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TO: State Administration and Veterans' Affairs Interim Committee

FROM: Andria Hardin, Legislative Attorney

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RE: A Legal Memo on Montana's Voting Bar for Individuals of Unsound Mind

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At a prior State Administration and Veterans' Affairs Interim Committee meeting, I was asked to provide the committee more information on Montana's laws barring those of an "unsound mind" from voting.

I. Current Montana Law

Article IV, Section 2 of the Montana Constitution provides the definition of a qualified elector. The definition excludes an individual of "unsound mind, as determined by a court." Section 13-1-111, MCA fleshes out the constitutional provision of voter qualifications, including that a "person adjudicated to be of unsound mind does not have the right to vote unless the person has been restored to capacity as provided by law. Furthermore, an election administrator may cancel the registration of an elector of unsound mind as established by a court, and an elector's right to vote may be challenged by any registered elector on the grounds of unsound mind as determined by a court. 13-2-402, MCA; 13-13-301, MCA.

The term is also found in Titles 25, 27, 28, 32, and 72, pertaining to civil procedure, civil liability, capacity to contract, and estates, trusts, and fiduciary relationships, and is usually coupled with the treatment of minors (e.g., minors and persons of unsound mind are incapable of contracting, 28-2-201, MCA).

However, the term is not defined within the constitution nor in Montana Code. Likewise, Montana courts have not taken up the issue to provide any guidance. Black's Law Dictionary defines "unsound mind" as "an essential deprivation of the reasoning facilities, or where a person is incapable of understanding and acting with discretion in the ordinary affairs of life." Black's Law Dictionary, Sixth Edition (1990).

HB 395 was introduced in the 2025 session, seeking to revise voting laws related to individuals who are of unsound mind and providing a definition. The definition was added under Title 53 pertaining to social services and institutions, and specifically in chapter 21 regarding treatment of the seriously mentally ill. It also added a definition for "penal institution" in Title 13, to mean "any penal or correctional facility, including but not limited to a facility for the mentally ill or mentally defective, in which inmates may lawfully be confined as a consequence of a felony conviction." The bill passed out of committee but failed to pass out of the Senate.

II. Other States with Similar Laws

According to the National Conference of State Legislatures, 34 states bar individuals adjudicated as mentally incompetent from voting.

A. Georgia

Article II, Section I of the Georgia Constitution states that, "No person who has been judicially determined to be mentally incompetent may register, remain registered, or vote unless the disability has been removed." Like Montana, Georgia has codified this constitutional provision but has not defined "mentally incompetent." *See also* O.C.G.A. § 21-2-216(b). However, Georgia does have a statute providing that probate judges in every county are to prepare and transmit to the Georgia Secretary of State each month a list of all persons with identifying information who were declared mentally incompetent and whose voting rights were removed. O.C.G.A. § 21-2-231(b). It should be noted that Georgia's probate courts exercise subject matter jurisdiction of the appointment and removal of guardians of incapacitated adults and all controversies as to the right of guardianship. O.C.G.A. § 15-9-30. Considering there is no other statutory provision for reporting individuals declared mentally incompetent to the Secretary of State, other than the probate judges, this suggests that seeking a guardian of an adult in probate court is the only mechanism by which one can be declared mentally incompetent and lose his or her right to vote. And according to a 1995 Georgia Attorney General official opinion, a judicial determination must be made on a case-by-case basis with a judge specifically finding a person mentally incompetent, thereby resulting in the loss of the right to vote. The Department of Law, State of Georgia, Attorney General Michael J. Bowers, Official Opinion 95-27, June 7, 1995, found at https://law.georgia.gov/opinions/95-27 (last visited Dec. 30, 2025). The standard probate judges is Georgia use for appointing a guardian for an adult is that it be in the best interest of the adult and only if the court finds the adult lacks "sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety." O.C.G.A. § 29-4-1. There is no presumption that a guardian is necessary based solely on a finding of criminal insanity, incompetence to stand trial, or an adult having developmental disabilities. *Id.* Therefore, it is key to understand that there must be a specific judicial finding in the probate judge's order that the individual is "mentally incompetent," not just in need of a guardian, to trigger the loss of voting rights in Georgia. *See* Official Opinion 95-97.

B. Nevada

Nevada's Constitution similarly provides that one adjudicated mentally incompetent is barred from voting. *See* Article 2, Section 1. Previously under Nevada code, if the district court adjudicated a person insane or mentally incompetent the court reported such finding to the appropriate entity for the purposes of cancelling the individual's voter registration. However, in 2013 the statute was amended to more narrowly provide that a court of competent jurisdiction issuing an order stating a specific finding by clear and convincing evidence that a person lacks the mental capacity to vote because he or she cannot communicate, with or without

accommodations, a specific desire to participate in the voting process must report such order to the appropriate entity for cancelation of registration. Nev. Rev. Stat. Ann. § 293.542.

C. Texas

Article VI, Section 1 of the Texas Constitution states that "persons who have been determined mentally incompetent by a court, subject to such exceptions as the Legislature may make" are not allowed to vote. Section 16.002 of Texas Election Code requires the clerk of each court having jurisdiction to adjudge a person mentally incapacitated to file a report with the appropriate voter registrar each month under three circumstances: (1) when an order adjudges an adult totally mentally incapacitated or partially mentally incapacitated without the right to vote; (2) when an order adjudges an adult to be completely restored; or (3) when an order modifies the guardianship of an adult to include the right to vote. Upon receipt of the report, the registrar must immediately cancel the voter's registration if disqualified by mental incapacity. Tex. Elec. Code § 16.031. However, the Texas Secretary of State website suggests that it does not follow an immediate cancellation process as required under § 16.031, but instead sends notice to the voter and waits 30 days for a response. Texas Secretary of State, Voter Registration, 3. Cancelation due to Mental Incapacity, https://www.sos.state.tx.us/elections/vr/index.shtml (last visited Dec. 30, 2025). There appears to be no statutory mechanism requiring the Secretary of State to reinstate registrations upon report by the courts of a voter's mental capacity being restored or modified, but the website states the individual may reapply. *Id.*

III. Analysis

While current Montana law prescribes that a court must declare someone to be of unsound mind in order to bar them from voting, it is unclear what it means to be of unsound mind, the process by which that happens, and how an election administrator may receive that information in order to cancel registration.

It is possible that, like Georgia, an otherwise qualified elector in Montana who is placed under a guardianship has the potential to be of unsound mind as determined by a court. In Montana, district courts have jurisdiction over such actions. 72-1-103,MCA; 71-1-202, MCA. Only an incapacitated person may be subject to a guardianship as an adult. 72-5-306, MCA. An "incapacitated person" is a person "who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the person or which cause has so impaired the person's judgment that the person is incapable of realizing and making a rational decision with respect to the person's need for treatment." 72-5-101(1), MCA. Any person interested in the incapacitated person's welfare, including the incapacitated person and the county attorney, may petition for a finding of incapacity and appointment of a guardian. 72-5-315(1), MCA. The incapacitated person may have an attorney of his or her choosing or be

provided an attorney by the state public defender. 72-5-315(2), MCA. The incapacitated person must be examined by a court-appointed physician and the court shall take into consideration the evaluation and recommendations of any public or charitable agency familiar with the incapacitated person. 72-5-315(3), MCA. If the court finds the individual to be an incapacitated person, the court can appoint a full or limited guardian. 72-5-316(1), MCA. Full guardians have powers described under 72-5-321, MCA, while limited guardians are only granted the powers given specifically in the court's order. *Id.* An order is required to state that all rights not specifically limited are retained by the incapacitated person. 72-5-316(3), MCA. Therefore, appointing a guardian to an incapacitated person will only bar him or her from voting if the court order explicitly states the incapacitated person is of unsound mind and that as such the incapacitated person's voting rights are suspended. However, even if such a precise order was issued, there may be other legal considerations that keep it from effectively barring the right to vote.

While the National Voter Registration Act permits states to restrict persons from voting based on criminal conviction or mental incapacity, there are other federal laws and constitutional issues to consider. 52 USCS § 20507. Framing the meaning of unsound mind around mental illness, particular diagnoses, or symptoms may be problematic as doing so places the individual in the protected class of disability and a group being treated less favorably. This could lead to legal challenges under the Equal Protection Clause of the Fourteenth Amendment, Title II of the Americans with Disabilities Act of 1964, as amended, ("ADA"), and Section 504 of the Rehabilitation Act. To avoid such categorization, unsound mind should instead be defined in the context of whether a qualified elector has the mental capacity to make his or her own decision by being able to understand the nature and effect of the act of voting.

Equally important is determining the process by which an elector is adjudicated to be of unsound mind. An individual, case-by-case determination by the court also avoids the arbitrary grouping of electors into a protected class or less favored group. The process described above for adult guardianships already includes this type of individualized assessment to determine incapacity, it would just need to incorporate the consideration of unsound mind to lawfully deprive an individual of his or her voting rights specifically.

As noted above, Montana courts have not addressed the meaning of unsound mind as it pertains to voting rights; however, some cases out of Minnesota and Maine seem to suggest that meeting both these criteria, i.e., adequately defining "unsound mind" and individualized judicial assessments of whether an elector is of unsound mind, may help the laws to withstand strict scrutiny under a Fourteenth Amendment challenge, as well as avoiding violations of the ADA and Section 504 of the Rehabilitation Act. Doe v. Rowe, 156 F. Supp. 2d 35 (D. Maine 2001); Minnesota Voters Alliance v. Ritchie, 890 F. Supp. 2d 1106 (De. Minn. 2012).

An argument could be made that the Due Process Clause of the Fourteenth Amendment also applies to proceedings seeking to deprive an elector of voting rights. Under this argument,

the elector must be given notice that their voting rights are at stake in any proceedings and then given a chance to be heard before deprivation of the fundamental right of voting may occur. Rowe, 156 F. Supp. 2d at 47-51. Therefore, establishing a statutory requirement for notice in any applicable proceedings may be necessary to avoid a due process violation.

Other points to possibly consider addressing in statute:

- providing in statute the burden of proof the court must use in determining whether an elector is of unsound mind (e.g., preponderance of the evidence);
- a requirement for the courts to notify election administrators when they adjudicate someone of unsound mind, or their capacity is restored; and
- clarification on the proceedings under which a court shall or may adjudicate someone of unsound mind (e.g., guardianship, involuntary commitment, etc.).