

# Voting Rights of People with Developmental Disabilities: Correcting Flaws in the Limited Conservatorship System

Voting Rights are Violated Because Judges and Attorneys are Unaware of Federal Laws

by Thomas F. Coleman

People think of voting as a fundamental constitutional right. However, the right to vote is not found anywhere in the United States Constitution.

The California Constitution, on the other hand, does specifically declare: “Any United States citizen 18 years of age and resident in this state may vote.” (Cal. Const. Art. 2, Sec. 2.)

The California Constitution also states: “The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony.” (Cal. Const. Art. 2, Sec. 4.)

The Legislature has passed statutes on competency for voting. Mental incompetency is mentioned in the Elections Code and in the Probate Code.

Elections Code Section 2208 states: “A person shall be deemed mentally incompetent, and therefore disqualified from voting if, during the course of any of the proceedings set forth below, the court finds that the person is not capable of completing an affidavit of voter registration in accordance with Section 2150 and [if the following applies]: (1) a conservator of the person or the person and estate is appointed pursuant to Division 4 (commencing with Section 1400) of the Probate Code.”

Probate Code Section 1823 (b) (3) states: “The proposed conservatee may be disqualified from voting if not capable of completing an affidavit of voter registration.”

Probate Code Section 1910 says that if the judge determines that the conservatee is not capable of

completing the affidavit, “the court shall by order disqualify the conservatee from voting.”

If these were the only laws involved in determining the voting rights of people with developmental disabilities, the analysis would end here. However, that is not the case. Federal law is also involved.

## **Federal Voting Rights Laws**

Because of the “supremacy” provision of the United States Constitution, state statutes and constitutions are superseded by federal statutes that govern the same subject matter. Congress has passed several statutes that apply to voting. Some of them pertain to voting rights for people with disabilities.

The National Voter Registration Act permits, but does not mandate, states to remove voters from registration rolls based on “mental incapacity.” (42 U.S.C. Sec. 1973gg-6(a)(b)(3).) However, another provision of the Act requires that such provisions must be in compliance with the Voting Rights Act of 1965. (42 U.S.C. Sec. 1973gg-6(b)(1).)

Section 208 of the Voting Rights Act allows people who can’t read or write, or who have any disability, to receive assistance in voting from any person of their choice. (42 U.S.C. Sec. 1973-aa-6.)

Also relevant to the rights of people with developmental disabilities is Section 201 of the Voting Rights Act. That section declares that “No person shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.” (42 U.S.C. Sec. 1973-aa.)

The term “test or device” means any requirement that a person as a prerequisite for voting “demonstrate the ability to read, write, understand, or interpret any matter.” (42 U.S.C. Sec. 1973-aa.)

California’s requirement that conservatees shall be disqualified from voting if they cannot complete an affidavit for voter registration is a “test or device” as defined by federal law. The Voting Rights Act allows people with disabilities to have help in completing the registration form. It also prohibits states from requiring them to show an understanding of the contents of the voter registration form.

With these federal statutes in mind, and knowing that the California Constitution and state statutes are superceded by these federal statutes, it would appear that California’s requirement concerning the ability of a voter to complete the registration application is a “test or device” prohibited by federal law.

Although there is no state or federal court case declaring this California requirement to be invalid because it violates federal law, a federal district court has declared a Maine statute to be invalid because it conflicted with federal law. (*Doe v. Rowe*, 156 F. Supp. 2d 35 (2001).) The Maine statute stated that persons under guardianship due to a mental illness were ineligible to vote.

Furthermore, assuming for the sake of argument that California’s statute is not unconstitutional, the court would be required to find, by clear and convincing evidence, that the conservatee cannot complete the voter registration application with the help of another person.

Who is going to prove that? And how? What standard would apply as to how much help the other person can give?

The loss of voting rights for limited conservatees is not academic. Evidence suggests that it may happen quite frequently – perhaps in a majority of cases.

Let’s look at how the voting rights issue arises in limited conservatorship cases in Los Angeles.

## **An Actual Case**

Consider the real-life case of Roy L. (a fictitious name for an actual case that came to the attention of the Disability and Abuse Project in 2013).

Roy, who has autism, is a client of a Regional Center. He lives with his mother in Los Angeles County. His father lives in another state. The parents are divorced.

His mother realized that she needed to file for a limited conservatorship. She went to a group workshop for such parents. The workshop was conducted by Bet Tzedek Legal Services.

In the group setting, following instructions on how to fill out the necessary paperwork, the mother checked a box stating that Roy was not able to complete a voter registration form. At the time, she did not know that by making such a statement, she was setting in motion a process whereby Roy would be disqualified from voting. No one told her that.

The petition and other paperwork were filed with the Probate Court. The judge assigned an attorney to represent Roy.

Before the attorney came to the home to talk to her and to meet Roy, the mother had a conversation with Roy about voting. He indicated that in the next election for President, he wanted to vote for Hillary.

The mother wondered whether Roy would retain the right to vote, so she asked the court-appointed attorney about this and told him about Roy’s desire to vote. The attorney told her that the concept of Roy voting would be inconsistent with the entire purpose of a conservatorship.

When the attorney filed a report with the court about his opinions on Roy’s capacities, he stated that Roy was not able to complete an affidavit for voter registration. This was done despite his knowledge that Roy wanted to vote.

Several weeks later, when the mother came to our

Project for help on another aspect of the case, she asked me about Roy having the right to vote. This prompted me to investigate the law, the result of which is the legal analysis which you have just read.

It appears to me that the attorney had not received any training about voting rights for people with developmental disabilities. It also seems that, by the way he dismissed the issue without giving it any thought, he considered it of no importance.

The issue of voting comes up in every limited conservatorship case. Court investigators, to the extent they play a role in a case, are supposed to render an opinion as to whether the proposed conservatee can complete an affidavit of voter registration. The court-appointed attorney is asked to do the same. The judge then generally makes a factual finding and enters an order.

The form used by the judge in each case has a place on it where the judge can check a box before the sentence: "The conservatee is not capable of completing an affidavit of voter registration." There is also a place on the form where the court can check a box entering an order that: "The conservatee is disqualified from voting."

### **Self Help Clinics**

The issue of voting came to my attention during a presentation at the Beverly Hills Bar Association. An attorney who works for Bet Tzedek Legal Services, and who is the coordinator of the Self Help Conservatorship Clinic, used a slide show during his talk. The screen displayed forms that are used when parents attend workshops to fill out court forms.

Places on the form that are routinely checked off with an X were checked off on the forms appearing on the screen during the presentation. An X appeared in the box stating that the proposed conservatee was not capable of completing an affidavit for voter registration.

Parents and family members are generally the people who attend these Self Help Clinics. They are the

ones who are filing petitions to initiate a limited conservatorship. Unfortunately, prior to attending the Self Help Clinics, such petitioners are not attending educational seminars or receiving legal advice on the implications of which boxes they check on the petition or what assertions they make in them. Thus, they are relying on prompts from the people who operate the Self Help Clinics.

Because the visual prompts have tended to suggest that the proper box to check is that which states the limited conservatee "is not able" to complete the voter registration form, these petitioners are, in effect, asking the court to disqualify the proposed conservatee from voting. Most petitioners probably are not aware that disability accommodation laws allow others to assist a person with a disability in the voting process, including the registration process.

### **Review of Court Records**

I recently examined a sample of 61 limited conservatorship cases at the downtown courthouse to determine which conservatees had their right to vote eliminated and which did not. I also examined what role the PVP attorney played in the voting rights determination.

The sample I reviewed included all limited conservatorship cases filed in the downtown court during the last four months of 2012.

Out of the 61 cases I examined, 54 limited conservatees had their right to vote taken away by the court. In all but two of these cases, the order of the court was entered after the court reviewed a PVP report in which the attorney informed the court that the client was unable to complete an affidavit of voter registration. How the attorney reached such a conclusion is unknown.

Based on Roy's case, the presentation by the Bet Tzedek attorney, and my sampling of cases in the downtown court, it is reasonable to conclude that as many as 90 percent of proposed limited conservatees in Los Angeles County may be unnecessarily and improperly losing their right to vote.

More conservatees would retain their right to vote if their court-appointed attorneys were aware of relevant federal laws that protect the right to vote of people with developmental disabilities. The same would be true if their attorneys refused to share potentially adverse information with the court, citing their ethical duties of loyalty and confidentiality.

Attorneys have a duty of loyalty to their clients. The principle of confidentiality applies to information gathered by attorneys during their representation of clients, including information obtained directly from clients as well as from others during interviews and reviews of records.

The duties of loyalty and confidentiality are violated when attorneys file PVP reports with the court to advise the court that their investigation revealed that the client lacks the ability to complete an affidavit of voter registration. Such a disclosure by the client's own attorney is likely to result in the court stripping the client of his or her voting rights. PVP attorneys know that, but despite this knowledge they routinely share information with the court, in a public record, that they know is adverse to the rights of the client.

Proposed conservatees are constitutionally entitled to effective assistance of counsel. Their court-appointed attorneys have a duty to act as diligent and conscientious advocates to protect and defend the rights of the client. This includes the right to vote.

To fulfill this duty, attorneys must be aware of statutes and judicial decisions relevant to the issues that are likely to arise in the case at hand. Legal standards for voting eligibility or disqualification are relevant to limited conservatorship cases.

Attorneys and judges in conservatorship cases should know that eligibility to vote is not only governed by California law but that a variety of federal statutes also must be considered when judicial decisions are being made on the voting rights of American citizens. They *should* know this, but apparently they do not.

In fact, there is reason to believe that court-ap-

pointed attorneys are being misinformed about the right of voters with disabilities to have assistance in the voting process. Registering to vote is part of that process.

### **PVP Attorney Trainings**

I recently attended a court-mandated training session for PVP attorneys in Los Angeles. One of the presenters at the training was a judge who decides limited conservatorship cases on a daily basis. He mentioned the issue of voting eligibility of proposed conservatees.

The judge told the audience of some 200 PVP attorneys that a proposed conservatee is only qualified to vote if he or she "is able to complete an affidavit of voter registration."

The judge said that the mother of a proposed conservatee once told him in court that her son could satisfy that standard because she could fill out a voter registration form for him. The judge then laughed as he was telling the story which prompted many lawyers in the audience to laugh.

The judge's punch line to the story was: "That's not how it works." No further comment or explanation was made. The judge moved on to discuss other issues not related to voting.

I was shocked at the judge's remarks about voting eligibility. They showed a complete lack of awareness of federal voting rights laws that protect the rights of people with cognitive or communication disabilities.

The audience was left with the impression that unless proposed conservatees can complete a voter registration affidavit by themselves, they are not qualified to vote. This misinformation will no doubt be used by these court-appointed attorneys in future cases. Their clients will lack the benefit of effective assistance of counsel since their attorneys will not be aware that several federal laws protect the voting rights of people with developmental disabilities.

A person with a disability can have someone help them in the registration process. This would include the right of people who cannot read or write to have someone fill out the form for them, despite the judge's statement to the contrary.

Federal law prohibits California or any other state from using any test or device to establish whether a potential voter can read, write, interpret, or understand any matter. Reasonably competent attorneys acting as diligent and conscientious advocates would know this and would therefore refuse to disclose to the court whether their clients are or are not able to complete an affidavit of voter registration.

### **Finding Remedies for Past Injustices**

Proposed conservatees, perhaps thousands of them, have been ruled "disqualified" to vote by judges who have relied on adverse public statements of court-appointed attorneys in this regard. These rulings could be challenged as unconstitutional for a variety of reasons, including that the attorney who checked off the "is not able" box in a PVP report was not providing effective assistance of counsel.

Effective assistance is undermined when attorneys lack knowledge of federal voting laws. The constitutional right to counsel is also violated when attorneys violate their duties of loyalty to the client and confidentiality of the lawyer's work product.

Petitions for reconsideration for these limited conservatees, perhaps thousands of them who have been stripped of the right to vote over the years, could be filed. Such petitions would ask that the order disqualifying them from voting be vacated and that the Registrar of Voters be notified of the new ruling.

But who will file such petitions? People with developmental disabilities generally would lack the ability to file such petitions on their own. The role of PVP attorneys generally ends when the court enters an order granting a conservatorship. At that time the court usually enters an order relieving the attorney as counsel for the conservatee.

There must be a remedy for this ongoing violation of the voting rights of limited conservatees. Perhaps the court could enter a general order vacating the voter disqualification orders for the past several years on the ground that the judges and the attorneys were unaware of the applicability of relevant federal laws protecting the voting rights of people with developmental disabilities.

Another remedy in individual cases would be for a conservatee to file a petition for writ of habeas corpus with the Court of Appeal and to ask the court to appoint an attorney to represent him or her in the proceeding. This would be one way to get the issue before the appellate judges, thereby giving them the opportunity to write a published decision that would provide guidance to judges and attorneys who handle conservatorship cases in the Probate Court.

There is also an option for a federal civil rights lawsuit to be filed, under 42 U.S.C. §1983. Such a lawsuit could be initiated by the United States Department of Justice or it could be filed as a class action lawsuit by a private law firm. Of course, such actions would not be necessary if state and local officials in California take steps to reinstate the voting rights of limited conservatees who were improperly disqualified due to the mistake or neglect of state judges or court-appointed attorneys.

Under section 1983, every person who deprives any citizen or other person rights guaranteed by the United States Constitution or federal laws is liable to the injured party. The victim of such civil rights violations may seek damages or injunctive relief or both, except that when the perpetrator of the civil rights violation is a judge, only injunctive relief may be sought.

People whose rights under federal voting laws may also file complaints with the United States Department of Justice. The Department has jurisdiction to investigate such complaints and to enforce the voting rights laws.

In addition to deficiencies in the performance of judges and court-appointed attorneys, there may be

problems with the performance of court investigators, if and when they are involved in limited conservatorship proceedings. It is unlikely that they have received training about the Voting Rights Act or other federal protections that would apply to the voting rights of people with developmental disabilities.

Regional Centers are required to assess seven areas of capacity of the proposed conservatee to make decisions and file a report with the court regarding a counselor's opinion on these issues. Capacity to vote is not an area addressed by the Regional Center.

There are probably 50,000 or more limited conservatees in California, with at least 5,000 being added to what administrators call "active inventory" each year. Who knows how many of them have been or will be unnecessarily and improperly denied the right to vote?

Considering the way this issue seems to routinely be handled by those who operate the Limited Conservatorship System in Los Angeles County, and based on the results of the sample of cases that I examined, it is reasonable to conclude that retention of voting rights is an exception to the rule of disqualification.

Based on all of the above, these are my preliminary findings, and my recommendations on how to better protect the right to vote of limited conservatees.

### **Preliminary Findings**

1. Voting is a fundamental right for everyone, including people with developmental disabilities.
2. California law uses a capacity "test or device" to determine whether a conservatee will be allowed to vote. The test is whether the conservatee is capable of completing the voter registration form.
3. California's voting rights test for conservatees appears to violate federal voting rights laws.
4. Court-appointed attorneys who represent proposed conservatees are not being educated by train-

ing programs of the Los Angeles County Bar Association about federal voting rights laws and the voting rights of people with developmental disabilities. These attorneys are not advocating in court for their clients to retain the right to vote.

5. PVP attorneys are setting in motion the disqualification of their clients from voting by submitting reports that advise the court about the client's inability to complete a voter registration affidavit. PVP attorneys could leave this statement blank when they submit their form. They could decline to take any action that would be adverse to the voting rights of their clients. If an attorney can't say something to affirm a client's right to vote, the attorney should say nothing at all. "Do no harm."

6. Regional Centers are not educating parents about the voting rights of people with developmental disabilities. Regional Centers currently do not make recommendations to the Probate Court about the voting rights of proposed conservatees.

7. The Self Help Conservatorship Clinic operated by Bet Tzedek does not educate parents about the voting rights of proposed conservatees. It does not provide legal education about any aspect of the conservatorship process. It plays an important role in helping parents with the court process, but this role is strictly administrative (filling out forms) and does not get into criteria about capacity for voting.

8. Bet Tzedek could advise parents of the option of leaving the line in the form about voting blank. They do not have to render an opinion about whether a conservatee can or cannot complete a voter registration form. Petitioners can take the position that because they have not been educated about federal voting rights laws and ADA accommodation laws, they decline to venture an opinion on this issue.

9. Parents are not given educational materials by the courts or from any other source about the voting rights of proposed conservatees.

10. Court investigators are rendering opinions as to whether a proposed conservatee is or is not capable

of completing a voter registration form – without any apparent knowledge of federal voting rights laws or the right of conservatees to have someone help them fill out the form. Judges have apparently not been educated about the voting rights of limited conservatees or about the role of federal law in making determinations about qualifications to vote.

11. It is unknown how many of the 50,000 or more people with developmental disabilities who are currently under limited conservatorship in California have been disqualified to vote. There is a similar lack of information about the tens of thousands of limited conservatees in Los Angeles County.

12. Area Boards of the State Council on Developmental Disabilities have a legislative mandate to advocate for the civil rights of people with developmental disabilities. Protecting the voting rights of this population does not appear to be on the agenda of Area Boards or the State Council at this time.

13. The Client's Rights Advocates at Disability Rights California (operating under a contract with the State Department of Developmental Services) are not educating Regional Center clients about their voting rights. The Office of Client's Rights is not monitoring the actions of the Probate Court which is taking away the voting rights of Regional Center clients in a routine manner. It appears that voting rights is not an issue monitored by the State Department of Developmental Services.

### **Preliminary Recommendations**

1. The California Secretary of State should issue an opinion on the right of limited conservatees to vote, including their right to assistance from someone in filling out a voter registration form.

2. The California Department of Justice should update its handbook on The Rights of Persons with Disabilities (2003) to include a section on the voting rights of persons with intellectual and developmental disabilities, including limited conservatees.

3. The Association of Regional Center Agencies

(ARCA) should create an educational booklet for parents, and a separate brochure for clients, about the voting rights of people with developmental disabilities. This booklet and this brochure should be distributed to parents and clients at all Regional Centers when the client turns 18.

4. The Department of Developmental Services should update its contract with Disability Rights California to require their Office of Clients Rights, and the Client's Rights Advocates (CRA), to monitor probate cases in which a petition for conservatorship, or a report filed by an attorney or investigator, states that the proposed conservatee is unable to complete an affidavit of voter registration.

5. Bar Association programs that train attorneys who represent limited conservatees should include information about federal laws protecting the voting rights of people with developmental disabilities. Attorneys who represent such clients should advocate that their clients retain voting rights.

6. Judges should not declare a limited conservatee disqualified to vote without clear and convincing evidence, at a hearing, to support a finding that the conservatee is unable, with assistance from a person of their choice, to complete a voter registration form. Any ruling should take into consideration the provisions of federal law that prohibit the state from requiring conservatees to show that they can read, write, or understand any matter, and the provision that gives them the right to have assistance in voting.

7. Remedies should be developed by the California Attorney General, the Judicial Council, and the Secretary of State to reinstate the voting rights of limited conservatees whose voting rights were taken away in the past due to the mistake or neglect of Probate Court judges or court appointed attorneys.

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