most of the lawyers in the state practice, with videotapes made available for lawyers in other cities. Thus, the elder law section became one of the few to offer a live CLE in another Alaska city.

Elder law is a hot area of practice in Alaska. While this part of the world has traditionally been a place where people made their fortunes and then retired to warmer climates, in recent years more Alaskans have been staying. In addition, more families have been bringing elderly parents north instead of leaving them in nursing or rest homes stateside. As a result, the elderly are the fastest growing demographic segment in the state, to an even greater extent than in the country as a whole. The expertise of Alaska lawyers has lagged behind this demographic trend, but the Elder Law Section is working to help bring the bar up to speed.

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Guardianship and Voting Rights

Continued from page 1

vidual's actual capacity to continue to exercise this basic civil right. Some states have made the guardianship process one that is crafted to the needs of the incapacitated person; others favor a one-size-fits-all approach. Although the trend is moving toward tailoring the guardianship, plenary orders still persist. With tailored orders, the courts recognize that an individual who is unable to make decisions in one area of life—for instance, balancing a checkbook—may be perfectly able in another, such as making medical decisions. Guardianship hearings should proceed selectively to deprive individuals only of those rights they are demonstrably incapable of reasonably exercising themselves.

When creating a guardianship and evaluating its consequences, courts balance the harm of taking away a right against the benefit of protecting the individual against harm. Typically the risk/benefit calculation involves matters of finance and medical care. When the issue is more fundamental, as is the right to vote, the scales become more difficult to balance. "The wrongful or misguided act is not as apparent when an individual is voting for a particular candidate as when the individual is negligent in his or her financial transactions."³

Voting rights are quite different than the ordinary interests in a guardianship determination. Although it is exercised less often than the everyday tasks that determine people's personal and financial lives, voting has been judged a fundamental right by the Supreme Court.⁴ This constitutional reality, coupled with the concern that it is harder to determine if the right is being misused, makes the right to vote a particularly thorny issue in guardianship proceedings.

Statutory Guidance

The prohibitions that keep individuals under guardianship from voting spring from the concept that they are unable to exercise a valid choice. Guardianship laws seek to guard them, and by extension the whole democratic process, from fraud and undue influence.⁵ Forty-four states have laws or constitutional provisions that disenfranchise the mentally

incompetent.⁶ Although the exact effects of the various states' laws are difficult to determine, our separate analysis paints a slightly better picture of the opportunity for persons under guardianship to retain their right to vote.

According to the authors' reading of the state constitutions, guardianship laws, and cases, the ability of a person under guardianship to retain the right to vote can be spread along a continuum measuring the extent of disenfranchisement. At one end are the states that specifically encourage voting. At the other end are the states that summarily bar voting. In the midrange are the states where the argument can be made that the right is retained because of the emphasis in the guardianship codes that persons under guardianship retain all rights unless they are specifically taken away. As might be expected, some states provide little guidance on whether wards can or cannot retain the right to vote (*see* chart, p. 14).

Just looking at state constitutions gives the first impression that most states are crowded at the disenfranchisement end of the continuum. Thirty-eight states have specific constitutional provisions that bar from voting persons who are under guardianship,⁷ adjudicated mentally incompetent or incapacitated,⁸ of unsound mind,⁹ with mental illness,¹⁰ *non compos mentos*,¹¹ or an idiot or insane.¹² The other twelve have no constitutional provision on disenfranchisement or do not include mental capacity as a criteria for eligibility to vote. However, in several states these constitutional provisions appear to be defined and applied much more narrowly or circumvented altogether because the definition in the guardianship code of a person who needs a guardian differs from the person who is excluded from voting.

States That Encourage Voting

The guardianship courts in seven states have the responsibility to determine specifically whether an individual loses the right to vote when a guardian is appointed.¹³ In Iowa, for example, the state constitution says that "No idiot, or insane person . . . shall be entitled to the privilege of an elector."¹⁴ On its face, this would seem to ban persons under guardianships from voting. The guardianship statute, however, states that the court must make a separate determination of the capacity to vote. It "shall find a ward incompetent to vote only upon determining that the person lacks sufficient mental capacity to comprehend and exercise the right to vote."¹⁵ Taken together, these laws appear to discourage summary removal of voting rights.

In two additional states, that responsibility is less specifically worded, but easily implied. The Florida code includes voting as one of the enumerated rights that may be removed from the incapacitated person.¹⁶ By inference, the incapaci-

Continued on page 12

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Guardianship and Voting Rights

Continued from page 11

tated Floridian would retain the right to vote unless the court took that right away. In California the court investigator, as part of the pre-hearing process, is to determine if the alleged conservatee is capable of completing a voter registration affidavit.¹⁷ The court investigator's recommendation allows the court to afford California conservatees the right to vote despite the constitutional language.

States That Encourage Disenfranchisement

Seventeen states have constitutions or laws that promote summary disenfranchisement, or at least do nothing to impede it. Of those, eight states can clearly be placed at the restrictive end of the disenfranchisement continuum. Arizona, Louisiana, Massachusetts, Mississippi, New Mexico, Nevada, South Carolina, Virginia, and Wyoming leave little question that a person under guardianship is summarily deprived of the right to vote. Although the guardianship statutes in an additional eight states¹⁸ are designed to encourage limited guardianship, the constitutional prohibitions seem to leave no room for suggesting that incapacitated persons can retain their franchise rights. New York has no constitutional prohibition, but by statute prevents persons adjudged incompetent from registering or voting.¹⁹ Arkansas recently reversed course on wards' right to vote. Guardians appointed before 2001 could not prohibit their wards from voting without court authorization. However, guardians now must get express court approval to authorize an incapacitated person to vote.²⁰

States That Encourage Retaining Voting with Other Rights

In the middle of the continuum are the states with an apparent constitutional bar to voting but with guardianship codes that specifically allow incapacitated persons to retain all civil and legal rights (without mentioning voting) unless the court removes that right. For example, the Washington Constitution states that persons judicially declared mentally incompetent may not vote.²¹ However, under guardianship law a person is not presumed to be incapacitated nor lose any legal rights or suffer any legal disabilities as a result of being placed under limited guardianship, except as specifically set forth in the court's order.²² Similarly in Kentucky, idiots and insane persons may not vote,²³ but partially disabled persons retain all rights except those designed as a legal disability or specifically granted to the limited guardian.²⁴ It is important

to keep in mind that the personal right to vote can never be delegated to a guardian. It is a right lost, but not transferred.

Alaska is among the states that statutorily bans disenfranchisement in light of a constitutional bar to voting. Although the Alaska Constitution states that no person may vote who has been judicially determined to be of "unsound mind,"²⁵ the guardianship statute provides that an incapacitated person is not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited by the court. More specifically, it states that a guardian may not prohibit the ward from registering to vote or from casting a ballot at a public election.²⁶

Ohio may be the most straightforward in acknowledging that the person prevented from voting in the constitution is not the same as the person under guardianship. Under the constitution, the terminology is "idiot or insane."²⁷ The guardianship code defines the term "incompetent" person as one who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of his self or property.²⁸ In a voting rights case, the Ohio court separated the definition of "insane" as used in the constitution, from "incompetent" as used in the guardianship statute.²⁹ The person who cannot vote suffers such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life, including voting.³⁰

Advocates in states where there is an apparent constitutional bar may be able to successfully argue that the constitutional definition of who is not allowed to vote does not apply to persons under guardianship. A finding that a person is incapacitated is not a finding that the individual is of unsound mind, an idiot, or insane; thus, the person under guardianship is not included in the category of those ineligible to vote. This argument is even stronger in states with a guardianship scheme that prefers a limited guardianship in which the ward retains all rights except those specifically delegated to the guardian. Additionally, the right to vote cannot be delegated to the guardian, it can only be taken away from the ward. Virginia leaves no room for question about the definition of "mentally incompetent." Perhaps anticipating the *Baker v. Keller* argument, its code specifies that a finding of "incapacity" in the guardianship court is a finding that the person is "mentally incompetent" for voting.³¹

States with No Constitutional Bar

The final group of states do not appear to constitutionally disenfranchise persons under guardianship. Persons with any type of mental disability are not included in the list of those who cannot vote. In some states, reference to the guardian-

ship code clarifies the voting status. In Oklahoma, the partially incapacitated person cannot be prohibited from voting unless the court restricts eligibility.³² Additionally, Ohio limited guardians have the statutory duty to assist the wards in fulfilling their civic duties.³³

With no constitutional bar and guardianship laws that specify that partially incapacitated persons retain all rights except those designated by the court, wards in Pennsylvania³⁴ and Vermont³⁵ could retain the right to vote. It may be safe to say that wards in Alabama, Colorado, Idaho,³⁶ Illinois, Indiana, New Hampshire, North Carolina, and Tennessee also can keep the right to vote because there is no constitutional prohibition. However, only inferences about that right can be drawn from the respective guardianship codes by referring to retained rights,³⁷ least restrictive alternatives,³⁸ or limited orders.³⁹ Clarity in the law would ensure the right to vote for those who can make a choice at the polling place.

Case Law Guidance

The reasons for disenfranchising wards often reflect the standards and mind-sets of the time that the laws were written. Persons under guardianship should not vote because, in the words of one nineteenth-century state legislator, “[the] fool has no consent; the lunatic has none, and the child has none.”⁴⁰ While “fool,” “lunatic,” or “imbecile” have been banished from society’s vocabulary and guardianship statutes, the purpose behind guardianship—protecting the wards from themselves—pretty much remains the same.⁴¹ Unfortunately, the pejorative terms “idiots and insane persons” remain in eight constitutions.

This history forces a return to the question of the harm. The presumed harm is that the incapacitated person will cast an irrational vote, perhaps one that is the result of undue influence or corruption. Although some authors have downplayed the possibility that these “incapacitated” voters could ever influence an election,⁴² it is possible that such voters could make up the margin of victory in a closely contested election. Clearly we should wish that all voters are capable of making a well-informed, rational choice, so that the will of the electorate is properly expressed.

The counter-argument is also readily apparent: many of the voters who have not been adjudged legally incapacitated make ill-informed decisions when they cast their ballots. How can we distinguish those people from those who are judged incapable to handle their daily affairs, but maintain the ability to understand the nature of their voting responsibilities, and make informed decisions in the voting booth?

Courts have had to decide this very question when interpreting their states’ franchise requirements. A century ago,

courts distinguished between the enfeebled elderly and those with life-long mental disabilities. In *In re South Charleston Law Election Case*, the court treated elderly voters differently when interpreting Ohio’s election law. “A person whose mind is greatly enfeebled by age is neither a lunatic nor an idiot within the meaning of the Constitution.”⁴³ The court did not explain why mental incompetence caused by age was different than any other kind of mental incompetence, but premised its decision on an earlier Ohio Supreme Court case that called for “respect for the hoary head.”⁴⁴

In *Carroll v. Cobb*, a New Jersey court found that despite the constitutional prohibition that “no idiot or insane person shall enjoy the right of suffrage,”⁴⁵ it was nonetheless improper for a county clerk to judge certain would-be voters to be presumptively incapacitated. The court demanded a more individualized inquiry, although the court refused to enumerate any specific standards for making that inquiry.

A later Ohio case, *Baker v. Keller*, did create such standards.⁴⁶ The court defined “insane person” to mean, in the voting context, a person who has “suffered such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life.”⁴⁷ While this definition improved on more archaic ones, it did not solve the problem of separating judgment in casting a ballot from judgment in other tasks of daily life. The court still followed the presumption that a person incapacitated for one thing was incapacitated for all.

The most recent guardianship voting case, *Doe v. Rowe*, makes this distinction.⁴⁸ In *Doe*, the Federal District Court of Maine struck down the portion of Maine’s Constitution that prohibited “persons under guardianship for reasons of mental illness” from voting.⁴⁹ The anonymous plaintiffs were under guardianship as a result of the mental deterioration of old age. Both plaintiffs, in the opinions of the psychologists who examined them, were able to make intelligent and well-informed decisions about the candidates and issues in the election in which they sought to vote.

Maine’s system of assigning guardians provides a number of procedural safeguards to protect the alleged incapacitated person. Nevertheless, the court found that Maine’s provisions lacked the individualized assessment necessary to satisfy the due process requirements for depriving people of their rights, especially a right as fundamental as the right to vote.⁵⁰ The *Mathews v. Eldridge*⁵¹ due process requirements state that the court must apply a balancing test considering first, the plaintiff’s interest in keeping the right; second, the risk of erroneously depriving the plaintiff of the right; and third, the state’s interest.

The *Doe* court concluded that the Maine probate court failed to give the individual proper notice and an adequate

Continued on page 14

Guardianship and Voting Rights

Continued from page 13

opportunity to be heard.⁵² Because due process requirements were not met, the statute enacting Maine's constitutional bar on voting under guardianship was struck down. Although the court ultimately left future decisions in the hands of probate courts and did not provide a definition of capacity to vote, it required those courts to take a longer look at the individual who might lose the right to vote under a guardianship.

Conclusion

The *Doe* decision moves in the right direction, but does not completely solve the problem of voting under guardianship. The all-or-nothing approach of plenary guardianship that many state courts take is flawed. Requiring all judges to individually assess the capacity of the would-be wards to vote would not only satisfy the *Mathews-Doe* requirements, but would also make for guardianships that are a better fit for the people for whom they are proposed. More states need to guarantee by statute that a citizen's right to vote is retained unless the court makes a specific finding that disenfranchisement is necessary to protect the democratic process.

Notes

1. Kingshuk K. Roy, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 ELDER L. J. 109 (2003).
2. Lawrence A. Frolik & Alison McChrystal Barnes, ELDER LAW: CASES AND MATERIALS 453 (3d ed. 2003).
3. Roy, *supra* note 1, at 113.
4. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).
5. Roy, *supra* note 1, at 117.
6. Kay Schriener & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 OHIO ST. L.J. 481, 485 (2001).

7. Maine, Maryland, Massachusetts, Minnesota, and Missouri. For specific statutory references, see the chart at www.abanet.org/aging/guardianship.html.
8. Arizona, California, Connecticut, Delaware, Florida, Georgia, Louisiana, Michigan, Minnesota, North Dakota, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.
9. Alaska and Montana.
10. Kansas.
11. Hawaii, Nebraska, and Rhode Island.
12. Arkansas, Iowa, Kentucky, Mississippi, Nevada, New Jersey, New Mexico, and Ohio.
13. ALASKA STATUTES § 13.26.150(3)(6) (2004) (guardian may not prohibit voting); DEL. CODE ANN. tit. 5, § 1701 (2004) (need specific finding by clear and convincing evidence of severe cognitive impairment which precludes basic voting judgment); GA. CODE ANN. § 29-5-7(f) (2004) (right to vote is independently determined); IOWA CODE § 633.556 (2004) (separate determination that lacks capacity to vote); MINN. STAT. § 524.5-313(8) (2004) (ward retains right to vote until court orders otherwise); N.D. CENT. CODE § 30.1-28-04 (3) (2004) (no ward may be deprived of right to vote except on specific finding); and WIS. STAT. § 6.03(3) (2004) (separate proceeding to determine understanding of objective of elective process).
14. IOWA CONST., art. II, § 5 (2004).
15. IOWA CODE § 633.556 (2004).
16. FLA. STAT. ANN. § 744.3115(2)(b) (2004).
17. CAL. WELF. & INST. CODE § 5357(c) (2004).
18. Connecticut, Hawaii, Kansas, Michigan, Nebraska, Utah, South Dakota, and West Virginia.
19. N.Y. ELEC. LAW § 81.02 (2004).
20. ARK. CODE ANN. § 28-65-302 (2)(E) (2004).
21. WASH. CONST., art. VI, § 3 (2004).
22. WASH. REV. CODE § 11.88.010(2) (2004).
23. KY. CONST. § 145 (2004).
24. KY. REV. STAT. ANN. § 387.590(11) (2004). See also ME. REV. STAT. ANN. tit. 18-A, § 5-408 (2004); MD. CODE ANN. EST. & TRUSTS § 13-706(b) (2004); MO. REV. STAT. § 475.078 (2004); MONT. REV. CODE ANN. § 72-5-316(3) (2004); OR. REV. STAT. 125.300(3) (2004); R.I. GEN. LAWS § 33-15-4 (2004); and TEX. PROB. CODE ANN. § 675 (2004).
25. ALASKA CONST. art. 5, § 2 (2004).
26. ALASKA STATUTES § 13.26.090 (2004).
27. OHIO CONST. art. V, § 6 (2004).
28. OHIO REV. CODE ANN. § 2111.01 (2004).
29. *Baker v. Keller*, 237 N.E.2d 629 (Ohio 1968).
30. *Id.* at 633.

Continuum of Wards' Voting Rights

Encourages Voting

Bars Voting

AK ⁵³	DE ⁵⁴	OK ⁵⁵	CA ⁵⁶	KY ⁵⁷	NJ ⁵⁸	AL ⁵⁹	AR ⁶⁰	NY ⁶¹	CT ⁶²	AZ ⁶³	VA ⁶⁴
	GA	PA	FL	ME	OH	CO			HA	LA	
	IA	NH		MD		ID			KS	MA	
	MN	VT		MO		IL			MI	MS	
	ND			MT		IN			NE	NM	
	WI			OR		NC			SD	NV	
				RI		TN			UT	SC	
				TX					WV	WY	
				WA							

31. VA. CODE ANN. § 37.1134.6 (2004).
32. OKLA. STAT. tit. 6, § 4-101 (2004). However, a totally incapacitated person is ineligible to register.
33. OKLA. STAT. tit. 6, § 3-114 (2004).
34. 25 PA. CONS. STAT. § 1301(a) (2004).
35. VT. STAT. ANN. tit. 14, § 3070(b) (2004).
36. The ban on incompetents voting was removed in 1998 and IDAHO CODE § 66-346(a)(6) (2004) allows patients in state institutions to retain the right to vote but there is no clarity about persons under guardianship.
37. N.C. GEN. STAT. § 34-A-1215(b) (2004).
38. TENN. CODE ANN. § 34-1-127 (2004).
39. ALA. CODE § 25-2A-105 (2004); COLO. REV. STAT. § 15-15-314(1) (2004); N.H. REV. STAT. ANN. § 464-A:25(g) (2004).
40. Nebraska state legislature, 1871, cited in *Roy*, *supra* note 1, at 117.
41. See Lawrence A. Frolik, *Plenary Guardianship: An Analysis, A Critique, and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 611-613 (1981).
42. See *Roy*, *supra* note 1, at 117-118.
43. *In re South Charleston Law Election Case*, 3 Ohio N. P (n.s.) 377; 1905 WL 774, *10 (Ohio Prob. 1905).
44. *Sinks v. Reese*, 19 Ohio St. 306, 320 (1869).
45. *Carroll v. Cobb*, 354 A.2d 355 (N.J. Super. Ct. App. Div. 1976).
46. *Baker v. Keller*, 237 N.E.2d 629 (Ohio 1968).
47. *Id.* at 633.
48. *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001).
49. *Id.* at 44.
50. *Id.* at 48.
51. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).
52. *Doe*, 156 F. Supp. at 48.
53. Guardian may not prohibit voting.
54. Constitutional bar but voting rights specifically reserved for court consideration.
55. No constitutional bar and guardianship statute encourages preservation of rights.
56. Court may consider right to vote.
57. Constitutional bar but guardianship statute reserves all rights not specifically taken away.
58. Court cases question presumption of disenfranchisement.
59. No constitutional bar but weak guardianship language on right retention.
60. Constitutional bar but guardian must get specific approval for ward to vote.
61. Constitution silent but statute bars those adjudged incompetent from voting or registering.
62. Constitutional bar and weak guardianship language on right retention.
63. Constitutional bar and no strong guardianship statement on preservation of rights.
64. Guardianship statute specifically defines incapacitated person as mentally incompetent in the constitution.

Mini-Conference on Legal Services

Continued from back page

those who are in the greatest social or economic need, this type of practice does have an impact on the delivery of legal services through encouragement of pro bono and bar association programs.

The 2004 Mini-Conference on Legal Services will explore ways to ensure that our nation's aging population will be able to obtain legal representation in the years ahead. **If you are interested in attending, send an email to Nancy Coleman at colemann@staff.abanet.org.**

In order to solicit input about conference topics and recommendations from as broad a range of lawyers and advocates in the field, the sponsors of NALC will also provide Web-based questionnaires to those who have an impact on the field. Watch for more information on that effort in future issues of Trainingworks, on the Elderbar and other listservs, and on NALC-sponsored Web sites.

*—Nancy M. Coleman, Director
ABA Commission on Law and Aging*

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Mini-Conference on Legal Services to Be Held in Preparation for the 2005 White House Conference on Aging

President Bush has called for a White House Conference on Aging to take place in October 2005. Members of the conference's policy committee have been appointed and the first meeting of that group has taken place. As of this writing, there are no procedures for officially designating groups to come forward with policy recommendations. However, if previous White House conferences are an indication, there will be numerous occasions prior to the actual conference when groups will make their recommendations known. It is important that advocates for older people be a part of that process.

In October 1994 a Pre-White House Conference on Legal Services was convened in conjunction with the Joint Conference on Law and Aging. That effort put forward five recommendations, as follows, which were sent to the policy committee for the 1995 White House Conference on Aging:

- Set 10 percent, minimum, of Title III B funds for legal assistance and maintain legal services as a priority service;
- Congress must appropriate additional funds for legal assistance developers and for legal counsel for the State Long-Term Care Ombudsman;
- Changes should be made in the Older Americans Act (OAA) to allow for a state to fund a statewide legal assistance program in lieu of often under-funded Area Agencies on Aging;
- Congress must fund statewide joint Administration on Aging (AoA)/Legal Services Corporation (LSC) legal services state support centers; and

- AoA must enforce the provisions of the OAA on the delivery of legal services for standards that assure high quality legal assistance.

In the years since, the political landscape for the delivery of legal services to the elderly has changed considerably. There has been an erosion of legal services at the same time that there is an appearance of greater coordination and policy advocacy. While some attention is being given to assuring rights—either through the passage of Title VII, the Elder Rights provisions, of the Older Americans Act—and the provision of specific types of rights programs—such as pension rights, Medicare “fraud squads,” health insurance counseling, etc.—there has been little, if any, additional funding for Title III legal assistance and no expansion in funding for the Legal Services Corporation. In fact, congressional restrictions placed on the Legal Services Corporation have resulted in diminished support, discontinued funding for national support, and the consolidation of programs.

In the past decade, there has been significant growth in “unbundled” delivery mechanisms, such as hotlines, mobile law units, and self help. Technology now plays an influential role in the way in which legal services are delivered to the elderly. There has been a vast expansion in the number of attorneys who practice elder law, as well as an increase in the number of state and county bar association sections on elder law. While those in private practice do not necessarily serve

Continued inside on page 15

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