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NO. 71917-3-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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IN RE THE MARRIAGE OF:

GEORGE LANE,

RESPONDENT,

and

SHARON LANE,

APPELLANT

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APPEAL FROM KING COUNTY SUPERIOR COURT  
CAUSE NO. 13-3-08461-2 SEA

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

A Litigation Guardian ad Litem (LGAL) does not have the authority to divest an incapacitated person of substantial rights without that person's express consent. This is true regardless of whether the court has formally entered a finding of incapacity. Here, however, Sharon Lane's LGAL waived her right to a trial on the merits, despite Ms. Lane's staunch opposition to settlement. In doing so, the LGAL deprived Ms. Lane of the process that was due to her as a litigant in a dissolution proceeding.

Ms. Lane does not seek to deprive Mr. Lane of his due process rights. Rather, all Ms. Lane asks is that she be provided with the same right given to all divorcing spouses: an opportunity to present her side of the story to the trier of fact. Because she was deprived of that right, Ms. Lane respectfully asks that this Court reverse the decision of the trial court and remand for further proceedings.

## II. ARGUMENT

### A. An LGAL may not waive an incapacitated person's substantial rights without their consent.

Respondent<sup>1</sup> asserts that because Ms. Lane was adjudged to be incapacitated, the LGAL had complete authority to act on her behalf, and

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<sup>1</sup> "Respondent" as used in this brief refers solely to George Lane. Jennifer Gilliam has been discharged and is no longer a party to this proceeding. CP 614.

that this authority includes the ability to waive Ms. Lane's right to a trial on the merits.<sup>2</sup> This is incorrect.

A judicial finding of incompetency does not deprive an incapacitated person of any substantial rights. *Cf. Matter of Guardianship of Ingram*, 102 Wn.2d 827, 836, 689 P.2d 1363 (1984). An LGAL must seek the express authority of their ward in order to waive any substantial rights, regardless of the ward's level of incapacity. *Quesnell v. State*, 83 Wn.2d 224, 238-39, 517 P.2d 568 (1973); *In re Welfare of H.Q.*, 182 Wn. App. 541, 554, 330 P.3d 195 (2014); *In re Houts*, 7 Wn. App. 476, 482, 499 P.2d 1276 (1972). This is so "[e]ven if the appointment [of an LGAL] is one made after hearing and determination of incompetency." *Quesnell*, 83 Wn.2d at 238; *Houts*, 7 Wn. App. at 482.

In addition to the authority cited in her opening brief, Appellant directs this Court's attention to *In re Christina B.*, 19 Cal. App. 4th 1441, 23 Cal. Rptr. 2d 918 (Cal. App. 4d 1993). In that case, the San Diego County Department of Social Services initiated a child dependency action against Agatha B. after receiving multiple reports of abuse in the home. *In re Christina B.*, 19 Cal. App. 4th at 1445. After Agatha's attorney

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<sup>2</sup> Respondent also spends a great deal of his brief emphasizing that Ms. Lane was represented by an attorney, Landon Gibson, throughout the proceedings, and that Mr. Gibson did precisely what he felt was necessary. However, Respondent omits one very important fact: Mr. Gibson did not sign the CR 2A agreement. CP 256-57. That agreement was entered into by the LGAL alone. Mr. Gibson's representation is irrelevant to this appeal, and should not be considered by this Court.

requested the appointment of a GAL, the trial court conducted a hearing to determine if she lacked the capacity to understand the proceedings or was unable to assist in the preparation of her case. *Id.* at 1446. Agatha testified at the hearing, maintaining that she was sane while simultaneously alleging a vast conspiracy against her. *Id.* at 1446-47. As a result of the hearing, the court found that Agatha was unable to assist her attorney and appointed a GAL for purposes of the dependency proceeding. *Id.* at 1448. Later, “at the May 3, 1993, jurisdictional hearing, the guardian ad litem, over Agatha’s objection, waived her trial rights and submitted the matter on the social worker’s reports.” *Id.* at 1449. Based on the reports, the trial court declared Agatha’s children to be dependents and removed them from her custody. *Id.*

In reversing the decision of the trial court, the California Court of Appeals stated that although a GAL “has the right to control the litigation on behalf of the incompetent person[,]” “the guardian may not compromise fundamental rights, including the right to trial, without some countervailing and significant benefit.” *Id.* at 1453-54. The Court specifically noted that “while the juvenile court properly found Agatha was unable to assist counsel in preparing her case, the record fails to show she was incapable of expressing her wishes and exercising the judgment necessary to determine whether to waiver her trial rights.” *Id.* at 1454. The

Court held, therefore, that “[i]t was her prerogative to decline to waive her rights and it was not within the province of her guardian ad litem, her attorney, or the court to force the waiver upon her.” *Id.*

The facts in this case are nearly identical to the facts in *In re Christina B.* Like Agatha, Ms. Lane was appointed an LGAL to control the litigation after the trial court determined that “Ms. Lane is not competent to understand the significance of these legal proceedings and the effects of these legal proceedings on her best interests.”<sup>3</sup> CP 243-44. Also like Agatha, Ms. Lane strongly objected to the LGAL’s waiver of her right to a trial. There is no serious dispute in this case that Ms. Lane is capable of expressing her wishes—Ms. Lane has always been clear that she did not wish to accept a settlement with Mr. Lane. This Court should follow the decision of *In re Christina B.* and the authority cited in Appellant’s opening brief, and hold that the trial court’s limited finding of incapacity did not authorize the LGAL to waive Ms. Lane’s substantial rights without her consent.

**B. Ms. Lane has a due process right to a hearing on the merits.**

Ms. Lane, like all Washington residents, has a due process right to a hearing on the merits before the court may deprive her of her property.

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<sup>3</sup> Notably, this determination was made pursuant to RCW 4.08.060, rather than RCW 11.88.010, and thus does not encompass a finding of total incapacity.

“Due process of law as provided by the fourteenth amendment to the United States Constitution and article 1, section 3 of the Washington State Constitution requires adequate notice and an opportunity to be heard prior to deprivation of a significant property interest.”<sup>4</sup> *Staley v. Staley*, 15 Wn. App. 254, 256-57, 548 P.2d 1097 (1976). “This is true in divorce actions just as it is in other types of cases.” *Kelly v. Kilts*, 243 P.3d 947, 952 (Wyo. 2010) (citing *Loghry v. Loghry*, 920 P.2d 664, 667 (Wyo. 1996)); accord *Staley*, 15 Wn. App. 256-57. Here, Ms. Lane was deprived of her property interests without **any** opportunity to be heard; the LGAL and the trial court dispossessed her of that opportunity. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), has no application where there has been a complete deprivation of process. This Court would be hard-pressed to find any case that applies the *Mathews* balancing test where a party’s representative has settled a case without the party’s consent.

Should this Court wish to apply the *Mathews* balancing test, it should still hold that Ms. Lane has a due process right to a trial on the merits. The *Mathews* test requires the Court to weigh the following three

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<sup>4</sup> The Fourteenth Amendment of the United States Constitution states that no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV. Similarly, the Washington Constitution provides that “No person shall be deprived of life, liberty, or property, without due process of law.” Const. art. 1, § 3.

factors: (1) “the private interest that will be affected”, (2) “the risk of an erroneous deprivation ... and the probable value, if any, of additional or substitute procedural safeguards”, and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” 424 U.S. at 335.

The private interest that was affected here was Ms. Lane’s interest in the property that was dispersed in the CR 2A agreement.<sup>5</sup> “A constitutionally protected property interest exists when a plaintiff demonstrates that he or she possesses a ‘legitimate claim of entitlement’ under the law.” *Durland v. San Juan Cnty.*, \_\_\_ Wn.2d \_\_\_, 340 P.3d 191 (2014). Prior to entry of a final order, Ms. Lane had an equal, undivided interest in all property acquired during her marriage. RCW 26.16.030; *Olver v. Fowler*, 161 Wn.2d 655, 671, 168 P.3d 348 (2007). This is precisely the type of interest that due process is designed to protect.

The second consideration of the *Mathews* test is the risk of erroneous deprivation. Respondent states, without any authority whatsoever, that the Court must consider the probable evidence to be

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<sup>5</sup> Respondent incorrectly characterizes the interest at stake as a liberty interest. Ms. Lane’s liberty interests were only affected to the extent that her contact with J.L. was limited. The primary focus of the CR 2A agreement was the distribution of property, and it is this distribution that most strongly provides the basis for Ms. Lane’s objections to settlement. The interest at stake is thus properly characterized as a property interest.

introduced when assessing the risk of an erroneous deprivation of property. This is a complete misstatement of the law. The *Mathews* test is designed to test the sufficiency of the **procedures** employed by the court, not the sufficiency of the evidence. See *Blaufuss v. Ball*, 305 P.3d 281, 287 (Alaska 2013) (“[T]he purpose of the three-part due process analysis is to determine the sufficiency of the procedures provided when there is a deprivation of a protected interest.”). This test precludes, rather than requires, the Court from considering the evidence in determining a party’s due process rights. “Procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.” *Mathews*, 424 U.S. at 344. It is thus the type of case, not the evidence, that matters to the due process determination.<sup>6</sup> The type of case here is a marriage dissolution, and it is through that lens that the Court must assess the procedures utilized.

The procedure employed in this case was that the trial court entered orders based on an agreement between Mr. Lane and the LGAL,

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<sup>6</sup> Respondent also asserts that Ms. Lane’s “credibility and testimony is worthless” because of her “severe mental health issues” and, therefore, she is not entitled to a trial on the merits. Should this Court accept Respondent’s contention, it would create a serious equal protection problem: the mentally disabled are not entitled to fewer due process protections by virtue of their illnesses.

Furthermore, Respondent has no basis for asserting that Ms. Lane lacks credibility, other than mere opinion. The trial court did not make any findings on the credibility of either party. It is not within the province of this Court to make such a finding in the trial court’s stead. *Morse v. Antonellis*, 149 Wn.2d 572, 575, 70 P.3d 125 (2003). Thus, all of Respondent’s arguments that are based on Ms. Lane’s supposed credibility issues should be rejected.

without giving Ms. Lane the opportunity to be heard. By statute, all property, both community and separate, is to be divided in a just and equitable manner after the court “consider[s] all relevant factors.” RCW 26.09.080. Here, however, the trial court did not consider any factors, but instead simply accepted the CR 2A agreement entered by Mr. Lane and the LGAL. Further, there are no post-decision procedures for review of the distribution of assets—the dissolution decree is designed to fully and finally resolve the property distribution between the parties. *Little v. Little*, 96 Wn.2d 183, 194, 634 P.2d 498 (1981). Ms. Lane has no recourse other than to have the judgment overturned in its entirety. With no opportunity to present her version of the facts for the trial court’s consideration and no opportunity for modification of the property distribution, the risk of Ms. Lane being erroneously deprived of her property is high.

The third factor the Court considers under the *Mathews* test is the interests of the government. When assessing the government’s interest, it is not enough to say that there are financial costs associated with a proceeding; all procedures have some sort of financial cost attached. Rather, the Court must examine the “costs and administrative burdens of **additional** procedures.” *In re Det. of Morgan*, 180 Wn.2d 312, 328, 330 P.3d 774 (2014). A trial on the merits of a marriage dissolution is not an **additional** procedure. Dissolutions are adjudicated on the merits all the

time. What Ms. Lane seeks is simply the same procedure that is afforded to all residents of this state. Were this Court to hold that there is no such thing as a right to adjudicate a marriage dissolution on the merits, it would upend decades worth of law and common practice.

The balance of the three *Mathews* factors indicates that Ms. Lane has a procedural due process right to adjudicate her dissolution on the merits. Ms. Lane had a substantial property interest in her separate property and the community property deriving from the marriage. The trial court made no decision as to what would be just and equitable, thus increasing the risk of erroneous deprivation. Finally, Ms. Lane is not asking for an extraordinary or additional procedure, but rather to be afforded the same right given to all persons in this State. Like all spouses, Ms. Lane had a procedural due process right to have her dissolution adjudicated on the merits.

**C. Mr. Lane does not have a due process right to the enforcement of the CR 2A agreement.**

Respondent further contends that Ms. Lane cannot be granted a trial on the merits because doing so would negatively affect his procedural due process rights. Although Mr. Lane may understandably wish to resolve his marriage dissolution without a trial, he does not possess a due process to do so. There is no such thing as a right to a particular method of

resolution of a claim.<sup>7</sup> *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983) (“Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.”). The trial court had the authority to reject the purported settlement agreement, negating Respondent’s claim to due process in settlement. *Bernier v. Bernier*, 44 Wn.2d 447, 450, 267 P.2d 1066 (1954). Furthermore, settlement agreements, even those entered pursuant to CR 2A, are considered contracts, not a process provided by the State. *Trotzer v. Vig*, 149 Wn. App. 594, 605, 203 P.3d 1056 (2009). Contrary to his assertions, Respondent will not be deprived of due process if Ms. Lane is afforded a trial on the merits.

Washington courts have long recognized that distribution of marital property requires procedural due process protections for **both** spouses. *Staley*, 15 Wn. App. at 257. As such, the trial court is not permitted, in the absence of default, to make a division of property when

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<sup>7</sup> That a trial on the merits would be expensive does not, by itself, implicate Mr. Lane’s due process rights. See *Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1086 (10th Cir. 2006) (“Robbins’ ‘right,’ pursuant to the Settlement Agreement, not to follow through with the pending administrative appeals is thus not the kind of right to which a property interest may attach, **regardless of the expense that these proceedings may entail**, and regardless of the consequences of a negative outcome.”) (emphasis added).

only one spouse has had the opportunity to present their version of the facts. *See e.g. Aleem v. Aleem*, 947 A.2d 489, 501 (Md. 2008) (no comity for Pakistani divorce decree with property division, where Pakistani law permitted husband, but not wife, to litigate dissolution); *Ex parte Montgomery*, 79 So. 3d 660, 670 (Ala. Civ. App. 2011) (QDRO invalid where husband had not been afforded the opportunity to respond to wife's request for implementation of order). Thus, it is irrelevant that Mr. Lane has received all the process due to him, when Ms. Lane has not. The trial court cannot accept Mr. Lane's proposed property division without first hearing from Ms. Lane.

Due process is afforded to both parties in a marriage dissolution, not just one. Affording Ms. Lane her right to due process does not deprive of Mr. Lane of those same rights.

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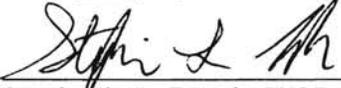
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### III. CONCLUSION

All spouses have a right to a trial on the merits of their marriage dissolution, whether they are incapacitated or not. However, Ms. Lane was deprived of that right by the unauthorized actions of her LGAL, and the subsequent ratification of those actions by the trial court. This Court should reverse the trial court's entry of the April 18 orders and remand this case for a trial on its merits.

DATED this the 28<sup>th</sup> day of January, 2015.

  
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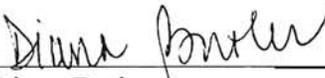
**CERTIFICATE OF SERVICE**

I certify that I caused one copy of the foregoing Reply Brief of Appellant to be served on the following parties of record and/or interested parties as indicated below, delivery to the same to the below named attorneys as follows:

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