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SUPREME COURT NO. 97753-4

NO. 78258-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Guardianship of:

CASEY URSICH,

An Incapacitated Person.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Suzanne Parisien, Judge

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Casey Ursich asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner, an adult incapacitated person, seeks review of the Court of Appeals' published decision in In re Guardianship of Ursich, case no. 78258-4-I, filed August 26, 2019 ("Opinion" or "Op."), which is appended to this petition. Appendix A. The Court of Appeals denied Ursich's motion for reconsideration on September 20, 2019. Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Guardianship statutes and the constitution protect incapacitated persons' rights to liberty, autonomy and association. The guardianship court ordered Ms. Ursich to reside primarily with her father, rather than her mother, against her express wishes. As a matter of first impression—in this context—does an unstructured best-interests analysis without the benefit of a constitutionally mandated "substituted judgment" decision-making framework violate an incapacitated person's rights?

2. Did the Court of Appeals misconstrue, and therefore fail to meaningfully address, Ursich's procedural due process claim?

3. Did the court order placing Ursich primarily with her father against her wishes violate the original limited guardianship order and

subsequent order modifying the original order, which required the guardianship court to honor her preferences?

D. STATEMENT OF THE CASE

This is not a child custody case, although that is how the superior court and Court of Appeals have treated it. This case is about whether a young adult subject to a limited guardianship may live with the parent she chooses, where, according to a court-appointed guardian ad litem (GAL), her choice is not harmful to her.

Casey Ursich is now 21 years old. CP 1119. Her parents love her but do not get along with each other. CP 491, 768. Ursich needs help making complex decisions, but she has strong preferences about where and how she lives her life. CP 159. For example, Ursich attends school and retains the right to vote. CP 1119, 1037, 1095-96. Most pertinent to this appeal, Ursich wants to live primarily with her mother. She has been steadfast in this preference. CP 771-73, 1112, 1126.

A 2016 limited guardianship order (naming Ursich's mother as limited guardian) recognizes that Ursich has the right to decide who will provide her with care and assistance, as well as the right to make decisions regarding social aspects of her life. CP 23-36, 1092-1107. A 2017 order replaces Ursich's mother as limited guardian, naming her father as limited guardian. Although requiring Ursich to live primarily with her father—

against Ursich's wishes—the order makes it clear that Ursich retains the power to seek a different primary residence, provided that her preference is supported by input from her attorney, the guardian ad litem (GAL), and other knowledgeable individuals. CP 311-12.

Following the superior court's 2017 order, a GAL was appointed. A 2018 report by the GAL recommended that Ursich's preference—again, to live primarily with her mother—be honored. Such arrangement was consistent with Ursich's health and safety. CP 643-51 (public report of guardian ad litem); CP 1112-32 (sealed confidential report). Nonetheless, the guardianship court, disregarding Ursich's express wishes and the GAL's recommendation, entered an order maintaining Ursich's residence primarily with her father, the limited guardian, and not altering the residential schedule. CP 760-67.

Ursich, at that time still represented by an appointed attorney, moved for reconsideration regarding the residential schedule. CP 768-74. She argued, the guardianship court's decision requiring Ursich to live primarily with her father was contrary to law, and substantial justice had not been done. CR 59(a)(7), (9). The court had failed to consider the GAL's recommendation. CP 771-72. Moreover, the court violated its own 2017 order, which indicated that Ursich could pursue a change in living arrangement, if deemed appropriate by the GAL and others. CP

772; see CP 311-12. Finally, the court had failed to consider Ursich's express wishes, as required by statute and case law. RP 772-73 (citing, inter alia, RCW 11.92.195; In re Guardianship of Ingram, 102 Wn.2d 827, 689 P.2d 1363 (1984)).

The guardianship court denied Ursich's motion for reconsideration, explaining in part that it has increased the residential time with her mother as a way of honoring her preference. CP 835-36. The court was then obliged to enter a clarifying order, indicating that while the court maintained the same residential schedule, it had declined to increase Ursich's father's time. CP 1031-34.

That same order, however, removed the appointed attorney who had, for several years, represented Ursich's interests in the superior court proceedings. The order states an attorney may be reappointed if Ursich requests. CP 1033. Ursich, however, must channel any such request through her father, her limited guardian. CP 1033; see also CP 985-92 (Motion for Order Issuing Instructions to Appointed Attorney for Incapacitated Person and for Order of Indigency); CP 993-97 (declaration of Ursich's former superior court attorney James A. Jackson in support of motion).

Just before Ursich's former superior court attorney was removed from the case, Ursich appealed the 2018 order and denial of



reconsideration. CP 837-48. The Court of Appeals appointed undersigned counsel to represent Ursich on appeal only. On appeal, Ursich argued (1) the court order placing Ursich primarily with her father against her express wishes violated her right to autonomy, liberty, and freedom of association under the guardianship statutes and the constitution, (2) the trial court's inadequate deference to Ursich's express wishes (in the context of an inadequate decision-making framework) violated her procedural due process right to be heard, (3) the court order placing Ursich primarily with her father against her express wishes violated the original limited guardianship order and subsequent order modifying the original order, which required the court to honor her preferences, provided that they were consistent with input from certain individuals familiar with the case.

In an August 26, 2019 published opinion, Division One of the Court of Appeals rejected Ursich's appeal. In doing so, the Court failed to meaningfully address her constitutional claims. It then denied her motion to reconsider its decision.

This Court should grant review to address Ursich's constitutional claims, which are of substantial public interest, and it should reverse the Court of Appeals for the reasons that follow.

E. REASONS REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW OF THE COURT OF APPEALS' DECISION UNDER RAP 13.4(b)(3) AND (b)(4).

This Court should accept review under RAP 13.4(b)(3) and (4) because the Court of Appeals' opinion fails to meaningfully address significant constitutional questions raised by Ursich, which have profound effects on her life and the rights she retains as a person subject to limited guardianship. The issue appears to be one of first impression. And, correspondingly, this case involves questions of substantial public interest—the autonomy, liberty, and free association rights of a young adult subject to limited guardianship. This Court should grant review under RAP 13.4(b)(3) and (4) and reverse the Court of Appeals.

1. Review is warranted regarding application of substituted judgment analysis in the residential context.

Washington guardianship statutes and the constitution ostensibly protect adult incapacitated persons' right to liberty, autonomy and association. These rights, as case law from this Court suggests, require the guardianship court to apply a substituted judgment analysis in this specific context. Cf. Op. at 11 (“absent a statute mandating use of the substituted judgment standard for a circumstance as highly intrusive and irreversible as surgical removal of an organ, there does not seem to be a basis to depart from the best interests standard specified by RCW 11.88.120(1)(a)”). In

failing to apply the appropriate test, the Court of Appeals' published opinion also fails to recognize that Ursich's liberty, autonomy, and association rights are being violated and that she is not free to deviate from the residential schedule. This Court should grant review to clarify this important issue.

- a. **Washington statutes and the constitution protect incapacitated persons' right to liberty, autonomy, and association, requiring application of a substituted judgment analysis rather than an unstructured best-interests inquiry.**

The intent of the guardianship statutes is to protect the liberty and autonomy of incapacitated persons, and to enable such persons to exercise their rights under the law to the maximum extent possible, consistent with the capacity of each person. In re Guardianship of Beecher, 130 Wn. App. 66, 73, 121 P.3d 743 (2005) (quoting RCW 11.88.005). The goal of a guardianship is to do what the incapacitated person would do, if she were competent to make the decision in question. Raven v. Dep't of Soc. & Health Servs., 177 Wn.2d 804, 818, 306 P.3d 920 (2013) (citing Ingram, 102 Wn.2d 827).

"Washington's guardianship statutes are designed to comply with the requirements of due process." In re the Guardianship of Denny, noted at 195 Wn. App. 1022, 2016 WL 4081150 (2016), review denied, 187 Wn.2d 1022 (2017) (unpublished decision). An incapacitated person retains the right to autonomy to the maximum extent possible. A court may only restrict the

incapacitated person to the extent necessary to protect the person's health and safety. Several statutes confirm this guiding principle. For example, a guardianship court "shall impose, by order, only such specific limitations and restrictions on an incapacitated person . . . as the court finds necessary for such person's protection and assistance." RCW 11.88.010(2) (emphasis added). Moreover, the legislature's express intent with regard to guardianships is "to protect the liberty and autonomy" of all persons, including those with "incapacities" and unique needs. RCW 11.88.005. As such, the legislature has stated that persons' "liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety[.]" RCW 11.88.005 (emphasis added). Under RCW 11.92.195(1), moreover, the incapacitated person retains the right to associate with persons of her choosing:

[A]n incapacitated person retains the right to associate with persons of the incapacitated person's choosing. This right includes, but is not limited to, the right to freely communicate and interact with other persons, whether through in-person visits, telephone calls, electronic communication, personal mail, or other means.[ ]

Further, the legislature imposes related obligations on the guardian or limited guardian himself: Under RCW 11.92.043, "[i]t is the duty of the guardian or limited guardian of the person . . . [c]onsistent with the powers

granted by the court, to care for and maintain the incapacitated person in the setting least restrictive to the incapacitated person's freedom." As for the right to association, even if an incapacitated person is unable to make decisions regarding association with another person, a guardian of the incapacitated person must give substantial weight to the incapacitated person's preferences. RCW 11.92.195(1).

Guardians' duties are also the duties of the supervising court. Once appointed, a guardian is under the general direction and control of the appointing court. RCW 11.92.010. "The court having jurisdiction of a guardianship matter is said to be the superior guardian of the ward, while the person appointed guardian is deemed . . . an officer of the court." In re Guardianship of Lamb, 173 Wn.2d 173, 190, 265 P.3d 876 (2011) (quoting Seattle-First Nat'l Bank v. Brommers, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977)).

In addition to the guardianship statutes, the constitution also protects the liberty, autonomy, and freedom of association of incapacitated persons. These rights are implicated in Ursich's case. Under the umbrella of privacy rights, the United States Supreme Court recognizes autonomy as a fundamental right and thus accords it the utmost constitutional protection. This right involves issues related to marriage, procreation, family relationships, child rearing and education. Whalen v. Roe, 429 U.S. 589,

600 n. 26, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). Action that infringes on this right is strictly scrutinized. O'Hartigan v. State Dep't of Personnel, 118 Wn.2d 111, 117, 821 P.2d 44 (1991).

There are two types of freedom of association protected by the constitution, as well. These are the freedom of expressive association and the freedom of intimate association. City of Bremerton v. Widell, 146 Wn.2d 561, 575, 51 P.3d 733 (2002). The right of expressive association is an outgrowth of the First Amendment, and it assists in fostering freedom of speech, assembly, petition for redress of grievances, and the exercise of religion. Id. The right of intimate association, in contrast, is derived from liberty and privacy rights, and from due process concepts of the Fourteenth Amendment. Id. This latter right protects the right of persons to enter into and maintain certain intimate human relationships. Id. at 576. Specially, the right includes cohabitation with one's relatives. Id. (citing Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977)).

As argued in the Court of Appeals, the guardianship court's residential order in this case implicates both statutory rights and fundamental constitutional rights. Thus, as Ursich argued, more than a free-floating best interests test is constitutionally mandated. Although there is no identical case, this case is analytically like cases from this Court employing "substituted judgment" analysis where the statutory and constitutional rights

of an incapacitated person were at issue. But, as demonstrated by the Court of Appeals' refusal to apply the necessary test in this context, this Court should grant review to clarify that such a test is required.

In Ingram, 102 Wn.2d 827, for example, a guardian sought a court order forcing the incapacitated person, Ingram, to submit to a laryngectomy for life-saving cancer treatment. The incapacitated person preferred radiation treatment. Id. at 829-31. This Court noted the issue was one of first impression and sought to provide the decisionmaker, i.e., the court faced with such a petition, the appropriate factors to be considered. Id. at 835-38.

In determining what the incapacitated person would do, if competent, the supervising court must make a "substituted judgment" for her. The "goal is to do what the ward would do, if she were competent to make the decision." Id. at 838. "The goal is not to do what most people would do, or what the court believes is the wise thing to do, but rather what this particular individual would do if she were competent and understood all the circumstances, including her present and future competency." Id. at 839. "[T]he court should consider all relevant factors that would influence this person's decisions regarding medical treatment. . . . The court may also consider what most people would do in similar circumstances, but as noted above, this should not be regarded as controlling." Id. at 840. The incapacitated person's express wishes must be given substantial weight. Id.

In In re Schuoler, 106 Wn.2d 500, 723 P.2d 1103 (1986), this Court further refined its analysis. A person committed under chapter 71.05 RCW challenged the trial court's authorization of electroconvulsive therapy (ECT) under the involuntary commitment statutes. Relying on Ingram, the Supreme Court found the hearing conducted in the superior court violated statutory and substantive due process requirements. Schuoler, 106 Wn.2d 501-02. As this Court explained, the state can limit fundamental liberty interests by regulations only if such regulations are (1) justified by a compelling state interest, and (2) narrowly drawn. Id. at 508 (citing Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973)).

Most recently, in Raven, this Court was required to examine the incapacitated person's preference of living arrangement in the face of potential harm from the exercise of that preference. The Department of Social and Health Services made a finding of neglect against professional guardian, Raven, related to her guardianship of an incapacitated person named Ida. Raven, 177 Wn.2d at 809. Division Two of the Court of Appeals had determined Raven's failure to pursue placement in a residential setting rather than Ida's home, despite Ida's ongoing opposition to such placement, supported the finding of neglect. "In failing to aggressively pursue transitioning Ida from home care to residential care, Raven was not balancing Ida's wishes against her medical needs; rather,



she was allowing Ida's historical opposition to residential care to override her critical medical needs." Raven v. Dep't of Soc. & Health Servs., 167 Wn. App. 446, 467, 273 P.3d 1017 (2012), rev'd, 177 Wn.2d 804, 306 P.3d 920 (2013). This Court disagreed. Raven could not have "neglected" Ida by acting consistently with Ida's wishes, which were protected by statutes including RCW 11.92.090. "As the Ingram court stated, it does not matter whether the ward's choice might not be what most people would do or find prudent." Raven, 177 Wn.2d at 821.

Although Raven discusses choice of residence, these cases do each contain a medical component. This appears to be the Court of Appeals' rationale for disregarding their guidance. Op. at 11. But like the present case, these cases deal with potential deprivation of fundamental constitutional rights. To preserve those rights, trial courts must apply a test more rigorous than the unstructured and nebulous best-interests inquiry. Cf. In re Aschauer's Welfare, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980) ("the criteria for establishing the best interests of the child are not capable of specification").

And while an order directing an incapacitated person where she must reside is, arguably, not as intrusive as removal of one's vocal cords, the state's interest in protecting the incapacitated person is also much less

compelling.<sup>1</sup> Under the appropriate and constitutionally required test, the guardianship court's decisions in this case do not pass constitutional muster.

Moreover, consistent with these constitutional principles, the legislature has now explicitly required that guardians (and therefore supervising courts) apply a substituted judgment test beyond the medical context. Guardianship statutes set to take effect in 2021 appear to adopt the substituted judgment test outside the medical realm:

(4) In making a decision for an adult subject to guardianship, the guardian shall make the decision the guardian reasonably believes the adult would make if the adult were able unless doing so would unreasonably harm or endanger the welfare or personal or financial interests of the adult. To determine the decision the adult subject to guardianship would make if able, the guardian shall consider the adult's previous or current directions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable by the guardian.

Laws of 2019, ch. 437, § 313 (approved May 2019; effective Jan. 1, 2021).

As the Court of Appeals' opinion observes, a current statute, RCW 11.88.120(1)(a), mentions "best interests" not and "substituted judgment." Op. at 11. But as Ursich pointed out at oral argument in the Court of Appeals, the fact that this new statute does not take effect until 2021 does not undercut the argument that the *constitution* currently mandates application of the substituted judgment test in lieu of unguided best-

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<sup>1</sup> Cf. Op. at 11 (suggesting infringement is not as intrusive and therefore less process is warranted).

interests consideration. Wash. Court of Appeals Oral Argument, In re Guardianship of Ursich, No. 78258-4 (Jul. 31, 2019) (“Oral Argument”) at 6:00-7:06.<sup>2</sup>

Nor does the prospective explicit adoption of the test suggest the legislature would disapprove of the test in this context; logically, it suggests the opposite. Cf. Woods v. Bailet, 116 Wn. App. 658, 670, 67 P.3d 511 (2003) (a “remedial” change in a statute, one that relates to practice, procedures, or remedies and does not affect a substantive or vested right, may be applied retroactively).

The Court of Appeals opinion rejects the appropriate framework without reason. As such, this Court’s guidance on this matter is needed. This Court should grant review and hold that the constitution requires the guardianship court to apply a substituted judgment analysis in determining whether it may order Ursich—subject only to *limited* guardianship—to live somewhere against her wishes.

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[http://www.courts.wa.gov/appellate\\_trial\\_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20190731](http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20190731) (second case).

b. **The Court of Appeals’ lack of meaningful analysis related to the substituted judgment test appears to rely on the false premise that the court order does not constrain Ursich.**

The Court of Appeals’ opinion is also deficient in that it repeats a fallacy first propounded in the respondent guardian’s brief—that the 2018 order binds Ursich’s parents but not Ursich herself. Op. at 14. Significantly, the Court of Appeals appears to have relied on this fallacious argument in failing to meaningfully address Ursich’s claim that her constitutional rights require application of substituted judgment analysis. The opinion states

[The father / limited guardian] argues that the trial court did not infringe on [Ursich’s] rights because “the residential schedule outlined in the 2018 Order is carefully crafted to restrict not [Ursich], but her parents, by establishing a default schedule that [the parents] are to make best efforts to follow without improperly influencing [Ursich].” *The language of the residential provision, which specifically instructs [Ursich]’s parents in how to manage [her] housing but does not direct [Ursich] herself, supports this argument.*

Op. at 14 (emphasis added).

This premise is, as stated, faulty. The guardianship court’s 2017 order explicitly indicates that any alteration of the residential schedule sought by Ursich herself is subject to court approval. CP 311-12; see also CP 1097 (2016 guardianship agreement gives power to *guardian* to resolve disagreements regarding Ursich’s residence). As Ursich pointed out in her

reply brief, the trial court repeatedly rebuffed Ursich's attempts to assert her rights and alter the residential provision. The court also denied Ursich's own motion for reconsideration as to residential provisions. CP 768-74 (motion for reconsideration); CP 835-36 (order denying motion for reconsideration).

As stated above, the guardianship court was obliged to enter a clarifying order indicating that, while the court maintained the same residential schedule, it had declined to increase Ursich's father's time. CP 1031-34. That same order removes the attorney who had been representing Ursich's interests in the superior court proceedings. The order states an attorney may be reappointed if Ursich requests. CP 1033. Ursich, however, must channel any such request *through her father*. CP 1033. Ursich reminds this Court that her father is the opposing party.

As Ursich pointed out below, considering the contentious guardianship proceedings and the realities her life, any suggestion that the residential orders do not constrain her is either naïve or disingenuous. Reply Brief at 4. For example, as Ursich also pointed out in her reply brief, the guardian's brief suggested that a vulnerable adult protection order could be obtained against Ursich's wishes—without a hearing—if she did not abide by the residential provision. Brief of Respondent at 38, 38 n. 30; Reply Brief at 4-5. This not-so-veiled warning seems to indicate that the guardian does

not even accept the premise that she is not bound by the order. With this in mind, the Court of Appeals' decision to accept this idea is perplexing.

This Court should grant review to reject the faulty premise that the residential provision binds Ursich's parents, not her, and that therefore an appellate court can feel free to reject her constitutional claims. Op. at 14.

2. This Court should also grant review because the Court of Appeals' opinion misconstrues and fails to meaningfully address Ursich's meritorious procedural due process claim.

This Court should also grant review because the Court of Appeals' opinion misconstrues and fails to meaningfully address Ursich's meritorious procedural due process claim. The Court of Appeals disposes of Ursich's procedural due process claim by pointing out Ursich was able to file pleadings and appear in court. Op. at 14-15. In doing so, the Court of Appeals resolved a claim that was not raised, and ignored Ursich's argument that the court's failure to give appropriate weight to Ursich's preference—failure to apply the appropriate framework—violated her right to be heard.

As Ursich argued below, due process, at a minimum, requires notice and an opportunity to be heard. Soundgarden v. Eikenberry, 123 Wn.2d 750, 761, 871 P.2d 1050, cert. denied, 513 U.S. 1056 (1994). “Careful employment of a substituted judgment or similar analysis would ensure that the wishes of an incapacitated person implicating the right to autonomy and free association are given due consideration.” Brief of Appellant at 31.

As was discussed extensively at oral argument in the Court of Appeals,<sup>3</sup> moreover, this premise is made explicit in this Court's decision in Schuoler, 106 Wn.2d 500. Schuoler highlights, as follows, the necessity of an appropriate framework in the provision of procedural due process:

Schuoler challenges the absence of substantive criteria for the decision to administer [electroconvulsive therapy]. We agree that such a decision cannot be left to the unguided discretion of a judge. Youngberg v. Romeo, 457 U.S. 307, 321, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28 (1982). However, in our discussion above we decided that before a court orders [electroconvulsive therapy] it must consider and set forth findings on (1) the desires of the patient or a substituted judgment by the court, (2) the state's interest in the treatment, and (3) the necessity for and effectiveness of the treatment. *These requirements provide the necessary limits to the trial court's discretion.*

Schuoler, 106 Wn.2d at 511 (emphasis added). As Schuoler makes clear, the framework itself is necessary to protect the liberty interests at issue.

That was the process missing from this case, not ability to receive notice of hearings and to file pleadings. Op. at 15. Without the necessary decision-making framework to protect Ursich's constitutional rights to autonomy and association, those trappings are but sad simulacra of due process.

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<sup>3</sup> Oral Argument, supra, at 2:40-3:25.

This Court should grant review because the Court of Appeals' decision below misconstrues and fails to address Ursich's claim she was denied procedural due process.

3. The court order placing Ursich primarily with her father against her express wishes violated the original limited guardianship order and subsequent order modifying the original order.

Finally, the court order placing Ursich primarily with her father against her express wishes violated the original limited guardianship order and subsequent order modifying the original order, which required the court to honor her preferences, provided that they were consistent with input from certain individuals familiar with the case. In reviewing this case, this Court should also address this issue, which was briefed by the parties in the court below.

F. CONCLUSION

Review is appropriate under RAP 13.4(b)(3) and (4). This Court should accept review and reverse the Court of Appeals.

DATED this 9<sup>th</sup> day of October, 2019.

Respectfully submitted,

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# **APPENDIX A**

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

In the Matter of the Guardianship of:	)	No. 78258-4-1
	)	
CASEY LYNN URSICH, an	)	DIVISION ONE
incapacitated person,	)	
	)	PUBLISHED OPINION
Appellant,	)	
	)	
v.	)	
	)	
GREGORY L. URSICH,	)	
	)	
Respondent.	)	
<hr/>		FILED: August 26, 2019

HAZELRIGG-HERNANDEZ, J. — Casey Lynn Ursich seeks reversal of certain provisions of her guardianship order, arguing that the court applied the wrong legal standard in determining her residential schedule and that the provisions violate her statutory and constitutional rights. Because the court did not abuse its discretion in determining that the provisions were in Casey's best interests, we affirm.

FACTS

Casey L. Ursich is a 21-year-old incapacitated person. Her parents, Gregory L. Ursich and Kathy Lynn, divorced when she was very young. When Casey<sup>1</sup> was a minor, her residential time was split between her two parents' homes.

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<sup>1</sup> For clarity, the parties will be referred to by their first names. We intend no disrespect.

I. 2016 Agreed Guardianship Order

As Casey approached the age of majority, Kathy filed a petition seeking to be appointed limited guardian of Casey's person and full guardian of her estate. Gregory filed a counter-petition requesting that he fill those roles. In June 2016, before the conclusion of trial, the parties entered an agreed order appointing Kathy to the contested roles. The order indicated that Casey had the right to provide input on all issues, which shall be taken into consideration by her guardian to decide who should provide her with care and assistance, and to make decisions regarding social aspects of her life. The order also specified that Casey was to make all decisions about her education, with assistance from school staff and her parents.

Casey was expected to remain in high school until the age of 21, during which time she was to reside primarily with her mother, but her residence could be changed on Casey's initiative with the agreement of her guardian. The parties agreed that it was in Casey's best interests to have continued contact with her father, and the order recommended that Casey reside with Gregory for four days of every fourteen-day period. Each visit would take place only with Casey's explicit approval after private, in-person consultation with a therapist, and Kathy was directed to "support, assist, and encourage Casey to participate in additional visitation requests." Both parents were directed to encourage communication between Casey and the other parent, and to "avoid undermining the parenting efforts of the other parent in front of Casey." The order also provided a grievance mechanism.

II. 2017 Modification of Guardianship Order

About a year later, in May 2017, Gregory moved to modify the guardianship order and replace Kathy as guardian, alleging that Casey's physical, medical, educational, and emotional conditions had deteriorated dramatically since the entry of the guardianship order. He asserted that the residential plan in the order had not been followed and Casey had only had one overnight visit with him. Gregory presented evidence that Casey had not attended school since January 10, 2017, and Kathy had canceled and failed to reschedule a meeting with school officials to discuss a possible re-entry plan. Casey's health care records indicated that she had gained a significant amount of weight in a short period of time.

Kathy responded that Casey had needed wrist surgery in September 2016, and the necessary adjustments to her medications leading up to that procedure had precipitated a mental health crisis. She asserted that Casey had begun complaining about school and refusing to attend, and Kathy felt that the school was not able to meet Casey's emotional and medical needs. She stated that Casey was responsible for her limited contact with her father.

The court stated at a hearing on the motion that, after reviewing the submissions of all parties, it was "incredibly concerned about the state of affairs." Even considering Casey's resistance to attending school and medical difficulties, the court was clear that "taking [Casey] out of her regular schedule with her friends, with structure, with socialization, with education, was not—not a choice that is or was in her best interest." The court expressed concern about the unacceptable breakdown of communication between Casey's guardian and the school, which it

felt was not in Casey's best interest. The court was also concerned by the minimal contact between Casey and Gregory, which it felt was not contemplated by the agreed order.

The court found good cause to grant the motion to modify and appointed Gregory as guardian of Casey's estate and limited guardian of her person. The court found that "[i]mminent and ongoing serious harm to Casey" had occurred due to her removal from school, minimal contact with her father, lack of engagement in physical activities, and isolation from her friends and family. The court determined that these circumstances were not in her best interests and "[w]ithout changes, the guardianship and residential arrangements in effect prior to the entry of this order will create an ongoing likelihood of serious harm to Casey." The court also found that Kathy had substantially violated the guardianship order "in many ways," including failing to consult with Gregory on educational decisions, to comply with the grievance process, and to make reasonable efforts to accomplish residential time and visits between Casey and Gregory; which all parties had agreed were in Casey's best interest.

Although Casey expressed a wish to reside primarily with her mother, the court found that she was susceptible to undue influence. The record contained a declaration from Casey's attorney in which he noted that "[i]t has become quite clear to me that Casey wants whatever her mother wants." Because she had been in the sole custody of her mother and had little contact with her father for over a year, the court found that it could not reliably determine her uninfluenced interests and preferences at the time.

The order specified a residential schedule in which Casey would reside with Gregory for nine days, then with Kathy for five days. The order stated that Casey's primary residence with her father could be "changed on Casey's initiative, subject to the court's approval following the receipt of input from Casey's attorney, GAL, and information from school and the family therapist." The court appointed a guardian ad litem (GAL) to investigate the situation and report her findings to the court, and scheduled a review hearing for six months later.

### III. 2018 Order Confirming Modification

In early 2018, the GAL issued a report recommending that Gregory remain guardian of Casey's estate and that either a certified professional guardian be appointed as limited guardian of her person or that Gregory continue to fill that role. Based on Casey's expressed wishes, the report also recommended that Casey reside primarily with her mother. The GAL noted in the report that "[w]ith appropriate checks and balances in place, this Guardian ad Litem does not believe Casey's health or safety is compromised by living primarily with her mother." The GAL recommended that "the primary goal for Casey going forward is to provide all resources and opportunities to her to develop independence so that in 2–3 years she is able to move out of her parents' homes and live independently in a supported living environment." In response to this report, Gregory submitted a declaration asserting that Casey had returned to school, resumed her physical and social activities, and had not threatened to run away or leave the house while residing primarily with him.

The court held the review hearing in January 2018. Gregory argued that “[t]here would be no reason for a guardianship if we were simply following the express wishes of Casey,” and all parties seemed to agree that a guardianship was necessary. He argued that the residential provisions directed Gregory and Kathy to “support a default residential schedule and not to interfere with it,” but did not actually restrict Casey’s actions. He also requested that the residential schedule be modified so that Casey would spend ten days with him and four with Kathy. He cited Casey’s marked improvement in the previous six months in support of this request. Kathy acknowledged that Casey had improved, but argued that her improvement should not be attributed to her living situation because she was already on the path to improvement when the guardianship was modified.

The court issued an order confirming the modification of the guardianship order, which maintained Gregory as full guardian of her estate and limited guardian of her person. The court stated that under RCW 11.88.120(1) it had the authority to modify a guardianship for good reason and to grant relief “as it deems just and in the best interest of the incapacitated person.” The court found that it was in Casey’s best interests to spend time with each of her parents and did not disturb the five-day/nine-day residential split in favor of her father, finding that the schedule was also in her best interests. The order directed Gregory and Kathy to “manage housing for Casey” by transporting her to the other parent’s residence on specified days. The parents were ordered not to make any effort to reside with Casey outside the designated time without the agreement of the other parent, “prior to contacting Casey Ursich for any discussion of a proposed change, until further

order of this Court.” The court identified the most significant fact bearing on its decision as Casey’s significant improvement since the order granting the motion to modify the guardianship. The court also found that Gregory had acted in Casey’s best interests since he was appointed guardian.

Casey moved for reconsideration through her counsel, arguing that the court failed to consider the GAL’s report and Casey’s own expressed wishes. The court denied the motion, indicating in a written order that it “carefully considered the desire of Casey Lynn Ursich as well as the GAL report and recommendations when issuing its prior ruling. Based on Casey’s desires and GAL’s recommendation, the mother’s residential time was increased by one day.” Casey expressed confusion regarding this ruling in a subsequent motion because there was no increase in the number of days that she was to reside with her mother. The court stated that it had increased Casey’s time with her mother by “reject[ing] the residential schedule proposed by the Guardian and grant[ing] the Mother 5 days with Casey instead of the 4 day residential rotation urged by the Father.” Casey appealed.

#### DISCUSSION

Casey contends that the court erred in imposing a residential schedule under which she would reside primarily with her father, contrary to her stated wishes.

The superior court has the authority to appoint guardians for the persons and/or estates of incapacitated persons. RCW 11.88.010(1)<sup>2</sup>. A court may deem

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<sup>2</sup> Chapters 11.88 RCW and 11.92 RCW were repealed by Laws of 2019, chapter 437, but the repeal will not take effect until January 1, 2021.



a person incapacitated as to their person when it finds that they have “a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.” RCW 11.88.010(1)(a). Similarly, a court may deem a person incapacitated as to their estate when it finds that they are “at [a] significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.” RCW 11.88.010(1)(b). The court also has the authority to appoint limited guardians for the persons or estates of incapacitated persons if they are capable of managing some of their personal and financial affairs, but still require some protection and assistance. RCW 11.88.010(2). In this instance, the court shall impose “only such specific limitations and restriction on an incapacitated person to be placed under a limited guardianship as the court finds necessary for such person’s protection and assistance.” Id.

We review the superior court’s management of a guardian for abuse of discretion. In re Guardianship of Cornelius, 181 Wn. App. 513, 528, 326 P.3d 718 (2014). A trial court abuses its discretion only when no reasonable person would take the view adopted by the trial court. In re Guardianship of Johnson, 112 Wn. App. 384, 48 P.3d 1029 (2002). We accept unchallenged findings of fact as true for the purposes of appeal, while we review challenged findings of fact for substantial evidence. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). “Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding.” Id. We defer to the trial court on

determinations of “the persuasiveness of the evidence, witness credibility, and conflicting testimony.” In re Knight, 178 Wn. App. 929, 937, 317 P.3d 1068 (2014).

I. Substituted Judgment Versus Best Interests Analysis

Casey contends that the trial court erred in using a “best interests” analysis rather than a “substituted judgment” analysis to determine her primary residence. After a guardianship is established, the court may modify the guardianship or replace the guardian or limited guardian “as it deems just and in the best interest of the incapacitated person.” RCW 11.88.120(1)(a). The court is the superior guardian of the incapacitated person, while the person appointed guardian is considered an officer of the court and is under the court’s direction and control in that capacity. Cornelius, 181 Wn. App. at 523; RCW 11.92.010.

In support of her argument for a substituted judgment analysis, Casey analogizes this case to those involving medical treatment decisions for incompetent persons. Casey cites two Washington Supreme Court cases for the proposition that “the goal of a guardianship is to do what the incapacitated person would do, if she were competent to make the decision in question.” Matter of Guardianship of Ingram, 102 Wn.2d 827, 838, 689 P.2d 1363 (1984); Raven v. Dep’t of Soc. and Health Servs., 177 Wn.2d 804, 817, 306 P.3d 920 (2013). However, the factual distinctions of these cases from the current case do not demonstrate that the Supreme Court intended this test to apply in this context.

In Ingram, the court considered a guardian’s responsibilities in determining a course of medical treatment for an incapacitated person diagnosed with throat cancer. 102 Wn.2d at 832. The court first considered whether the appointed

guardian was required to seek court approval under former RCW 11.92.040(3) (1984), recodified as RCW 11.92.043(1)(f), before consenting to a proposed laryngectomy. Id. at 836. That statute required a guardian to act in the ward's best interests to provide timely, informed consent to necessary medical procedures, but specified certain procedures for which the guardian could not provide consent before petitioning the court. Id. at 836–37 (citing former RCW 11.92.040(3)). The court found that “[t]he apparent intent of the statutory exclusions to the guardian’s powers is to require court approval before the guardian may consent to highly intrusive, irreversible medical treatment.” Id. at 837. Once the guardian had petitioned the court for approval, the substituted judgment analysis applied to its substantive treatment decision. Id. at 838.

More recently, Raven considered whether a guardian was neglectful when she declined to place her ward in a nursing home facility based on a good-faith determination that the ward, when competent, had consistently refused to be placed in a nursing home. Raven, 177 Wn.2d at 809, 811. When discussing the guardian’s duties in determining a health care plan, the court looked to a statute specifically governing informed consent for patients who are not competent. Id. at 819. The statute specified that a person authorized to provide informed consent on behalf of an incapacitated person “must first determine in good faith that that patient, if competent, would consent to the proposed health care.” Id. (emphasis omitted) (citing RCW 7.70.065(1)(c)). The court noted that the statute’s “substitute judgment provision requires the guardian to determine what the ward would want if competent. If that determination cannot be made, then the guardian may act in

the ward's best interests." Id. at 821. Although Raven uses Ingram to illustrate the substitute judgment analysis, the informed consent statute is the controlling authority requiring the court to apply that standard.

Absent a statute mandating use of the substituted judgment standard for a circumstance as highly intrusive and irreversible as surgical removal of an organ, there does not seem to be a basis to depart from the best interests standard specified by RCW 11.88.120(1)(a). The court did not err in applying the best interests standard when considering the motion to modify the guardianship order.

## II. Statutory and Constitutional Rights

Casey challenges the following findings of fact and conclusions of law from the 2018 order:

E. It is in Casey Ursich's best interest to spend time with both her father and her mother and the residential schedule outlined below is in her best interests.

F. The Court specifically inquired and all parties agreed that Casey Ursich has improved significantly since the July 17, 2017 Order Granting Motion to Modify, Appointing Gregory Ursich as Guardian and Appointing Guardian ad Litem. This is the most significant fact bearing on the Court's decision and will guide any future decisions of this Court.

G. The Guardian, Gregory Ursich, has acted in Casey Ursich's best interest since the July 17, 2017 Order Granting Motion to Modify, Appointing Gregory Ursich as Guardian and Appointing Guardian ad Litem was entered.

She also assigns error to the section of the order detailing her parents' responsibilities regarding management of her housing.

Throughout this guardianship action, the parties have agreed on paper, if not always by their actions, that continued contact with both of her parents is in Casey's best interests. Kathy agreed at the hearing that Casey had shown

improvement since the modification of the guardianship. Casey does not provide any argument that Gregory did not act in her best interests from the time of the 2017 order modifying the guardianship to the 2018 order confirming the modification. Casey appears to be challenging whether the residential schedule in the order is in her best interests and whether the court appropriately relied on her improvement as the most significant fact bearing on its determination.

Casey argues that the residential schedule violated her statutory and constitutional rights to autonomy and association and that the court's failure to give appropriate weight to her preferences violated her right to procedural due process.

A. Right to Autonomy and Association

The Washington State Legislature has recognized that some people with incapacities require the help of a guardian to exercise their rights and provide for their basic needs. RCW 11.88.005. However, the legislature's intent in enacting statutes governing guardianships is to "protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person." Id. A guardianship should restrict an incapacitated person's liberty and autonomy "only to the minimum extent necessary to adequately provide for their own health or safety." Id.

An incapacitated person retains the right to associate with persons of their choosing. RCW 11.92.195(1). This right includes the right to freely communicate and interact with other persons via in-person visits, or telephonic or electronic means. Id. "A guardian or limited guardian may not restrict an incapacitated

person's right to communicate, visit, interact, or otherwise associate with persons of the incapacitated person's choosing," unless the court authorizes such a restriction, a protection order forbids the contact, or the guardian has good cause to believe the contact would cause harm to their ward. RCW 11.92.195(2).

A guardianship by its nature entails some limitation on an incapacitated person's liberty and autonomy for their own protection and assistance. An incapacitated person's expressed wishes and best interests are not necessarily the same. Johnson, 112 Wn. App. at 389. The trial court found that Casey had suffered actual harm when residing primarily with her mother. This finding was supported by substantial evidence showing the she had stopped attending school and participating in her usual physical activities, become isolated from her friends and family, and expressed suicidal ideation. The court also found that Casey's condition had improved in the time she was residing primarily with her father. This finding was supported by substantial evidence and agreed to by both of her parents.

Casey argues that the GAL's determination that Casey would not be harmed by residing primarily with her mother shows that the court abused its discretion. However, the court is not bound by the recommendations of a GAL. Fernando v. Nieswandt, 87 Wn. App. 103, 107, 940 P.2d 1380 (1997). A reasonable person could disagree with the GAL's conclusion that Casey would likely not be harmed by residing primarily with her mother, and find that this living situation would not be in Casey's best interests.

Gregory argues that the trial court did not infringe on Casey's rights because "the residential schedule outlined in the 2018 Order is carefully crafted to restrict not Casey, but her parents, by establishing a default schedule that Gregory and Kathy are to make best efforts to follow without improperly influencing Casey." The language of the residential provision, which specifically instructs Casey's parents in how to manage Casey's housing but does not direct Casey herself, supports this argument. The 2018 order also provides that all of Casey's "authorities, duties, rights, and obligations" enumerated in the 2016 agreed order, the 2017 order modifying the guardianship, and another order clarifying the 2017 order remain unchanged to the extent that they are not inconsistent with the 2018 order. Therefore, the provision of the 2017 order establishing a procedure for Casey to change her housing arrangement remains in effect.

The trial court did not abuse its discretion in finding that the residential schedule in which Casey would reside primarily with her father was in her best interests and restricted her rights only to the extent necessary to protect her health and safety.

#### B. Procedural Due Process

Casey argues that the court violated her constitutional right to procedural due process because it failed to give appropriate weight to her expressed preferences. We review constitutional challenges de novo. City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). No state shall deprive a person of life, liberty, or property without, at a minimum, notice and an opportunity to be heard. Cornelius, 181 Wn. App. at 530 (citing Amunrud v. Bd. of Appeals, 158

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Wn.2d 208, 216, 143 P.3d 571 (2006); Soundgarden v. Eikenberry, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994)). Notice to the party must be reasonably calculated to inform the party of the pending action and of the opportunity to object. State v. Dolson, 138 Wn.2d 773, 777, 982 P.2d 100 (1999). The party's opportunity to be heard must be meaningful in time and manner. Cornelius, 181 Wn. App. at 530.

Assuming that Casey has a liberty interest in determining her residence, her procedural due process rights were not violated. She appears to have received notice of all pleadings filed and hearings scheduled through her own independent counsel. She filed a number of responsive pleadings during the pendency of the motion to modify the guardianship expressing her preferences and objections, and the court indicated that it had reviewed these documents. Casey does not appear to argue that she was denied appropriate notice and opportunity to be heard. She does not provide any authority suggesting that the court's failure to decide the issue in accordance with her wishes constituted a denial of due process. This claim has no merit.

### III. Motion for Reconsideration

Casey assigns error to the court's denial of her motion for reconsideration of the 2018 order confirming the guardianship modification. She contends that the court's inaccurate comment that it had increased Casey's residential time with Kathy shows that the court abused its discretion in imposing the residential schedule in the 2018 order. Casey provides no further argument that the court erred in denying the motion for reconsideration. "Passing treatment of an issue or

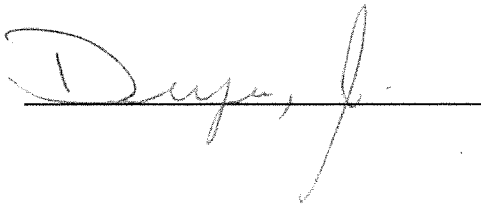
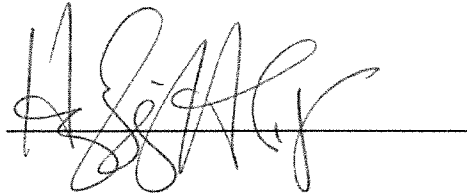


lack of reasoned argument is insufficient to merit judicial consideration." Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (citing State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)); RAP 10.3(a)(6). We decline to review the denial of the motion for reconsideration on any separate grounds.

Although the court's comment that it had increased Casey's time with Kathy by not decreasing it was perhaps unartfully phrased, it appears the court intended to demonstrate that it had considered the input of Casey, Kathy, and the GAL, and not simply taken Gregory's assertions at face value. This statement does not indicate that the court's decision was manifestly unreasonable. The court did not err in denying the motion for reconsideration.

Affirmed.

WE CONCUR:



# **APPENDIX B**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

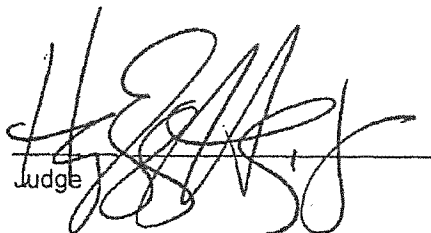
In the Matter of the Guardianship of:	)	No. 78258-4-1
	)	
CASEY LYNN URSICH, an incapacitated	)	DIVISION ONE
person,	)	
	)	ORDER DENYING MOTION
Appellant,	)	FOR RECONSIDERATION
	)	
v.	)	
	)	
GREGORY L. URSICH,	)	
	)	
Respondent.	)	

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The appellant, Casey L. Ursich, filed a motion for reconsideration for the opinion filed on July 26, 2019. A majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

  
Judge

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**October 09, 2019 - 1:27 PM**

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