STATE OF MINNESOTA **FOURTH JUDICIAL DISTRICT**
DISTRICT COURT
COUNTY OF HENNEPIN **PROBATE/MENTAL HEALTH DIVISION**

In re the Guardianship of Court File No. 27-GC-PR-09-57

Brian W. Erickson,

Ward. **ORDER**

INTRODUCTION

The case before the Court involves one of the most fundamental rights granted to American citizens: the right to vote in government elections. The importance of this right cannot be overstated in a democratic system, where voting is an act of self-definition and an expression of deeply held personal beliefs. It is also not solely a personal right without the potential for great societal consequence: as recent history demonstrates, the votes of a few can change the course of our nation.

For all the blood spilled and lives lost to preserve key tenets of our democracy such as the right to vote, courts must do their part to protect the integrity of each vote. The Court's obligation to the electoral process is two-fold:

- *Courts must ensure that every citizen entitled to vote is allowed to do so.* Anything less deprives that citizen of a fundamental right, and it deprives the citizenry of a true democracy; and

- *Courts must also ensure that no person votes who is not entitled to vote.* Anything less dilutes the fundamental rights of the proper electorate, and it likewise deprives the citizenry of a true democracy.

It is easy to say that courts should preserve the right to vote for those entitled to vote, and should prevent those from voting who are not entitled to vote. As the ongoing debate over the proposed "Voter ID" Amendment suggests, however, it is a concept that is easy to support but maddeningly difficult to effectively put into practice. Putting into practice that concept, however, is what the Court must do in this case as it relates to voting rights for those under guardianship.

Specifically, the above-captioned matter came before the undersigned on July 13, 2012, pursuant to a petition filed for Brian Erickson by Alternate Decision Makers, Inc., the court-appointed guardian for Mr. Erickson. Mr. Erickson seeks a declaratory judgment determining that individuals placed under guardianship have the presumptive right to vote until and unless a court orders that right taken away. Mr. Erickson further seeks the specific determination that he retains the right to vote.

Robert McLeod, Esq., appeared with Stephen Grisham of Alternate Decision Makers, Inc., the guardian in this matter. Mr. Erickson appeared personally. The Minnesota Attorney General was given notice of this proceeding, but did not make a formal appearance.

PROCEDURAL HISTORY

Mr. Erickson's Guardianship

The Plaintiff in this case, Brian Erickson, was placed under guardianship by order of this Court filed March 27, 2009. In that order, the Court found that a guardianship over Mr. Erickson was appropriate based on evidence that Mr. Erickson had

> been diagnosed with schizophrenia and dysthymia with psychotic tendencies. On occasion, he exhibits agitation and poor sleep. He needs reminders to accomplish many of his daily activities. He does not understand his medical/psychiatric diagnoses...he does exhibit paranoia, especially with respect to food.

See March 27, 2009 Order, p. 1. Alternate Decision Makers, Inc. (ADMI), a professional fiduciary organization, was appointed to serve as Mr. Erickson's guardian, a role which it continues to hold. Mr. Erickson has generally done well under his guardianship. His condition, however, has not improved to the degree that a termination of the guardianship would be appropriate.

The Court's Evolving Practice on Voting Rights

It has been the standard practice of this Court to follow the generally accepted statutory prescription for addressing a ward's right to vote. That statutory prescription (discussed in greater detail below) essentially allows those placed under guardianship (referred to as wards) to retain their right to vote. The ward is presumed to retain the right to vote, and the right can only be taken away if there is a specific finding that it should be taken away. Consistent with that common practice, the March 27, 2009 Order placing Mr. Erickson under a guardianship notes that he retains the right to vote.

It is understandable that courts (including this one) have followed this general practice: Minnesota's guardian statutes are thick with language that supports wards' right to vote. Furthermore, there is no statutory imperative for the courts to look in depth at the issue to determine whether the right to vote is properly vested in any particular ward. The end result of this practice is that there is rarely any serious scrutiny given to a proposed ward's ability to vote.

This historical practice, however, ignores the existence of specific language in the Minnesota Constitution. That language, which is found in Article VII of the Minnesota Constitution, appears to prohibit all people under guardianship from voting. Furthermore, it does so through very direct and unambiguous language: the Minnesota Constitution bans a number of classes of people from voting, including any person "under guardianship." *See* Minnesota State Constitution, Article VII. Accordingly, there is an apparent conflict between the permissive nature of Minnesota's guardianship statutes and the restrictive nature of the Minnesota Constitution.

Upon a consideration of this apparent conflict, this Court began to leave any particularized finding regarding voting out of its orders entirely. It did so because of the uncertainty surrounding the reach and application of the Minnesota Constitution, as well as the fact that there was no case before it upon which to analyze the issue.

Mr. Erickson's Petition

The uncertainty surrounding Mr. Erickson's right to vote gave rise to his current petition before the Court. In his Petition, Mr. Erickson seeks to settle the question of whether he, and others similarly situated, retain the right to vote notwithstanding the

language of Article VII of the Minnesota Constitution. Specifically, on June 27, 2012, ADMI filed a Petition for Declaratory Judgment, seeking an order of this Court which would declare "that this ward, and all similarly situated ward's (sic) who are under guardianship in Minnesota retain the right to vote absent an order by the court finding that a ward lacks capacity to vote." *See* Petition for Declaratory Judgment, p. 3. Thus, this case presents on a small scale the same fundamental question that is being discussed on a much bigger scale in Minnesota and nationally: who has the right to vote, and what process should be employed to ensure that people who have the right to vote are allowed to exercise that right?

THE STATUTORY AND CONSTITUTIONAL FRAMEWORK

If the Court would start—and stop—with the current statutes addressing the issue of guardianship and voting, this decision would be easy. Minnesota Statute Section 524.5-313 states that "unless otherwise ordered by the court, the ward retains the right to vote." Similarly, Minnesota Statute Section 524.5-120 states that:

> [t]he ward or protected person retains all rights not restricted by court order and these rights must be enforced by the court. These rights include the right to...vote, unless restricted by the court.

This language appears to establish that Mr. Erickson, and all others under guardianship in Minnesota, retain the right to vote by default. The only way Mr. Erickson would lose that right under the statute would be for the Court to affirmatively take it from him.[1]

[1] As indicated earlier, courts seem to generally rest on the presumption in § 524.5-313 that wards retain the right to vote. It appears that many courts do not engage in an in-depth analysis of whether the presumption should be applied in any given case. Indeed, it is rare for a court to restrict a ward's right to vote, and some courts do not require any type of in-court hearing before granting a guardianship.

On their face, the statutes identified above make sense: it seems best to presume that all citizens retain all of their fundamental rights unless a compelling reason is established that justifies taking that right away. The problem, however, is that those statutes do not exist in isolation. Rather, as briefly mentioned previously, they exist in apparently direct *conflict* with a specific provision of the Minnesota Constitution. That provision, found in Article VII of Minnesota's Constitution, states:

> *[t]he following persons shall not be entitled or permitted to vote at any election in this state*...a person who has been convicted of treason or felony, unless restored to civil rights; *a person under guardianship*, or a person who is insane or not mentally competent.

(1974) (emphasis added).

Thus, the Court is faced with a direct conflict between the Minnesota Constitution and a Minnesota statute. The statute presumes that a person under guardianship retains the right to vote; the Constitution says that a person under guardianship "shall not be entitled or permitted to vote."

In the following section, the Court discusses whether that apparent conflict can be reconciled in a way that gives effect to both.

I. THE LEGISLATURE LACKS THE AUTHORITY TO PRACTICALLY CHANGE THE MINNESOTA CONSTITUTION BY STATUTORILY REDEFINING KEY TERMS.

Petitioner seeks to sidestep constitutional scrutiny of Article VII by offering an interpretation that allows the statutes and the Constitution to both retain their vitality. Specifically, Petitioner argues that the Minnesota Constitution delegates authority to the Legislature to define and to regulate guardianship. As Petitioner argues:

> Article VII, Section 1 of the 1974 Minnesota State Constitution does not define "guardianship" when limiting a person's right to vote. The Wilcox and Pearson precedents, and Article VI, Section 7 of the Constitution, confirmed and held that the Minnesota state legislature is vested with the authority to regulate and define guardianship matters. Therefore, the regulation and enforcement of voting rights, or lack thereof, for persons under guardianship is a power vested in the legislature to effectuate the constitutional mandates.

Memorandum of Law To Support Petition for Declaratory Judgment, p. 8. Essentially, Petitioner seems to argue that the Legislature can exercise a statutory prerogative to decide who under a guardianship can, and cannot, vote. This statutory prerogative is supposedly embedded in the Constitution itself and enables "the legislature to effectuate the constitutional mandates." *Id.*

A. Petitioner Relies on *Pearson* to Support His Argument.

Petitioner bases his argument in large part on the Minnesota Supreme Court's decision in *State ex rel. Pearson v. Probate Court of Ramsey County*, 287 N.W. 297 (Minn. 1939). Petitioner points to one sentence in *Pearson* which states that "[t]he

constitution does not specifically state what class of persons are subject to guardianship but leaves the regulation of that question to the legislature." *Id.* at 299.[2]

Essentially, Petitioner uses that one sentence to argue that there is no constitutional infirmity because the Minnesota Constitution itself delegates to the Legislature the power to determine who is under guardianship. Therefore, since the Legislature has the constitutional authority to define and regulate the category, whatever category or regulation the Legislature chooses must be constitutional.

Though Petitioner's argument is appealing in its simplicity, the Court believes it cannot withstand proper constitutional analysis and scrutiny. The Court's reasoning is provided below.

B. *Pearson* Does Not Control.

For starters, the underlying constitutional question in *Pearson* related to sex offenders, not voting. *Pearson* centered on whether or not the Probate Court had jurisdiction over persons deemed sexually psychopathic personalities. *Id.* at 298. The sentence that Petitioner relies on ("[t]he constitution does not specifically state what class of persons are subject to guardianship but leaves the regulation of that question to the legislature") is the only substantive reference to the Legislature's authority to regulate those under guardianship.

In the end, the Minnesota Supreme Court found in *Pearson* that the Legislature could properly empower the Probate Court to exercise jurisdiction over sex offenders—

[2] Petitioner is not alone in his assertion that this language gives the Legislature authority to define the definition of guardianship as it relates to voting rights. A recent decision of the United States District Court for the District of Minnesota agrees with that statement. *See Minnesota Voters Alliance, et. al. v. Mark Ritchie, et. al.*, Civil File. No. 12-519, signed August 17, 2012 by the Honorable Donovan W. Frank. As much as the Court respects the Petitioner, Petitioner's counsel, and Judge Frank, it cannot agree with the reasoning that led to that result.

nothing more, and nothing less. This Court does not find that holding to be compelling precedent for the proposition that the Legislature can bestow a right that the Minnesota Constitution specifically denies.

Further, even if the operative language in *Pearson* were to be read to allow for the Legislature to take some action, the supposedly controlling language states only that the Legislature may regulate "what class of persons are *subject to guardianship*." (emphasis added). *Id.* at 299. The class of persons subject to guardianship is a matter wholly apart from the rights and privileges retained by those *under guardianship*. In other words, *Pearson* may recognize the Legislature's power to declare that certain categories of people may be placed in guardianships, but it does not allow the Legislature to supersede the Constitution's prohibition on their ability to vote once they are under a guardianship.

Simply stated, the language in *Pearson*, when read as Petitioner suggests, allows the Legislature to freely define and redefine those who would be eligible to be placed under guardianship. In the *Pearson* case, that meant that the Legislature could decide that sex offenders fall under the constitutional ambit of "guardianship." Once under guardianship, however, the Court finds no authority for the proposition that the Legislature can also decide which sex offenders under a guardianship may, or may not, retain their right to vote, or whether other categories of people placed under guardianship may, or may not, vote. Any attempt to do so contradicts the express language of the Minnesota Constitution.

C. The Legislature Cannot Amend the Constitution Through Statutory Changes.

Though most constitutional scholars consider the Minnesota Constitution to be a document that evolves with the times, few would agree that a substantive constitutional prohibition can be expanded or contracted at the whim of the Legislature. Yet, under Petitioner's theory, the Legislature could give every ward the right to vote this year; take it from every ward next year; and give it back the following year. According to Plaintiff, all such scenarios would be constitutional because the Legislature would have been acting within its constitutionally-declared power to regulate guardianships.

Plaintiff bases its argument on the premise that the Legislature is simply acting to "effectuate the constitutional mandates." Here, however, the constitutional mandate is clear: *Those under guardianship cannot vote*. To say that the Legislature has the power to determine by statute which people under guardianship can vote is to allow the statutory tail to wag the constitutional dog. That is simply not how our constitutional democracy is designed to work.

In the end, the only way to effectuate the clear constitutional mandate is to prevent those under guardianship from voting, not to pass statutes that attempt to paint over the harsh reality that the Minnesota Constitution forbids them from voting. Even if the Constitution allows the Legislature to determine who may be placed under a guardianship, no amount of statutory finagling can preserve for those placed under a guardianship a right that the Constitution says they cannot have.

D. Petitioner's Suggested Interpretation Impermissibly Renders Portions of the Minnesota Constitution Superfluous.

Petitioner, in a final effort to avoid attacking the Minnesota Constitution, argues that the term "guardianship" as used in the Minnesota Constitution is intended only to disenfranchise those persons under guardianship who are *also* incompetent. *See Petitioner's Memo,* p. 11. This argument has the obvious appeal of preserving the right to vote for many of those under guardianship, while leaving the language of the Minnesota Constitution intact. As appealing as that argument is, the Court cannot accept Petitioner's suggestion that the Minnesota Constitution be interpreted to leave the Article VII language intact.

The Court rejects that argument because it would render portions of Article VII of the Minnesota Constitution superfluous. Specifically, Article VII of the Constitution is clear in establishing discrete categories of people as being barred from voting:

- a person who has been convicted of a felony;
- a person who has been convicted of treason;
- a person under guardianship;
- a person who is insane; and
- a person who is not mentally competent.

Because they are individually identified, each category must mean something different. Here, that means that a person under guardianship is not necessarily the same as a person who is incompetent, with neither being the same as someone who is insane.

To be sure, these are not mutually exclusive categories. Some people under guardianship are incompetent, and some people who are incompetent are under guardianship. Some of each of those are likely also "insane" (whatever that means today).

But the drafters of the Constitution obviously intended different categories to mean different things by using different terms.

In essence, Petitioner seeks to merge one of the Constitution's discrete categories into another: those under guardianship with those who are not mentally competent. In other words, for voting purposes Petitioner wants the Court to prohibit voting for those who are under guardianship and also not competent. Though this may ultimately be the proper test, it is the wrong way to get there. Under the Minnesota Constitution, all persons who are not mentally competent – whether under a guardianship or not -- are already disenfranchised in the last constitutional category. That being the case, there would be no point to identifying in Article VII of the Constitution the separate category "under guardianship."

E. The Court Must Read the Constitutional Language as it is, Not as Many Think it Should Be.

Few in this day and age believe that all people under guardianship should be categorically denied the right to vote, as the drafters of the Minnesota Constitution apparently did. The Legislature, in passing the statutes which give many under guardianship the right to vote, obviously recognized that it is wrong to disenfranchise everyone under guardianship. Indeed, the Court commends the Legislature for crafting the current statutes, which strike an excellent balance between the need to protect the right to vote for the deserving while preserving the integrity of the vote by denying that right to the unable.

The statutory law is as the Court believes it should be. The Minnesota Constitution, however, is *not*. Unfortunately, the Legislature cannot make right by statute what is wrong by unambiguous constitutional mandate.

In the end, the Court cannot stretch the language of the Constitution past its reasonable limits. It is not so malleable a document that its practical application can be manipulated to defy its express language. The Constitution says what it means, and it means what it says: those under guardianship **cannot** vote. Period. This leaves the Court to analyze the Constitution as it is actually written, rather than as some wish it were, or strain it to be.

In light of the above, the Court must find that the Minnesota Constitution trumps the statutes. To the extent that Minn. Stats. §524.5-313 and 524.5-120 authorize persons under guardianship to vote, those statutes cannot stand under the Minnesota Constitution.

As is discussed below, however, the above conclusion is by no means the end of the analysis.

II. THE MINNESOTA CONSTITUTION'S BLANKET BAN ON WARDS VOTING IS UNCONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION.

Under most circumstances, the Court's task would be an easy one. When a Minnesota statute conflicts with the Minnesota Constitution, the statute normally must yield. Here, that would mean that the statutes allowing wards to vote would fall, and no one under a guardianship would be "entitled or permitted" to vote.

The reason that the Court must inquire further in this case is that the United States Constitution has something to say about voting rights, and it is supreme over the

Minnesota State Constitution. In other words, though the Minnesota Constitution is the supreme law of this state, the United States Constitution predominates as the supreme law of this land. Accordingly, if the Minnesota Constitution conflicts with the U.S. Constitution, the Minnesota Constitution must yield.

A. Federal Constitutional and Statutory Law recognizes the critical importance of protecting the right to vote.

It is well settled law that "the right to vote is considered fundamental under both the U.S. Constitution and the Minnesota Constitution." *Kahn v. Griffin*, 701 N.W.2d 815, 830 (Minn. 2005), citing *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966); *Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978). "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

The importance of protecting the right to vote is embodied in the Voting Rights Act of 1964 and its subsequent modifications. Under that Act, all states shall "provide that the name of a registrant may not be removed from the official list of eligible voters except...as provided by State law, by reason of criminal conviction or *mental incapacity*..." 42 U.S.C.A. § 1973gg-6 (2002) (emphasis added). There is nothing in the above statute to suggest that "guardianship" can be used as a synonym for "incapacity."

B. Federal Constitutional Law Invalidates States' Attempts to Unduly Restrict Voting Rights for Those Under Guardianship.

In recent years, several decisions have been handed down by various federal courts which relate to other states' statutes which purport to restrict the right to vote of those under guardianship. The most compelling was decided in 2001, where the District Court for the District of Maine issued a ruling in *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Maine 2001). At issue in that case was that portion of the Maine Constitution which stated that all persons were eligible to vote except those "under guardianship for reasons of mental illness."[3] *Id.* at 38. In essence, the question in *Rowe* was essentially the same as the question here: can a state constitution categorically deny those under guardianship the right to vote?

In *Rowe*, three persons under guardianships due to mental illness filed suit challenging the prohibition on their right to vote. The State of Maine, as defendant, did not even attempt to argue for the facial constitutionality of that provision of the Maine Constitution. Rather, the state argued that, despite the restrictive language in the Maine Constitution, it remained valid because probate judges retained the power to authorize or deny any particular ward the right to vote. *Id.* at 43. The State further urged the court to find that the above portion of the Maine Constitution should be read to mean that a ward retains the right to vote "unless and until it is expressly suspended by a judicial officer in a guardianship proceeding based upon a finding that the ward lacks the mental capacity to

[3] The Court notes that this provision is actually *less* sweeping than the questioned provision of the Minnesota Constitution, which forbids *all* persons under guardianship from voting, not just those under guardianship by reason of mental illness.

understand the nature and effect of the act of voting." *Id.* at 45. Those arguments are remarkably similar to the arguments being made in the present case.

1. The *Rowe* court struck down Maine's constitution because it violated the Equal Protection Clause as applied.

Notwithstanding the state's arguments, the court in *Rowe* found Maine's constitutional proposition to be a violation of the Equal Protection Clause of the 14th Amendment as applied. *Id.* at 52, 56. Specifically, the State's implementation of the constitution had acted to disenfranchise persons under guardianship due to mental illness who had the capacity to vote, while not disenfranchising persons under guardianship for other mental deficiencies (dementia, mental retardation) who did not have capacity. *Id.* at 52. As the court stated:

> State Defendants now admit that this...definition of the term 'mental illness' 'produces a result that renders Article II, Section I arbitrary and irrational, in that it singles out, for no legitimate basis, people with psychiatrically based diagnoses as opposed to all those who may be under guardianship for reasons of mental incapacity.'

(internal citations omitted) *Id.* The court found that the above practice failed to adequately correlate to the State's legitimate interest in protecting voting rights as "the State has disenfranchised a subset of mentally ill citizens based on a stereotype rather than any actual relevant incapacity." *Id.*

2. The *Rowe* court also struck down the Maine Constitution as facially invalid.

Secondly, the *Rowe* court found that the Maine Constitution was facially invalid when held under scrutiny of the United States' Constitution's Equal Protection Clause. The reason the court struck it down was that it allowed for "mental illness" to serve as a

substitute for "mental incapacity" for voting purposes. *Id.* at 55. In other words, the court was troubled by the fact that "mental illness" was a proxy for "mental incapacity" when the terms clearly cover different things.

Maine, in an attempt to salvage its position, argued that "mental illness" as used in the constitution included *all* mental incapacities. *Id.* To support this claim, the State cited a 1959 law passed by the Maine Legislature, which stated in relevant part

> Wherever in the Revised Statutes or public laws or private and special laws the words "insane" or "insanity" appear, they shall be amended to the words 'mentally ill' and 'mental illness.'

Id. at 52-53. The State further argued that the Legislature intended, at that time, to include persons considered to be "idiotic, non compos, lunatic or distracted" to all fall under the definition of "mentally ill." *Id.* at 53.

The *Rowe* court did not find the above argument persuasive. Rather, the court ruled that the above definition of mental illness "creates illogical and inconsistent results" in three separate ways. *Id.* First, the definition as provided would overlap with other independent bases for instituting a guardianship, rendering portions of the state probate code superfluous. *Id.* Next, the above definition would include those with certain types of mental retardation, and such persons are explicitly held to be distinct from those considered "mentally ill" by other state statutes. *Id.* at 54. Finally, the court found that the State's proposed definition of mental illness required the probate court to utilize archaic terms such as "idiot" and "lunatic" in order to properly define persons as mentally ill. *Id.* at 54.

The court concluded that the "[D]efendants' historically-based definition of mental illness is not narrowly tailored to encompass all of the possible incapacitated persons who might lack the capacity to cast an individual ballot." *Id.* at 55. In the end, the court recognized that "'mental illness' cannot serve as a proxy for mental incapacity with regards to voting," and that, as such, there was no reasonable construction of the constitutional language which would meet the requirements of Equal Protection. *Id.* at 55-56.

3. The *Rowe* court found Maine's Constitution to violate Due Process because there was no notice that rights may be taken away.

Finally, the court ruled that the procedures used in guardianship matters were a violation of Due Process under the 14th Amendment. The reason for the Due Process violation was that proposed wards were not given notice that they could lose the right to vote if the guardianship petition was granted. *Id.* at 48. This makes sense: One should not lose a fundamental right without at least having fair warning that the right might be lost.

The *Rowe* court found unpersuasive Maine's attempt to avoid Due Process issues when the state offered up alternative processes that could pass constitutional muster. Specifically, Maine, during the litigation, attempted to alleviate constitutional problems by proposing a new notice system that provided advance warning to proposed wards that their voting rights could be at issue in the proceeding. *Id.* Under the proposed system, petitioners would be required to provide specific notice that they would be seeking to disenfranchise a proposed ward. *Id.* The probate court would then need to make specific

findings as to a ward's incapacity to vote before that right could be taken away. *Id.* The court agreed that such a process would meet constitutional muster. The court found, however, that Maine had taken no steps to put this new process into place. *Id.* Further, the Court found that this new system went far beyond a "narrowing construction" and rather amounted to an "amendment to substantive state law," which was more appropriately the purview of the legislature or the state electorate. *Id.*

In the end, the *Rowe* court was unwilling to let Maine's constitutional provision stand for several reasons:

- It disenfranchised those who were able to understand the nature and effect of the voting act itself;
- It was based on outdated stereotypes of mental illness and those under guardianship; and
- It did not give those to be placed under guardianship proper notice that their right to vote may be taken away.

As discussed in the following section, many of the same infirmities that lead the Court in *Rowe* to strike down that provision of the Maine Constitution render Minnesota's similar provision unsupportable.

C. As in *Rowe*, the Minnesota State Constitutional language is unconstitutional.

The comprehensive and compelling analysis of the Maine Constitutional provision in *Rowe* is equally forceful in the case before this Court. Upon consideration, many of the same, or similar, infirmities are present in the language used in the Minnesota State Constitution as that of Maine's, leading the Court to conclude that Article VII of

Minnesota's Constitution as it relates to those under guardianship is unconstitutional under the United States Constitution.

Much like *Rowe*, this Court is presented with a sweeping constitutional ban which prohibits *all* persons under guardianship from voting. Just as the *Rowe* court found that Maine's "mental illness" category could not serve as a synonym for voting incapacity, neither can Minnesota's "under guardianship" category. There are simply too many people under guardianship who are fully capable of exercising sound electoral judgment for the Court to conclude that the Minnesota Constitution can categorically disenfranchise those under guardianship as uniformly lacking the capacity to vote. Indeed, the Minnesota Legislature seems to recognize this fact by virtue of the current statutes which ensure that those subject to guardianships retain the right to vote unless a court takes that right away. Thus, just as in *Rowe,* the language in Article VII is not narrowly tailored to the degree necessary to pass federal constitutional muster.[4]

Similarly, the Minnesota system as applied suffers from the same Due Process deficiencies recognized in *Rowe*. Specifically, there is no uniform notice provided to proposed wards in Minnesota that their capacity to vote will be evaluated and their right to vote may be taken away if they are placed under a guardianship. Moreover, the Court is not aware of any common practice among petitioners of providing such notice to proposed wards, even on a voluntary basis. This lack of notice that such a fundamental right will be analyzed—and may be taken away by the Court—is unquestionably a violation of Due Process.

[4] The *Rowe* court engaged in an extensive constitutional analysis to support its decision. Rather than duplicate that entire analysis, this Court will simply refer any interested readers to *Rowe*.

III. THE PROBATE COURT HAS A DUTY TO INDEPENDENTLY ASSESS VOTING CAPACITY FOR ALL WARDS.

As mentioned previously, it is one of the Court's highest duties to ensure that the right to vote is protected for those entitled to vote. The Court's duty, however, goes beyond doing everything it can to keep the polls open to those holding the valid right to vote. The Court satisfies its duty to the voting public only if it also safeguards that right solely for those appropriate to exercise it.

To be sure, it is tempting to blithely pass over the question of whether a person subject to guardianship should be denied the right to vote. No pleasure comes from disenfranchising a person dealing with the challenges that create the need for a guardianship. Given the Court's role in overseeing each proposed ward's general capabilities and deficiencies, however, the Probate Court is uniquely situated to analyze the question of whether a ward can thoughtfully and responsibly vote. If the Court is already deciding whether a proposed ward can live on his own, make medical decisions for himself, or the like, it is little additional effort to also scrutinize whether that person has the capacity to understand the nature and effect of the act of voting.

Accordingly, in light of the fundamental nature of the right to vote, the Court concludes that it has a duty to independently evaluate the voting capacity of each ward at the time of the hearing on a petition for guardianship, and on subsequent occasions as needed or requested. While this will almost certainly result in slightly increased judicial

time and costs, such administrative burdens are outweighed by the nature of the rights involved. [5]

The Court recognizes that capacity to vote in a person under guardianship may wax and wane. For example, a ward with a recent traumatic brain injury may not have the capacity to vote at the time a guardianship is initiated, but may recover sufficiently over time to regain capacity. Conversely, a ward with dementia may have capacity at the time of the petition; as the illness worsens, however, that ward may eventually become incapacitated in that regard. In these cases, the guardian will bear the responsibility of returning the matter to the Court for reassessment when, and if, appropriate and necessary.

Of course, this Court does not control the policies or practices of its brethren courts throughout the State. It speaks for itself when it commits that it will, going forward, conduct an independent inquiry into voting capacity for each guardianship petition coming before the Probate Court. Accordingly, going forward in Hennepin County Probate Court, the Court will specifically inquire into a proposed ward's capacity to vote and designate whether or not that ward retains the right to vote.

With respect to existing guardianships, it would be impractical to reopen all active guardianship files to consider this issue. To the extent wards presently under guardianship believe it necessary to come to court for a clarification of their voting rights, they may petition the Court for reconsideration or confirmation of their voting capacity.

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[5] The Court in *Rowe* seemed to suggest that it may be enough for the Probate Court to evaluate voting capacity only "once the petitioner raises the issue." *Id.* at 50. As much as the Court respects the judgment of petitioners who come into court, the Court believes that it has an independent obligation to assess the voting capacity of each ward. It owes the general electorate at least that much.

IV. THOSE POTENTIALLY UNDER GUARDIANSHIP MUST RECEIVE NOTICE THAT THEIR CAPACITY TO VOTE WILL BE ANALYZED AND RIGHT TO VOTE MAY BE TAKEN.

In light of the potential Due Process issues at stake when an individual may lose their right to vote as a result of a guardianship proceeding, the Court finds that in future guardianship petitions the proposed ward must also be specifically informed that the ward's capacity to vote will be analyzed by the Court, and that the right to vote may be taken away. The person who is subject to the guardianship petition may, of course, present evidence on that issue.

The Court will do its part to begin providing this notice as soon as practical for future guardianship proceedings. In the meantime, petitioners seeking guardianship should take all reasonable steps to provide this notice to prospective wards.

V. MR. ERICKSON RETAINS HIS RIGHT TO VOTE.

Though the case at the bar presents complicated legal and policy questions, at its heart it is about the Plaintiff in this particular case, and his individual right to vote. As to Mr. Erickson, the Court finds that he *does* have sufficient capacity and understanding to make an informed and intelligent vote. Simply stated, he is the type of informed and dedicated voter that our country needs.

Specifically, the Court heard testimony from the guardian in this matter, through its principal Stephen Grisham. Mr. Grisham testified Mr. Erickson has expressed a desire to vote, and that the two of them have had discussions regarding voting. Mr. Grisham testified that Mr. Erickson has articulated which candidates he supports, and for what reasons. Moreover, the evidence reflects that Mr. Erickson is far more independent than

many wards that come before this Court; he holds a valid driver's license and drives to see his family members and others as he desires. In short, all of the evidence before the Court indicates that Mr. Erickson has sufficient capacity and knowledge to exercise his right to vote. He clearly has the mental capacity to make his own voting decision because he is able to understand the nature and effect of the act of voting.

Because the United States Constitution is supreme, Mr. Erickson and others like him cannot be prevented from voting because Article VII of the Minnesota Constitution says he cannot. Thus, the Court finds that Mr. Erickson has established that he is capable of making an informed decision about voting and that he possesses the capacity necessary to vote in public elections. Mr. Erickson shall, therefore, retain the right to vote unless, and until, some future showing is made that he no longer maintains capacity to do so.

SUMMARY

At least as it pertains to those under guardianship, Article VII of the Minnesota Constitution is a vestige of a bygone era. That era was one that did not recognize the many talents and capabilities of those under guardianship, including the ability of many to properly exercise the fundamental right to vote. Rather than leaving that vestige intact and with illusory vitality, it is best to declare its day to be done. Accordingly, this Court declares Article VII of the Minnesota Constitution unconstitutional insofar as it categorically restricts those under guardianship from voting.

IT IS ORDERED:

1. Brian W. Erickson is hereby authorized to vote.

2. Article VII of the Minnesota Constitution is unconstitutional under the United States Constitution insofar as it prohibits all persons under guardianship from voting.

3. As a standing order for all future cases under the jurisdiction of the Court, the Probate Court shall assess each proposed ward's capacity to vote at the substantive hearing held on any petition filed for guardianship, and at subsequent hearings where the ward's capacity to vote may be questioned.

4. Effective as soon as practical, notice must be given to proposed wards that the ward's capacity to vote will be assessed at the hearing on the petition and that their right to vote may be taken away.

5. Those presently under guardianship and within the jurisdiction of this Court will retain the right to vote unless:

   a. Future order of this Court removes that right based on the determination that the person under guardianship no longer has the capability to vote; or

   b. The guardian believes in good faith that the person under guardianship no longer has the capacity to vote, in which case the guardian shall not permit the ward to vote. If there is disagreement about the guardian's conclusion, the guardian must promptly bring the matter to court for a hearing and resolution.

6. Since the Court has concluded that Article VII of the Minnesota Constitution is unconstitutional, the Petition for Declaratory Judgment, to the extent it seeks a finding by this Court that all wards automatically retain the right to vote absent a court order to the contrary, is hereby GRANTED.

Date: October 4, 2012

BY THE COURT:

Jay M. Quam
Judge of District Court
Probate/Mental Health Division