

CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS (QUALIFICATIONS OF VOTERS).

ELECTIONS: VOTER REGISTRATION — GENERAL PROVISIONS AND ADMINISTRATION.

MENTAL HEALTH GENERALLY: COMMITTEES AND TRUSTEES.

Election laws referring to ‘incapacitated’ and constitutional provision referring to ‘mentally incompetent’ as standards for disqualifying person from voting are not in conflict. Court has option to determine whether ‘incapacitated’ adjudication rises to standard of mental incompetence necessary to deprive person of his voting franchise. General Assembly has power to eliminate court’s option.

The Honorable Bill Bolling
Member, Senate of Virginia
December 10, 2001

You ask whether Article II, § 1 of the Constitution of Virginia, which refers to persons "adjudicated to be mentally incompetent," conflicts with §§ 24.2-101, 24.2-404(A)(4)(iv), 24.2-410, 24.2-418 and 37.1-134.6¹ of the *Code of Virginia*, which refer to persons "adjudicated incapacitated." Additionally, you ask whether a court order that finds a person to be "incapacitated," but allows such person to continue to vote, conflicts with Article II, § 1. If not, you also ask whether the General Assembly may amend § 37.1-134.6 to eliminate a court’s option to enter such an order.

Article II, § 1 states the prerequisites for voting in popular elections and provides that "[a]s prescribed by law, no person adjudicated to be mentally incompetent shall be qualified to vote until his competency has been reestablished." (Emphasis added.) This voting disqualification is long-standing, but it has been couched in different terms through the years. For example, the Constitution of 1830 barred from voting "any person of unsound mind."² Later, the Constitution was amended to exclude from voting "‘idiots and lunatics.’"³ "The language was again changed in 1902 to exclude ‘idiots’ and ‘insane persons’ from registering and voting."⁴ The present Constitution "substituted the term ‘mentally incompetent’ for ‘of unsound mind,’ since it was thought to be more readily understood by the public."⁵

Title 24.2 provides for the administration of elections in the Commonwealth and implements the qualifications and disqualifications enunciated in the Constitution. The statutory provisions to which you refer address in some manner the disqualification at issue. Notably, prior to 1998, §§ 24.2-101, 24.2-404, 24.2-410, and 24.2-418 used the phrase "mentally incompetent."⁶ Effective January 1 and April 15, 1998, the General Assembly deleted the phrase in §§ 24.2-101, 24.2-404 and 24.2-

418, and added the term "incapacitated,"⁷ and added the latter term in § 24.2-410, while retaining the phrase "mentally incompetent."⁸

The constitutional history of the disqualification from voting for what now is phrased "mentally incompetent" reflects the current evolution of this phrase from the original phrase "unsound mind." The history demonstrates attempts by the framers of the Virginia Constitution to use varying terms of art to denote the requisite standard for the state of mind necessary for disqualification in accordance with the contemporary views of that standard. Although different terms have been used, all such terms are consistent with the overriding purpose of the constitutional provision, which is to ensure that the voting franchise is exercised only by persons capable of making a mature and responsible decision among candidates and issues.⁹

Similarly, the implementing statutes seek to identify the standard for disqualification in conformance with the constitutional provision. It is my opinion that the latest amendments to these statutes on this issue are an attempt by the General Assembly to clarify and modernize the constitutional standard but not to change the standard itself. Thus, the statutory amendments do not create a new or alternate standard; rather, such are examples of an exercise in semantics.¹⁰ In this regard, the use of the phrase "mentally incompetent" is interchangeable with the use of the word "incapacitated."¹¹ Therefore, I am of the opinion that the statutes in Title 24.2 at issue and Article II, § 1 are not in conflict.

Regarding your second and third inquiries, Title 37.1 relates to mental health generally and specifically defines the phrase "incapacitated person" in § 37.1-134.6 for purposes of adjudicating a person "‘mentally incompetent.’" Notably, the General Assembly enacted this definition at the same time it amended §§ 24.2-101, 24.2-404 and 24.2-418 to incorporate the term.¹² Section 37.1-134.6 states that "[a] finding that a person is incapacitated shall be construed as a finding that the person is ‘mentally incompetent’ as that term is used in Article II, Section 1 of the Constitution of Virginia and Title 24.2 unless the court order entered pursuant to this chapter^[13] specifically provides otherwise."

The Constitution makes clear that the decision whether an individual is "mentally incompetent" is "determined not by the [voting] registrar but through procedures established by, and based on standards of competency prescribed by, the General Assembly."¹⁴ Thus, it directs the General Assembly to establish such procedures "[a]s prescribed by law."¹⁵

Section 37.1-134.6 is among the statutes prescribed to implement this constitutional directive. Although this section contains seemingly mandatory language in that it provides that "[a] finding that a person is

incapacitated shall^{16]} be construed as a finding that the person is 'mentally incompetent'" under the Constitution and Title 24.2 (thus triggering the attendant prohibition from voting), this statute also permits a court to specifically order otherwise. The General Assembly does not require in clear and unambiguous language that a finding of "incapacitated" result in the prohibition from voting due to mental incompetence. When the General Assembly intends to enact a mandatory requirement, it, of course, knows how to express its intention.¹⁷ Under this definitional statute, a court possesses the discretion to determine on a case-by-case basis whether a finding of "incapacitated" is tantamount to a finding that the individual is "mentally incompetent." Thus, the General Assembly presently leaves it within the court's discretion to find that a person adjudged "incapacitated" under § 37.1-134.6 rises to the standard of mental incompetence necessary to deprive the person of his voting franchise. It is likewise certainly within the General Assembly's prerogative to amend this statute to eliminate the court's option to do so.

¹Section 37.1-134.6 states that the term "incapacitated person" "shall be construed as a finding that the person is 'mentally incompetent,'" unless the court order finding the individual an incapacitated person provides otherwise.

²1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 347 (1974).

³*Id.*

⁴*Id.*

⁵*Id.* at 348.

⁶See 1997 Va. Acts ch. 801, at 1973, 1997-99 (amending and reenacting §§ 24.2-101, 24.2-404, 24.2-418); 1998 Va. Acts ch. 582, at 1373, 1373 (amending and reenacting § 24.2-410).

⁷See ch. 801, *supra*, at 1997-99; *see id.* at 2036 (enacting effective date of act in clause 2).

⁸See ch. 582, *supra*, at 1373; *see id.* at 1376 (enacting effective date of act in clause 2).

⁹1972-1973 Op. Va. Att'y Gen. 261, 262.

¹⁰*Compare* 1975-1976 Op. Va. Att'y Gen. 323, 324 (noting that amendments substituting "city sheriffs" for "city sergeants" are semantic only and do not change power, duties or responsibilities previously imposed on city sergeants).

¹¹*Compare* 1993 Op. Va. Att'y Gen. 33, 44 n.1 (noting that, although Virginia Constitution refers only to voter's "precinct," terms "polling place" and "precinct" are interchangeable under state statutes).

¹²See 1997 Va. Acts ch. 921, at 2503, 2521 (adding § 37.1-134.6 defining "incapacitated person"); see *id.* at 2536 (enacting in clause 2, effective date of act as January 1, 1998).

¹³Va. Code Ann. tit. 37.1, ch. 4, §§ 37.1-134.6 to 37.1-134.22, 37.1-136 to 37.1-137.5, 37.1-139, 37.1-141, 37.1-143, 37.1-144, 37.1-146, 37.1-147 (Michie Repl. Vol. 1996 & Supp. 2001) ("Committees and Trustees").

¹⁴Howard, *supra* note 2, at 348.

¹⁵Va. Const. art. II, § 1.

¹⁶See 2000 Op. Va. Att'y Gen. 24, 25 (use of word "shall" in statute ordinarily implies that its provisions are mandatory); see *also* Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959).

¹⁷See 1998 Op. Va. Att'y Gen. 87, 88.

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