GENDER AND JUSTICE COMMISSION

FRIDAY, MARCH 4, 2022 (9:30 AM – NOON)
JUSTICE SHERYL GORDON MCCLOUD, CO-CHAIR
JUDGE MARILYN PAJA, CO-CHAIR
ZOOM: HTTPS://WACOURTS.ZOOM.US/J/96303761251
PHONE: 253-215-8782 US (TACOMA)
MEETING ID: 961 8818 4011; PASSCODE: 1112

Agenda

9:30 AM – 10:15 AM **WELCOME AND INITIAL BUSINESS**

- **Welcome and Introductions** — Justice Sheryl Gordon McCloud, Co-Chair
  - Roundtable introductions of members and guests
- **Approval of November 19th Meeting Minutes**
- **Commission Updates** — Kelley Amburgey-Richardson
  - Staffing
  - Membership

10:15 AM – 10:45 AM **COMMITTEE AND PROJECT UPDATES**

- **Education Committee** — Judge Rebecca Glasgow, Co-Chair
  - Upcoming programs
- **GJ Study Implementation Committee** — Barbara Serrano, Chair
- **Legislative Updates** — Justice Sheryl Gordon McCloud, Kelley Amburgey-Richardson
  - 2022 Session
  - Formation of a legislative committee

10:45 AM – 11:00 AM **STRETCH BREAK**

11:00 AM – 11:50 AM **DISCUSSION ITEMS**

- **Kitsap County Girls Court – Toolkit Development** — Dr. Arina Gertseva
  - Commission input
- **Proposal to Amend Code of Judicial Conduct** — Commissioner Jonathon Lack
  - Gender Identity and Expression

11:50 AM – 12:00 PM **ADJOURMENT**

- **Next Steps and Adjournment** — Justice Sheryl Gordon McCloud, Judge Marilyn Paja, Co-Chairs

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APPENDIX

- HB 1320 Stakeholder Work Group progress report
- Applications for membership
- Court Rules posted for comment (informational memo)
- 2022 Gender and Justice Commission Meeting Dates

NEXT MEETING – May 27, 2022

WASHINGTON COURTS	**Gender and Justice Commission** **Friday, November 19, 2021** **9:30 AM – 12:00 PM** **Zoom Videoconference**	GENDER AND JUSTICE COMMISSION GENDER EQUALITY IN THE JUSTICE SYSTEM

MEETING NOTES

Members & Liaisons Present

Justice Sheryl Gordon McCloud (Co-Chair)
Judge Marilyn Paja (Co-Chair)
Dua Abudiab
Honorable Melissa Beaton
Judge Anita-Crawford-Willis
Judge Michelle Demmert
Laura Edmonston (Embedded Law Librarian)
Judge Rebecca Glasgow
Professor Gail Hammer
Commissioner Jonathon Lack
Erin Moody
Riddhi Mukhopadhyay
Dr. Dana Raigrodski
Jennifer Ritchie
Barbara Serrano
Olivia Shangrow (SU)
Judge Jackie Shea-Brown
Vicky Vreeland

Members & Liaisons Absent

Roberta Blood (UW)
Kelly Harris
Lillian Hawkins
Elizabeth Hendren
Lauren Jaech (UW)
Casey Kinross (GU)
Ivy-Rose Kramer (L&C)
Sal Mungia (ATJ Board)
Sloan Nickel (GU)
Chief Judge Cindy Smith

Guests

Professor Lynn Daggett
Dr. Lisette Garcia, WSCCR
Dr. Carl McCurley, WSCCR
Judge Averil Rothrock
Rhea Yo

Staff

Kelley Amburgey-Richardson
Cynthia Delostrinos
Laura Jones
Moriah Freed
Sierra Rotakhina

WELCOME AND INITIAL BUSINESS

Welcome and Introductions
The meeting was called to order at 9:33 AM.
Judge Marilyn Paja welcomed Commission members, staff, and guests.

September 10th Meeting Minutes
The meeting minutes were approved as presented.

Announcements

- Commissioner Laird has agreed to co-chair the Gender and Justice Commission Education Committee.
- Kelley Amburgey-Richardson has been promoted to manager of the Supreme Court Commissions. She will remain involved in selecting the next staff to the Gender and Justice Commission.

HB 1320 STAKEHOLDER GROUPS

Project Overview – Judge Jackie Shea Brown and Erin Moody, Project Co-Leads

- E2SHB 1320 was passed last session to reform all protection order types in Washington. The bill named the Gender and Justice Commission to convene workgroups that answered specific questions stemming from the bill and report back on where there is or is not consensus on recommendations from the stakeholders. The recommendations will not come on behalf of the Commission, but from the workgroups that represent a broad range of perspectives and stakeholders.
- A summary of the draft recommendations is included in the meeting packet beginning on page 7.
- The first deliverable, a report to the legislature, is due on December 1, 2021. Only the litigant rights and research and information sharing groups will participate in that report. All 3 groups will participate in an additional report due to the courts in the spring.
- The stakeholders were organized into 3 groups by subject area that include over 100 individuals:
    - Litigant rights and access
    - Research and information sharing
    - Technology
- Laura Jones, project coordinator, began organizing the groups and project in June after E2SHB 1320 was passed. All of the groups have been meeting on a regular basis since the summer.
- In the materials today are the recommendations from two of the groups. The research group is submitting a report on the issue of making visible protection orders that are entered by tribal, federal, etc., by Washington State judicial officers and courts.

Litigant Rights and Access Workgroup – Judge Averil Rothrock and Riddhi Mukhopadhyay

The Litigant Rights and Access workgroup was directed to report on three issues for the December deliverable:

- Jurisdictional divisions
- Recommendations for protection orders involving minor litigants
- How the protection order law can be amended to better address coercive control

Judge Averil Rothrock discussed the recommendations covering jurisdictional divisions and protection orders involving minor litigants:

- The group did not end up with a consensus for major revisions regarding jurisdictional divisions. There were not overwhelming requests for changes, nor strong thoughts on transfers. One universal message was that access is key.
- Municipal court jurisdiction – municipal courts were not included in a prior amendment about hearing protection order cases. The group recommends the legislature look into this.
- It was suggested the legislature take time to gather more data about allocation of resources.
- There was not much consensus on recommended changes regarding youth litigants. The group ended up with privacy recommendations that were supported by stakeholders, such as using youth initials in proceedings, and extending sealing beyond ERPOs for youth.
    - Sanctions are still under debate. Science is showing that youth brain development are different than adults – unclear on what sanctions should be.

Riddhi Mukhopadhyay summarized the coercive control related recommendations:

- The section received high stakeholder involvement. The Washington State Women's Commission (WSWC) conducted listening sessions around the state, and workgroup participants attended a conference on the subject to report back.
- There was consensus across the board that coercive control is part of domestic violence, but there was not consensus on a definition as part of E2SHB 1320. There was concern that including coercive control in the definition would give abusers another tool to engage in abusive litigation tactics and further control victims. There was also concern around the criminalization of coercive control and having the definition applied to the criminal statute. This distinction between civil and criminal was made clear in the report. The majority opinion was that coercive control needed to be added to the definition.
    - A protection order cannot be issued unless certain criteria in the domestic violence definition are met, which is why encompassing coercive control in the definition is needed.

    - The group discussed having more objective standards of the understanding of coercive control in addressing the concern of use by abusers or perpetrators.
    - A few other states have codified the definition of coercive control in various ways.
- The group recommends that the state allocate funding to train judicial officers on coercive control. This was raised by a lot of stakeholders.

Research and Information Sharing Workgroup

Judge Michelle Demmert discussed the Research and Information Sharing workgroup recommendations.

- The group was tasked to develop best practices to address the issue of making visible protection orders that are entered by tribal courts, federal courts, etc., to Washington State courts. Additionally, they are exploring how tribal courts can enter their protection orders into JIS or other databases to prevent conflicting orders, and how Washington can use NCIC to check other protection orders.
- A statewide survey was distributed to collect information, interviews with other states were conducted, and the group conferred with the Department of Justice Tribal Access Programs.
- One issue that has been identified is that in order to determine best practices, the best information available is needed to determine conflicting protection orders.
- The Administrative Office of the Courts (AOC) provided the group with several scenarios for information sharing. Two of the proposals are as follows:
    - Have AOC develop a new application user interface so that tribal courts can enter protection orders directly into the Washington state database. This could begin as a pilot.
    - Have Washington state courts obtain access to NCIC. The pilot project would involve volunteer courts to have access to the database.
- In the short term, courts could update petition forms to explicitly ask about protection order proceedings in other courts.
    - Have judicial officers ask on the record of tribal affiliation or other court protection orders.
- Civil rule 82.5 – amended a year ago. Specifically mentions superior courts, but not CLJs. Further amendments could be possible to be inclusive of all courts.
- The group has also looked at what Arizona, Oregon and California are doing for information sharing.

Discussion and Commission Feedback

- Dr. Dana Raigrodski asked about the recommendation amending the domestic violence statute. She expressed concern in applying a reasonable person standard to coercive control, and wants to know if examples, such as financial abuse, are included. Judge Shea-Brown clarified that examples, including financial abuse, are included.
- Recommendations are rapidly changing, and have been updated since materials were provided in the packet.

ACTION: Commission members can follow up with Laura Jones, E2SHB 1320 workgroups project coordinator, at Laura.Jones@courts.wa.gov with questions. Feedback needs to be provided by 11/24.

RECOGNITION OF LEADERSHIP

Gender Justice Study Recognition of Leadership

- Judge Paja recognized Justice Gordon McCloud for her leadership on the Gender Justice Study on behalf of the Commission. A framed version of the "lifting as we climb" photograph that appears on the report cover was presented to her with the inscription: In recognition of your leadership on the Gender Justice Study, which provides a roadmap for us all – In your words – to "change the world."

FEE WAIVERS AND NAME CHANGES

Presentation & Judicial Education Proposal – Rhea Yo, Legal Counsel for Youth and Children

- Presenters provided a disclaimer that there is currently appellate litigation on the issue, but it will not be discussed today.
- There are substantial barriers to accessing name change petitions for Washington's indigent LGBTQ+ community. Partners at Qlaw and Team Child have experienced similar barriers.
- Some district courts do not accept Qualified Legal Service Provider (QSLP) fee waivers. Even with waivers, some petitioners must first pay the $203.50 recording fee before the petition can be filed. Some courts do not recognize that GR 34 and Jafar v. Webb apply to recording fees.
- The right to access courts includes waiving recording fees for name change petitions.
- Kitsap and Spokane counties were highlighted for their responses on the issue.
- LCYC would like to partner with the Gender and Justice Commission to provide training to DMCJA and DMCMA on the topic of fee waivers and name changes. They believe this

issue is in-line with the 2021 Gender Justice Study recommendations, and are seeking the Commission's partnership in the education programming.

Discussion

- Judge Paja shared that in Kitsap county there is still discrepancy between the court waiving the fee and the treasurer needing to collect a fee.
- Dr. Dana Raigrodski pointed the Commission to the recommendation in the Gender Justice Study to convene a group to address this specific issue. It is an issue the Commission has committed to working on.

ACTION: The issue of fee waivers and name changes will be referred to the Gender and Justice Commission Education Committee. They will consider which an appropriate role for the Commission on this issue, taking into account the presentation from LCYC, and the recommendations from the Gender Justice Study.

REPORTS AND DISCUSSION ITEMS

2022 Legislative Discussion

- This year, in advance of session, the Gender and Justice Commission is asking Commission members to alert staff of any legislation they are working on. Judge Paja has asked members to share actively before and throughout session.
- The Board for Judicial Administration (BJA) has several proposals and Commission Co-Chairs had the opportunity to provide input. One proposal is to add mental illness to the list of mitigating factors for sentencing.
    - Justice Gordon McCloud suggested this be broadened to "mental health" and the BJA Legislative Committee agreed to make that modification before filing the bill.
    - The Gender Justice Study recommended that "primary caregiving" be added to the list of mitigating factors. This disproportionately affects women, particularly women of color.
        - Judge Glasgow added that judges can consider mitigating factors not on the list. This could be addressed through judicial education.
        - Erin Moody added that the statutory list of mitigating factors is not exhaustive, but there is case law limiting those factors in abstract ways that the parties may interpret differently in any given case. Adding a mitigating factor in statutory language will resolve that potential disagreement from the outset, making things easier on the trial court.

    - Justice Gordon McCloud and Kelley Amburgey-Richardson shared this recommendation with BJA's legislative staff and committee, for consideration.
- The Sexual Violence Law Center is actively working on the E2SHB 1320 trailer bill, but is not prepared to share bill specifics yet.

ACTION: Commission members are asked to share legislation they are working on with staff throughout session.

Potential New Liaison: Council on Public Defense (CPD) – Justice Sheryl Gordon McCloud

- Justice Gordon McCloud suggests formalizing a liaison to the CPD. Justice Gordon McCloud currently attends all meetings on behalf of the court, but would like a formal CPD liaison to attend GJC meetings.
- It was suggested that a Washington Association of Prosecuting Attorneys (WAPA) liaison might also be added if a CPD liaison is added. Other members support asking WAPA if they would be interested to give the option.
- The Commission supports adding a CPD liaison and will proceed.

Gender Justice Study Implementation Committee – Justice Sheryl Gordon McCloud and Dr. Dana Raigrodski

- The Commission is beginning to undertake implementation of the Gender Justice Study recommendations. Dr. Raigrodski emphasized working with partner organizations to tackle the recommendations, and figuring out what should be done in-house verse what other groups might be more equipped to tackle.
- Commission members volunteered at the last meeting to participate on the Implementation Committee. It was also suggested that someone from the Washington State Center for Court Research (WSCCR) join the group. The Implementation Committee is seeking expertise in all 5 goal areas.
- A chair of the Implementation Committee will be selected from the volunteers.
- Barb Serrano and Lynn Daggett also volunteered to join the committee.

Introduction of WSCCR Equity Researcher Dr. Lisette Garcia – Dr. Carl McCurley

- Dr. Carl McCurley introduced Dr. Lisette Garcia, who has been hired as the first ever dedicated Equity Researcher at WSCCR.
- Two years ago, Cynthia Delostrinos and Carl McCurley began meeting to discuss the Commission's research needs. It was decided that a new position would be needed to address the equity related research needs.
- Dr. Garcia's job will be to carry out, oversee, and conduct equity research; establish a baseline; track policy changes the court makes based on inequities.

Racial Consortium Update – Judge Rebecca Glasgow and Dua Abudiab

- Dua Abudiab and Judge Glasgow provided brief background of the Racial Justice Consortium. A large portion of the meetings thus far have focused on belonging, developing trust and learning amongst the group.
- The goal is shifting now to develop reform proposals.
- The Racial Justice Consortium is also developing a website to share stories, the mission, and work of the Consortium.

NEXT STEPS AND ADJOURNMENT

Announcements

- The Gender and Justice Commission is still recruiting for openings. Please share the announcement with your networks.
- There is a proposal from Commissioner Lack in the meeting packet. The item will be on the agenda at the next meeting with a specific ask.
- A letter from Treasurer Mike Pellicciotti was included in the packet re: Gender Justice Study thanking the Commission for their work in addressing issues gender inequities in the justice system.
- 2022 Commission meeting dates are included in today's meeting packet for calendaring.

The meeting was adjourned at 11:57 AM.

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October 12, 2021

Ms. Erin Lennon
Clerk of the Supreme Court
PO Box 40929
Olympia, WA 98054-0929
By Email: supreme@courts.wa.gov

Dear Ms. Lennon:

For the eight years I have served as a Commissioner for the Superior Court, first in Thurston County, and now in King County. In that capacity, I have had the opportunity to adjudicate numerous cases involving people who are transgender. In working with other judicial officers and court staff throughout the State of Washington, I have found there is an inconsistency in how gender identity and expression are handled in the court.

In January, the New York Advisory Committee on Judicial Ethics issued an Opinion finding that the failure to recognize a person's preferred gender pronouns to be a violation of the New York Code of Judicial Conduct. (Opinion 21-09 attached.) Upon researching the issue in Washington State, I was surprised to discover that gender identity and gender expression are not protected under the Washington Code of Judicial Conduct. I believe this should change.

In August of this year, the Washington Court of Appeals, Division II, issued a Commissioner ruling which recognized the right of a person to be referred by their chosen pronouns. (In the Matter of the Welfare of M.D., a minor child, No. 55647-2-II, attached.) This ruling painstakingly outlines the medical, psychological, and emotional reasons for this decision.

I trust you will agree that for *everyone* to be confident that the court will treat them fairly and without bias, courts need to recognize people for who they are and they should not be prejudged because of their gender expression or identity. As such, I propose the Washington Code of Judicial Conduct, specifically, Rule 2.3 Comment [3] be amended to read:

> Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

I presently serve on the Superior Court Judges Association, Equality and Fairness Committee. That committee has wholeheartedly endorsed this amendment to the Code of Judicial Conduct. If you have any questions about this proposal, please do not hesitate to contact me.

Thank you for your consideration.

Sincerely yours,

Jonathon H Lack
Commissioner
King County Superior Court

Enclosures

GENERAL RULE 9

RULE AMENDMENT COVER SHEET

PROPOSED AMENDMENT TO WASHINGTON CODE OF JUDICIAL CONDUCT

RULE 2.3, COMMENT [3]

1. Proponent Organization: Commissioner Jonathon Lack (in his individual capacity)

2. Spokesperson and Contact information: Jonathon Lack, jlack@kingcounty.gov

3. Purpose of Proposed Rule Amendment

   Washington State law prohibits discrimination based on gender identity. RCW 49.60.030; RCW 49.60.040(27); WAC 162-32-040. This amendment would conform the antidiscrimination provision of the Code of Judicial Conduct with chapter 49.60 RCW and WAC 162-32-040.

4. Is Expedited Consideration Requested? No.

5. Is a Public Hearing Recommended? No, because it conforms the JPC with the RCW and WAC.

Proposed amendment

Washington Code of Judicial Conduct, Rule 2.3 Comment [3] should be amended to read:

> Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

Opinion 21-09

January 28, 2021

Digest: Where a party or attorney has advised the court that their preferred gender pronoun is "they," a judge may not require them to instead use "he" or "she."

Rules: 22 NYCRR 100.2; 100.2(A); 100.3(B)(4)-(5); Opinion 19-50.

Opinion:

A judge asks if they may "require a singular pronoun be used for a singular person" in order to "keep order in the courtroom, and to have a clear record." That is, when a party expresses a preference for gender-neutral plural pronouns (they/them), the judge wishes to require them to instead choose a singular pronoun, he/him or she/her. The judge is concerned that the use of "they" could create confusion in the record as to the number of persons to whom a speaker is referring.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act in a manner to promote public confidence in the judiciary's integrity and impartiality (*see* 22 NYCRR 100.2[A]). A judge must "perform judicial duties without bias or prejudice against or in favor of any person" (22 NYCRR 100.3[B][4]). For example, a judge must not, "by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon ... sexual orientation, gender identity [or] gender expression" (*id.*). A judge "shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct" (*id.*). The judge's responsibility for curbing such manifestations of bias and prejudice in the courtroom even extends to "lawyers in proceedings before the judge" (22 NYCRR 100.3[B][5]).

The "courthouse and courtroom must convey to the public that everyone who appears before the court will be treated fairly and impartially" (Opinion 19-50). While a judge may take reasonable steps to ensure the clarity of the record, including courteously referring to an individual by surname and/or their role in the proceeding as appropriate, a judge must be careful to avoid any appearance of hostility to an individual's gender identity or gender expression. We can see no reason for a judge to pre-emptively adopt a policy barring all court participants, in all circumstances, from being referred to by singular "they," which is one of three personal pronouns in the English language. That is, "they" has been recognized as a grammatically correct use for an individual (*see e.g.* Merriam-Webster, *2019 Word of the Year: They*, https://www.merriam-webster.com/words-at-play/word-of-the-year-2019-they/they).

Adopting and announcing the sort of rigid policy proposed here could result in transgender, nonbinary or genderfluid individuals feeling pressured to choose between the ill-fitting gender pronouns of "he" or "she." This could not only make them feel unwelcome but also distract from the adjudicative process. Thus, as an ethical matter, we believe the described policy, if adopted, could undermine public confidence in the judiciary's impartiality.

In sum, we conclude that, where a person before the court has advised the court that their preferred gender pronoun is "they," the inquiring judge may not require them to use instead "he" or "she" in the proceeding. We trust judges to handle an expressed preference for the use of singular "they" on a case-by-case basis, adopting reasonable procedures in their discretion to ensure the clarity of the record as needed. We also note that there is no ethical impropriety in making adjustments over the course of a proceeding, if a judge finds that an initial approach was unsuccessful or confusing.

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[1] Of course, the rule "does not preclude legitimate advocacy" by attorneys when sexual orientation or other similar factors "are issues in the proceeding" (22 NYCRR 100.3[B][5]).

Filed
Washington State
Court of Appeals
Division Two

August 24, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN THE MATTER OF THE WELFARE OF: M.D.,[1] A minor child.	No. 55647-2-II RULING GRANTING DISCRETIONARY REVIEW, REVERSING IN PART, AND REMANDING; AND GRANTING MOTION TO CHANGE CAPTION

Eleven-year-old M.D. moves for discretionary review of the juvenile court's denial of his motion related to pronoun use by the court and parties. RAP 2.3(b). The Department of Children, Youth, and Families (Department) cross-moves for discretionary review. The Department also requests a change of caption to *In re the Welfare of M.D.*, to reflect M.D.'s new name. RAP 3.4.

[1] For the reasons set out in this ruling, this court is granting the motion and cross-motion for discretionary review, and the motion to change the caption to *In re the Welfare of M.D.* This ruling, therefore, uses the new caption, the initials "M.D." for the child's name, and the child's requested male pronouns.

This court grants M.D.'s motion and the Department's cross-motion for discretionary review. It also grants the Department's motion to change the caption. RAP 3.4. Under RAP 18.13A(a), this court reverses the juvenile court's decision in part and remands for further dependency proceedings.

FACTS

M.D. was assigned the sex of female at birth. In December 2018, the Department became involved with the family for the second time[2] after receiving a report that M.D. had fallen asleep at school and was difficult to wake. The school was unable to reach his mother, D.D. So law enforcement drove M.D. home.

Two months later, in February 2019, D.D. contacted the Department asking for assistance. She requested the Department place M.D. in a long-term psychiatric facility because M.D. was not sleeping and was trying to access pornography at night.

In March, the Department held a Family Team Decision Making (FTDM) meeting where D.D. said she "does not feel safe with [M.D.] in the home and she does not know how to help [M.D.]." Mot. for Disc. Rev., Appendix at 54. D.D. agreed to in-home services, such as Family Preservation Services (FPS). But the FPS referral was closed after two attempts to engage D.D. in services. And on May 15, 2019, D.D. refused to let a social worker into her home.

Two days after the social worker's attempted visit, M.D. was hospitalized after stabbing himself in the neck with an unidentified object. During M.D.'s stay, hospital staff could not reach D.D. for several days. While he was hospitalized, M.D. asked a social

[2] An earlier dependency action was dismissed on May 4, 2018.

worker for help. M.D. also said that at times he did not want to live. D.D. reported to a social worker that she did not know what to do and said she could not resolve M.D.'s mental health issues.

In September 2019, D.D. entered into an agreed dependency. The Department placed M.D. in a therapeutic residential group home in Kennewick, Washington. There, M.D. received counseling and behavioral services to address a history of trauma.[3]

In counseling, M.D. said he wanted to identify as male and use male pronouns. M.D.'s attorney then contacted D.D., the Department, the guardian ad litem (GAL), and D.D.'s attorney by e-mail in early January 2021, informing them of M.D.'s request to be referred to as "he/him/his and boy" and his related request for a haircut. Mot. for Disc. Rev., Appendix at 74. But D.D. opposed both the use of male pronouns and the haircut. D.D. blamed an earlier foster home placement for encouraging M.D. to "live a gay lifestyle" and stating that before that placement, M.D. had never mentioned a male gender identity. Mot. for Disc. Rev., Appendix at 80.

In January 2021, M.D. moved to have the juvenile court and parties use his male pronouns.[4] M.D. also requested a short haircut to allow him to better conform to his male identity. M.D. additionally requested the juvenile court to "determine whether any additional services may be necessary" for the parents "based on their inability to

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[3] The dependency petition alleges that M.D.'s father and the father of a half-sibling sexually abused M.D.

[4] The father supported M.D.'s motion. But his parental rights were terminated sometime after the juvenile court heard the pronoun motion.

recognize the needs of [M.D.'s] gender identification." Mot. for Disc. Rev., Appendix at 72. The Department supported M.D.'s requests.

M.D.'s motion included studies, research, and a hand-written declaration from M.D. stating usage of male pronouns would help him feel "comfturble in 'MY' body." Mot. for Disc. Rev., Appendix at 105. M.D. wrote, "I want to be preffered as him/he/his. I want to get my hair shaved because I want somebody to look at me and say I am male. . . . I've been wanting to make this change for 3 years. 'I WANT TO BE A BOY.' 'AND THATS OK'." Mot. for Disc. Rev., Appendix at 105-106.

The juvenile court heard argument on M.D.'s motion on February 1, 2021. M.D. made a statement at the hearing, affirming that "I do feel like I should be represented as he/him." He added that if he had been in court in person, as opposed to on the phone, "I would have broke up in tears." Mot. for Disc. Rev., Appendix at 8 (Report of Proceedings (RP) Feb. 1, 2021 at 8). He also said that a haircut "would represent me as male or help represent me as male." Mot. for Disc. Rev., Appendix at 8-9 (RP Feb. 1, 2021 at 8-9). D.D. responded that the gender issue "has never come up before." Mot. for Disc. Rev., Appendix at 10 (RP Feb. 1, 2021 at 10). D.D. "wanted to hear from a counselor" about the situation and wanted a psychological evaluation for M.D.

Laura Gustavson, the GAL, then spoke to the court. She emphasized that gender identity issues were "deeply important" for a "child's sense of self-esteem." Mot. for Disc. Rev., Appendix at 14 (Report of Proceedings (RP) Feb. 1, 2021 at 14). She noted that M.D.'s identity issues were "not a new thing" and that he was exploring them in individual counseling and "finding [his] voice in terms of what [he] wants." Mot. for Disc. Rev., Appendix at 14 (RP Feb. 1, 2021 at 14). She recommended that the family have

therapeutic support to address this issue. Finally, Gustavson opined that ordering M.D. to undergo a psychological evaluation simply because of his request "seems a little bit heavy handed and concerning." Mot. for Disc. Rev., Appendix at 16 (RP Feb. 1, 2021 at 16).

The juvenile court permitted M.D. to cut his hair[5] but denied his motion to use male pronouns. The court reasoned that a "ten-year-old does not get to make these kind of choices for themselves." Mot. for Disc. Rev., Appendix at 29 (RP Feb. 1, 2021 at 29). The court also noted that M.D.'s brain is "still so developing." Mot. for Disc. Rev., Appendix at 29 (RP Feb. 1, 2021 at 29). So "[t]here is no way the court can let a youth of that age have a significant say in this." Mot. for Disc. Rev., Appendix at 29 (RP Feb. 1, 2021 at 29). It declined to order a psychological evaluation. It did not address whether additional services were necessary under the circumstances.

M.D. moved for reconsideration, providing more research and guidance. He submitted a second hand-written declaration, which stated "I am very triggerd when someone calls me female. . . . I Want to look male, and say im male!!" Mot. for Disc. Rev., Appendix at 108. The juvenile court denied the motion, reasoning that there was no basis for the court to reconsider its initial decision.

[5] At the hearing, the mother's counsel acknowledged "[t]he haircut is not the major issue." Mot. for Disc. Rev., Appendix at 10 (RP Feb. 1, 2021 at 10). The court allowed the haircut because of its temporary nature, noting "[t]he great thing about hair, it always grows back." Mot. for Disc. Rev., Appendix at 28 (RP Feb. 1, 2021 at 28).

M.D. moved for discretionary review of the juvenile court's decisions. Rather than answer the motion, the Department cross-moved for discretionary review.[6] The Department also moved to change the caption of the case to *In re the Welfare of M.D.* to reflect M.D.'s new name. RAP 3.4. The Washington Defender Association, Lavender Rights Project, ACLU-Washington, Legal Counsel for Youth and Children, and QLaw Foundation submitted an amici curiae brief in support of the motion and cross-motion for discretionary review. RAP 10.6.

On August 2, 2021, the trial court issued an order clarifying its ruling on M.D.'s February 1, 2021 motion. The order states that "no party may refer to the child by the pronouns he/him/his or a name other than [P.D.]." Department Resp. to Amici Curiae Br., Appendix C at 13. It also notes the pronoun issue is pending in this court.

ANALYSIS

I. Discretionary Review

Washington strongly disfavors interlocutory review, and it is available only "in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591, *review denied*, 169 Wn.2d 1029 (2010); *Right-Price Recreation, LLC v. Connells*

[6] M.D. and the Department served D.D.'s juvenile court counsel with the notices of discretionary review in March and April 2021. But D.D. did not appear here. In addition, although D.D. had not appeared, M.D. served D.D. with a copy of his motion for discretionary review on July 29, 2021.

After service of M.D.'s motion on D.D., his appellate counsel filed a declaration on July 29, 2021, stating she would not object if D.D. requested an extension of time to respond to M.D.'s motion. Court Spindle, Declaration of Tiffinie B. Ma, Jul. 29, 2016, at 2. As of this ruling's filing date, however, this court has not received anything from D.D.

Prairie Cmty. Council, 146 Wn.2d 370, 380, 46 P.3d 789 (2002), *cert. denied sub. nom, Gain v. Washington*, 540 U.S. 1149 (2004). Under *Minehart*, "Where there is a weaker argument for error [under RAP 2.3(b)(1) or (2)], there must be a stronger showing of harm." *Minehart*, 156 Wn. App. at 463.

This court may grant discretionary review only when:

> (1) The superior court has committed an obvious error which would render further proceedings useless;
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

M.D. seeks discretionary review under RAP 2.3(b)(2) and (3). The Department cross-moves for discretionary review under RAP 2.3(b)(2).

A. RAP 2.3(b)(2)

Probable Error

RAP 2.3(b)(2) requires the moving party to show the superior court committed probable error, which had a substantial effect on the status quo or the freedom of the

parties to act. The moving parties argue that the juvenile court committed probable error by misgendering[7] M.D. and denying his motion to use male pronouns.

Generally, this court reviews orders issued in dependency cases for an abuse of discretion.[8] *In re Dependency of D.C-M.*, 162 Wn. App. 149, 158, 253 P.3d 112 (2011). A juvenile court abuses its discretion when its decision is manifestly unreasonable, rests on untenable grounds, or is made for untenable reasons. *D.C-M.,* 162 Wn. App. at 158; *In re Dependency of T.L.G.*, 139 Wn. App. 1, 15, 156 P.3d 222 (2007). A decision is manifestly unreasonable if it goes beyond acceptable choices, given the facts and the applicable legal standard. *T.L.G.*, 139 Wn. App. at 15-16. A decision is based on untenable grounds or is made for untenable reasons if the court applied the wrong legal standard or relied on unsupported facts. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

It is undisputed that parents have a fundamental liberty interest in the care and welfare of their minor children. *In re Dependency of Schermer*, 161 Wn.2d 927, 941, 169 P.3d 452 (2007). But the state also has an interest in protecting the physical, mental, and emotional health of children. *Schermer*, 161 Wn.2d at 941. Thus, in a dependency, it is well established that "[w]hen the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail." RCW 13.34.020. And as a dependent child's legal custodian,

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[7] "Misgender" means to refer to the gender of a person incorrectly. MERRIAM-WEBSTER DICTIONARY, https://www.dictionary.com/browse/misgender (last visited Aug. 24, 2021).

[8] M.D.'s brief does not identify the underlying standard of review that he believes applies to a pronoun decision. The Department uses the abuse of discretion standard.

the Department has the responsibility to provide M.D. with "conditions free of unreasonable risk of danger, harm, or pain." *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 700, 81 P.3d 851 (2003); *see also T.L.G.*, 139 Wn. App. at 15 (holding that the safety of the child prevails over the rights of the parents when in conflict in a dependency matter); *Matter of the Dependency of W.W.S.,* 14 Wn. App. 2d 342, 359, 469 P.3d 1190 (2020) (when the right of a parent conflicts with that of the child, the child's right prevails).

M.D. and the Department argue that the juvenile court's decision was probable error under RCW 13.34.020[9] and the evidence M.D. provided in support of a minor's decision to socially transition.[10] This court agrees.

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[9] Along with RCW 13.34.020, M.D. relies on the Washington Law Against Discrimination (WLAD), RCW 49.60. He argues that this statute prohibits discrimination based on gender identity, RCW 49.60.040(26) through (27). He adds that the Office of the Superintendent of Public Instruction and the Department have interpreted the WLAD to require them to respect a minor's pronoun usage. Mot. for Disc. Rev. at 12 (citing Susanne Beauchaine, et al., *Prohibiting Discrimination in Washington Public Schools: Guidelines for School Districts to Implement Chapters 28A.640 and 28A.642 RCW and Chapter 392-190 WAC,* WASH. SUPERINTENDENT OF PUB. INSTRUCTION, OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION (Feb. 2012), https://www.k12.wa.us/sites/default/files/public/equity/pubdocs/Prohibiting_Discrimination_in_Washington_Public_Schools_February2012%28RevisedSep.2019Disclaimer%29.pdf (last visited Aug. 24, 2021), and Washington Department of Children, Youth, and Families, *Supporting LGBTQ+ Identified Children and Youth,* Policies & Procedures 6900, Policy (2)(a)(b) (Jul. 1, 2018), https://www.dcyf.wa.gov/6000-operations/6900-supporting-lgbtq-identified-children-and-youth (last visited Aug. 24, 2021)). But because M.D. cites no opinions adopting this interpretation of the WLAD and because the law surrounding RCW 13.34.020 is well established, this court need not reach the WLAD issue to determine whether the juvenile court committed probable error.

[10] *See* Motion for Disc. Rev. Appendix at 112 (discussing what it means to socially transition); *see also* HUMAN RIGHTS CAMPAIGN, *Glossary of Terms*, https://www.hrc.org/resources/glossary-of-terms, para. 30 (stating that "[t]ransitioning . . . . typically includes social transition, such as changing name and pronouns." (boldface omitted)) (last visited Aug. 24, 2021).

M.D. presented the juvenile court with many studies and reports from reputable sources showing the harmful effects of misgendering. The evidence also shows that a minor's gender expression should be supported. The mother did not counter this evidence.

The juvenile court, though, ruled there was "no way the court can let a youth of that age have a significant say in this." Mot. for Disc. Rev., Appendix at 29 (RP Feb. 1, 2021 at 29). This ignored M.D.'s statement he became aware of his gender identity at eight years old, and studies showing that (1) most children have a stable sense of gender identity at a young age and (2) supporting a child's expressed gender is linked to better mental health outcomes. *See* Mot. for Disc. Rev. at 7-8, 7 n.3 (citing James R. Rae, Sulin Gülgöz, Lily Durwood, Madeleine DeMeules, Riley Lowe, Gabrielle Lindquist, and Cristina R. Olson, *Predicting Early Childhood Gender Transitions*, ASS'N FOR PSYCH. SCI., 669, 671 (Mar. 29, 2019), https://journals.sagepub.com/doi/pdf/10.1177/0956797619830649 (last visited Aug. 24, 2021); and Ed Yong, *Young Trans Children Know Who They Are*, THE ATLANTIC (Jan. 15, 2019), https://www.theatlantic.com/science/archive/2019/01/young-trans-children-know-who-they-are/580366/, para. 3 (last visited Aug. 24, 2021) (stating children who later transitioned had a "strong sense of their identity" from the start)); *see also* Mot. for Disc. Rev., Appendix at 98-100 (stating that the American Academy of Pediatrics and its norms for gender identity in children note that by four years old children have a stable sense of gender identity); Mot. for Disc. Rev., Appendix at 105-106 (M.D.'s statement that "I've been wanting to make this change for 3 years. 'I WANT TO BE A Boy.' 'AND THATS OK'.").

In addition, statistics from The Trevor Project[11] showed that out of 400,000 LGBTQ teens surveyed in 2020, 42 percent "seriously considered attempting suicide"; and over 60 percent of transgender youth and nonbinary youth reported self-harm. Mot. for Disc. Rev., Appendix at 70, 82; *National Survey on LGBTQ Youth Mental Health 2020*, THE TREVOR PROJECT (2020), at 1, 14, https://www.thetrevorproject.org/wp-content/uploads/2020/07/The-Trevor-Project-National-Survey-Results-2020.pdf (last visited Aug. 24, 2021). But these high numbers can be combated by supporting an individual's expressed gender, leading to better mental health outcomes. Mot. for Disc., Rev., Appendix at 70, 82; *National Survey on LGBTQ Youth Mental Health 2020*, THE TREVOR PROJECT (2020), https://www.thetrevorproject.org/wp-content/uploads/2020/07/The-Trevor-Project-National-Survey-Results-2020.pdf (last visited Aug. 24, 2021).

Here, M.D. informed the court that misgendering distresses him. Mot. for Disc. Rev., Appendix at 108 ("I am very triggerd when someone calls me female. . . . I Want to look male, and say im male!!"). He also has already exhibited some of the significant mental health concerns mentioned by the statistics. For example, M.D. expressed suicidal thoughts after being hospitalized for stabbing himself in the neck.

In light of this information, the juvenile court's ruling that M.D. could not make this type of decision because of his young age was unsupported. *See* Mot. for Disc. Rev.,

[11] The Trevor Project describes itself as "the leading national organization providing crisis intervention and suicide prevention services to lesbian, gay, bisexual, transgender, queer & questioning (LGBTQ) young people under 25." https://www.thetrevorproject.org/about/ (last visited Aug. 24, 2021).

Appendix 29 (ruling that M.D. "does not get to make these kind of choices" due to his brain "still so developing. . . . [t]here is no way the court can let a youth of that age have a significant say in this."). In addition to the studies already referenced, M.D. submitted the letter-declaration of Aidan Key, co-chair of the Gender Clinic at Seattle Children's Hospital. Key directly addressed best practices for a child expressing a new gender identity in preadolescence, which include requested pronoun usage.

Key also listed harmful practices, which include "refusing to use names and pronouns that are in congruence with [the] child's gender identity." Mot. for Disc. Rev., Appendix at 112. Key also acknowledged that a minor's social transition, such as name changes, pronoun changes, and other gender expressions, may end up being temporary, but best practices support allowing a child to make these decisions to "explore their gender identity." Mot. for Disc. Rev., Appendix at 112. Key further stated that supporting "reversible social transition steps"[12] "will *not* make a child's gender identification change," rather the support will "ensure that [the] child is confident in the love and support of their family as they explore their gender identity." Mot. for Disc. Rev., Appendix at 112 (italics in original).

In light of RCW 13.34.020 and the extensive and uncontroverted documentation submitted by M.D. showing that his decision to socially transition should be supported and that children are at a significant risk of harm when these decisions are not honored,

[12] The juvenile court's decision to allow M.D. to cut his hair tracked Key's recommendation to allow a child to take steps to socially transition. The court relied on the fact that a haircut is temporary. But it did not explain why this reasoning did not extend to pronoun usage, another potentially temporary social transition step.

this court concludes that both M.D. and the Department satisfy the error prong of RAP 2.3(b)(2).

Effect Prong

Besides finding probable error, RAP 2.3(b)(2) also requires this court to determine that the juvenile court's decision "substantially alters the status quo or substantially limits the freedom of a party to act." M.D. argues that the decision limits his freedom to use his "[correct[13]] pronouns in court and in pleadings." Mot. for Disc. Rev. at 14. The Department adds that the juvenile court's decision changes the status quo by altering the Department's written policy, Policy 6900, that directs it to "mirror[] language the [dependent] child or youth uses to describe themselves." Department Resp. and Cross-Mot. for Disc. Rev., Appendix B at 3 (Washington Department of Children, Youth, and Families, *6900. Supporting LGBTQ+ Identified Children and Youth,* Policies & Procedures 6900, Policy (2)(a)(b) at 3, (Jul. 1, 2018); also available at: Washington Department of Children, Youth, and Families, *6900. Supporting LGBTQ+ Identified Children and Youth*, Policies and Procedures 6900, Policy (2)(a)(b) at 3 (Jul. 1, 2018),

[13] M.D.'s motion for discretionary review actually states, "using his *preferred* pronouns in court . . . ." Mot. for Disc. Rev. at 14 (emphasis added). This court, however, recognizes that the term "preferred pronouns" is falling out of favor, so this court replaces "preferred" with "correct" here. *See generally* Ashlee Fowlkes, *Why You Should Not Say 'Preferred Gender Pronouns,'* FORBES (Feb. 27, 2020, 10:22 PM EST), https://www.forbes.com/sites/ashleefowlkes/2020/02/27/why-you-should-not-say-preferred-gender-pronouns/, at para. 2 ("[T]he phrase 'preferred gender pronouns,' while well-intended, gives the impression that pronouns other than the ones specified are acceptable.") (last visited Aug. 24, 2021); *see also generally Gender Pronouns*, TRANS STUDENT EDUC. RES., https://transstudent.org/graphics/pronouns101/ (last visited Aug. 24, 2021) ("We also do not use 'preferred pronouns' due to people generally not having a pronoun 'preference' but simply having 'pronouns.' Using 'preferred' can accidentally insinuate that using the correct pronouns for someone is optional.").

https://www.dcyf.wa.gov/6000-operations/6900-supporting-lgbtq-identified-children-and-youth (last visited Aug. 24, 2021)).

M.D.'s harm argument at first appears untenable given *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014), *discretionary review denied*, 182 Wn.2d 1008 (2015), which requires a superior court's decision to have some effect outside the courtroom. But because the juvenile court's decision, although arguably limited to pronoun use in court proceedings and pleadings, goes directly to M.D.'s identity and autonomy, this court determines that *Howland* does not preclude granting review. *See generally Taking Offense v. State*, No. Co88485, 2021 WL 3013112, at * 20 (Cal. Ct. App. 5th Jul. 16, 2021) (Robie, J., concurring) ("One's name or the pronoun that represents that name is the most personal expression of one's self."); *see also* WASH. CONST. ART. I, sections 3 and 7 (autonomous decision making is a fundamental right); *Butler v. Kato*, 137 Wn. App. 515, 527-28, 154 P.3d 259 (2007) (stating that the right to autonomous decision making is given the "utmost constitutional protection. . . ."); *State v Koome,* 84 Wn.2d 901, 904, 530 P.2d 260 (1975) (stating that the "constitutional rights of minors, including the right of privacy, are coextensive with those of adults"). M.D. shows that the juvenile court's decision substantially limits his freedom to act to express his identity and have his identity acknowledged. In addition, the Department's argument that the decision alters its status quo is well taken.

B. RAP 2.3(b)(3)

M.D. also argues that the juvenile court's decision warrants review under RAP 2.3(b)(3) because it departs "from the accepted and usual course of judicial proceedings." This court agrees. The juvenile court had sufficient guidance on pronoun usage best practices—both from M.D. and the Department, as well as from other opinions and juvenile and LGBTQ bench guidebooks—which it did not follow.

First, opinions from our state courts and other courts routinely respect a party's pronouns. *Matter of Detention of C.S.*, No. 80655-6-I, 2021 WL 2313409, at *1 n.1 (June 7, 2021) (cited under GR 14.1 (c)) ("The record reflects that C.S. prefers the pronouns 'they/them/their.' We defer to C.S.'s preferred pronouns."); *State v. Perry*, No. 35476-8-III, 2020 WL 550253, at *12 n.1 (Feb. 4, 2020) (cited under GR 14.1 (c)) (using feminine pronouns to refer to the appellant but only for periods after gender reassignment for clarity (because witnesses referred to Perry as male during the trial) and noting the court's departure from its usual practice while meaning no disrespect); *see also Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993) ("Farmer prefers the female pronoun and we shall respect her preference.").

Second, the National Council of Juvenile and Family Court Judges issued guidance in 2017, directly addressing the issue at hand. It states that juvenile courts are "ethically obligated to promote access to justice for all impartially, competently, and diligently regardless of race, ethnicity religion sexual orientation, gender identity, and gender expression." *Access to Juvenile Justice Irrespective of Sexual Orientation, Gender Identity, and Gender Expression (SOGIE)*, at intro., NAT'L COUNCIL OF JUV. & FAM.

CT. JUDGES (2017), https://www.ncjfcj.org/wp-content/uploads/2017/08/SOGIE_Benchcard-7-15-17.pdf (last visited Aug. 24, 2021).

To do so effectively, the benchbook highlights these practices: (1) supporting an individual's expression of gender identity by using their name and pronouns of choice, (2) demanding professionalism and prohibit use of derogatory pronouns, including "he-she" and "it" for Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, and Gender Non-Conforming (LGBTQ-GNC) individuals by ensuring all in court use the individual's chosen pronouns, and (3) where issues relating to youth's gender identity are raised, carefully considering any existing law, research, best practices, and standards of care before issuing a decision. *Access to Juvenile Justice Irrespective of Sexual Orientation, Gender Identity, and Gender Expression (SOGIE), Unique Considerations at Every Stage of the Case*, Bench card 2, para. 9, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES (2017), https://www.ncjfcj.org/wp-content/uploads/2017/08/SOGIE_Benchcard-7-15-17.pdf (last visited Aug. 24, 2021). Here, as discussed, M.D. presented significant unrebutted evidence on best practices and current standards of care.

Third, for several years our state courts have the benefit of a bench guide issued by QLaw of Washington for the Washington State Supreme Court's Gender & Justice Commission. *Judges' Bench Guide on the LGBTQ Community and the Law*, QLAW FOUND. OF WASH. & QLAW ASSOC. (3d ed. 2017), http://www.courts.wa.gov/committee/pdf/LGBTQ%20Bench%20Guide.pdf (last visited Aug. 24, 2021). This document is readily available online and has been cited by this court

in at least one ruling.[14] This guide advises correct pronoun usage in court. *Judges' Bench Guide on the LGBTQ Community and the Law*, ch. 2, § 2, QLAW FOUND. OF WASH. & QLAW ASSOC. (3d ed. 2017), http://www.courts.wa.gov/committee/pdf/LGBTQ%20Bench%20Guide.pdf (last visited Aug. 24, 2021) ("Inclusive Language and Tone"). It does not exempt juvenile courts.

In sum, discretionary review is warranted under RAP 2.3(b)(2) and (3).

II. Caption Change

The Department also moves for a caption change[15] under RAP 3.4 to reflect the initials of M.D.'s new name and not his deadname.[16] RAP 3.4 provides in relevant part:

> Upon motion of a party or on the court's own motion, and after notice to the parties, the Supreme Court or the Court of Appeals may change the title of a case by order in said case.

See Matter of Welfare of K.D., No. 98965-6, 2021 WL 3085557, at *1 (Wash. Jul. 22, 2021).

In *Matter of Welfare of K.D.*, our Supreme Court held that RAP 3.4 and this court's general order for changes to juvenile case captions require that identifying information

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[14] *In re Detention of Adel Pittman*, COA No. 52331-1-II, Ruling Denying Review at 1 n.2 (Sept. 6, 2018) (also citing Heidi K. Brown, INCLUSIVE LEGAL WRITING, *We Can Honor Good Grammar and Societal Change Together*, 104-APR A.B.A. J. 22 (April 2018)). The *Pittman* ruling is cited neither as binding nor persuasive authority. *See generally* GR 14.1(c). Rather it is cited only to show that this court uses the QLaw bench guide as a reference.

[15] At argument, M.D. joined this motion.

[16] "[D]eadname" refers to the birth name of a LGBTQ+ individual who no longer uses it. MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/deadname (last visited Aug. 24, 2021).

about juveniles be removed from the case title in dependency and termination appeals and be replaced with a child's initials. *See* Gen. Order for the Court of Appeals, Div. Two, 2018-2, *In re Changes to Case Title* (Wash. Ct. App. Aug. 22, 2018), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2018-2&div=II (last visited Aug. 24, 2021); *K.D.*, 2021 WL 3085557, at *1. The purpose behind the rule and order is to protect the children involved and their privacy.

Here, the Department moves for a change of the case caption, contending that it would further M.D.'s mental health and allow the Department to comply with its own policies to meet M.D.'s needs while in its care. Changing the caption of the case to replace the deadname initials does not place M.D.'s privacy at risk or go against the purpose of RAP 3.4. In fact, as previously noted by scientific data provided to the juvenile court and M.D.'s own words and wishes, changing his initials in the caption for this case would further M.D.'s wellbeing and mental health outcomes. Thus, under RAP 3.4, this court grants the Department's motion.

III. RAP 18.13A(a)

The moving parties show that the court should accept discretionary review. RAP 2.3(b)(2) and (3); RAP 6.2(a). This court takes review and, under RAP 18.13A(a) and for the reasons stated in this ruling, it reverses in part the juvenile court's denial of the child's motion to be identified as male by the parties to this case, the juvenile court, and by his parents.[17] Specifically, the Department and the dependent child are allowed to use the

[17] This court accepts review and issues a merits decision in the same ruling because child welfare matters are time sensitive and this family remains subject to active dependency proceedings. RAP 18.13A(a); RAP 7.3; *see generally In re K.J.B.*, 187 Wn.2d 592, 613,

initials "M.D." (and M.D.'s corresponding full name) and to use male pronouns for M.D.; the juvenile court is required to do so; but D.D. may use the name and pronouns that she believes are warranted in light of M.D.'s wishes, the evidence he submitted about best practices, and feedback D.D. may receive from service providers and M.D. in this dependency.

The context in which this dispute arises informs this court's decision not to order D.D. to use M.D.'s name and pronouns. This family is in an active dependency. The child welfare system exists because when a parent seriously jeopardizes a child's physical or mental health, "the State has a parens patriae right and responsibility to intervene to protect the child." *In re Dependency of Schermer*, 161 Wn.2d 927, 942, 169 P.3d 452 (2007) (quoting *In re the Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)); *In re the Welfare of Shantay C.J.*,121 Wn. App. 926, 935, 91 P.3d 909 (2004). Once legal custody of a child transfers to the Department, it is charged with providing the parent with services necessary to achieve family reunification, the goal of any dependency. *See* RCW 13.34.180(1)(d).

To that end, the juvenile court has ordered D.D. to engage in individual and family therapy.[18] M.D. is also receiving ongoing supports in his placement, including individual

387 P.3d 1072 (2017) (González, J., dissenting) ("In matters of juvenile justice, getting to the right result quickly is a priority.").

[18] As of February 1, 2021, D.D. had not started family therapy, although the parties had discussed it and M.D. advocated for it. And as of the March 15, 2021 dependency review hearing, family therapy had still not started. M.D. continued to express that he wanted to start family counseling.

counseling. And there is some consensus that M.D.'s request for his mother to use male pronouns should be addressed through these services.

For example, at the initial hearing on pronouns, GAL Gustavson emphasized that the conflict between M.D. and D.D. about M.D.'s wishes should be "facilitated" with a therapist to allow D.D. to have "therapeutic communication with her [child.]" Mot. for Disc. Rev., Appendix at 14-15. D.D. also indicated that she wanted to hear from mental health providers about M.D.'s decision. And at a March 15, 2021 dependency review hearing, the juvenile court ordered family counseling to start "immediately" and identified it as "an integral part of moving towards a return home." Mot. for Disc. Rev., Appendix at 47 (RP Mar. 15, 2021 at 14).

As in any dependency, these services are in place to assist D.D. and M.D. in addressing their relationship to facilitate their planned reunification.[19] Department Resp. to Amici Curiae Br., Appendix at C at 10 (setting a trial return home date of September 26, 2021). D.D. has not completed these necessary services and a court order for D.D. to use male pronouns in court proceedings will do nothing to address the underlying conflict between M.D. and his mother on this issue. Nor will it facilitate reunification. Accordingly, it is hereby

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[19] Amici contend that the juvenile court denied M.D.'s request for additional reunification services for his parents. Amici Curiae Br. at 2. But at the February 1, 2021 hearing, the juvenile court did not appear to rule on M.D.'s request to consider additional services. And any party remains free to request additional necessary services at future periodic dependency review hearings. *See generally* RAP 2.3(b)(2) (effect prong requires substantial change in the status quo or limitation on freedom of party to act).

This court expresses no opinion as to whether additional services will be required during the dependency. That determination is left to the juvenile court, with input from D.D., M.D., the Department, the GAL, and current service providers.

ORDERED that M.D.'s motion and the Department's cross-motion for discretionary review are granted. It is further

ORDERED that the juvenile court's denial of M.D.'s motion for the court and the parties to use male pronouns is reversed in part, and this matter is remanded for further dependency proceedings. And it is further

ORDERED that the Department's motion to change the caption from *In re the Welfare of P.D.* to *In re the Welfare of M.D.* is granted.

Aurora R. Bearse (she/her)
Court Commissioner

cc: Tiffinie B. Ma
Elizabeth A Baker
Andrew D. Pugsley
Christopher Torrone
D'Adre Cunningham
Megan Dawson
Nancy Talner
Yvonne Chin
Antoinette M. Davis
Erin L. Lovell
Denise Diskin
Hon. Christine Schaller

Proposed Rule Changes Published for Comment
(July – December 2021)

Memo

To: Washington State Supreme Court Gender and Justice Commission

Date: February 14, 2022

Re: Proposed rule changes of interest

This memorandum summarizes proposed rule changes submitted between July – December 2021 that may be of interest to the Gender and Justice Commission.

Published for Comment (December 2021)

Code of Judicial Conduct Canon 2 Comments, Rule 2.2 (Impartiality and Fairness) and Rule 2.6 (Ensuring the Right to Be Heard)

Proponent: Superior Court Judges' Association

Purpose: To help judges discern what constitutes "reasonable accommodation" of unrepresented litigants, including specific examples (23) of reasonable accommodations.

Comment expiration date: April 30, 2022

Code of Judicial Conduct Cannon 2 Comments, Rule 2.3 (Bias, Prejudice, and Harassment)

Proponent: Commissioner Jonathon Lack

Purpose: To conform the Code of Judicial Conduct with chapter 49.60 RCW and WAC 162-32-040, which prohibit discrimination based on gender identity and gender expression.

Comment expiration date: April 30, 2022

General Rule 11.3 (Remote Interpretation)

Proponent: Washington State Supreme Court Interpreter Commission

Purpose: To provide clarification regarding the use of remote interpreting services during court proceedings, including clarification that interpreter services must be provided to all limited English-proficient persons and persons with hearing loss, to include litigants, parents, witnesses, guardians, observers, etc.

Comment expiration date: February 28, 2022

General Rule 26 (Mandatory Continuing Judicial Education)

Proponent: The Board of Judicial Administration, Court Education Committee

Purpose: To increase education on issues of diversity, equity, and inclusion throughout the judicial system by mandating a minimum number of hours (4.5) each reporting period.

Comment expiration date: April 30, 2022

Published for Comment (November 2021)

Court Rules for Courts of Limited Jurisdiction: 4, 8, 13, 15, 17, 18, 19, 20, 22, 24, 25, 40, 41, 43, 44.1, 46, 47, 49, 51, 54, 55, 56, 58, 59, 73, 75

Proponent: Washington State Bar Association Rules and Procedures Committee

Purpose: To make the Civil Rules for Courts of Limited Jurisdiction gender neutral, as was done previously for the Superior Court Civil Rules.

Comment expiration date: April 30, 2022

Published for Comment (October 2021)

General Rules 3.1, 5, 10, 12.4, 21, 22, 23, 26, 29, 30, 31.1, 33, 34; Code of Judicial Conduct Cannons 2 and 3, Rules 1.3 Comment, 2.11, 2.12 Comment, 3.4, 3.7, 3.8, 3.11, 3.14, 4.1, 4.1 Comment, 4.2, 4.4, 4.5; Discipline Rule for Judges 13; Admission to Practice Rules 8, 9, 12, 15, 15, 15 Regulation, 19, 22.1, 23, 24.1, 25.2, 28, 28 Regulation; Limited Practice Officer Rules of Professional Conduct 1.2, 1.6, 1.8, 1.10; Rules for Enforcement of Limited Practice Officer Conduct 2.3, 2.8. 4.1, 5.1, 5.7, 8.1, 8.3, 9.2, 10.14, 11.12, 12.6, 14.1, 14.2, 14.4; Limited License Technician Rules of Professional Conduct Fundamental Principles, Rules 1.2, 1.10, 5.5 Comment, 8.4; Rules of Professional Conduct Fundamental Principles, 1.0, 1.2 Comment, 1.6 Comment, 1.8 Comment, 1.10 Comment, 1.13, 1.13 Comment, 1.14 Comment, 1.18 Comment, 4.2 Comment, 4.3 Comment, 6.1 Comment, 8.4, 8.5, 8.5 Comment; Rules for Enforcement of Lawyer Conduct 2.3, 2.5, 2.7, 2.10, 4.1, 4.9 Title and Rule, 5.1, 5.8, 8.1, 8.2, 8.3, 9.3, 10.14, 11.14, 12.4, 12.6, 14.1, 14.2, 14.4; Evidence Rules 803, 1101

Proponent: Consortium to Address Biased and Non-Inclusive Language in Court Rules

Purpose: "To identify biased and non-inclusive language in the court rules and to replace such language with neutral word(s) or re-write the rule utilizing neutral language that does not change the substantive meaning of the rule."

Comment expiration date: April 30, 2022

Rule of Professional Conduct 8.4 (Misconduct)

Proponent: QLaw

Purpose: To conform the antidiscrimination provision of the Rules of Professional Conduct with chapter 49.60 RCW and WAC 162-32-040, which prohibit discrimination based on gender identity and gender expression.

Comment expiration date: April 30, 2022

Published for Comment (July 2021)

General Rule 22 (Access to Family Law & Guardianship Court Records)

Proponent: District & Municipal Court Judges' Association

Purpose: To limit public access to assessments and treatment reports to "further the goal of therapeutic courts to provide individualized treatment intervention" by encouraging cooperation and honesty with risk/needs assessments, mental health and chemical dependency evaluations, and treatment.

Comment expiration date: April 30, 2022

E2SHB 1320 Stakeholder Workgroup Update

After submitting its report to the legislature on December 1, 2021, the E2SHB 1320 workgroup shifted its focus to our spring 2022 deliverables: a series of recommendations *to the courts* relating to data-collection and privacy, administrative efficiency, and court access for unrepresented litigants in protection order proceedings. See E2SHB 1320 sections 16 and 36.

Beginning in mid-December, project leads Judge Jacqueline Shea-Brown and Erin Moody (co-chairs of the Commission's Domestic and Sexual Violence Committee) and project coordinator Laura Jones held a series of meetings to discuss the workgroup's spring deliverables and timelines. We determined that, during this second phase of the E2SHB project, the workgroup's organization will remain as it was preceding the December report, divided between our three topical subgroups: Research and Information Sharing; Litigant Rights and Access; and Technology. But the spring deliverables will differ significantly from the December report in style and substance. Whereas the December report was a long-form, citation-heavy analysis with hundreds of pages of appendices, the spring deliverables will be short, user-friendly guides. We are modeling the spring deliverables on the materials produced by the Court Recovery Task Force, available at:
https://www.courts.wa.gov/programs_orgs/pos_bja/?fa=pos_bja.CRTF_reports

Below is a summary of each topical group's spring 2022 directives and progress, following the submission of the December report:

Research and Information Sharing

Spring directive: "Develop best practices in data collection and sharing, including demographic information, in order to promote research and study on protection orders and transparency of protection order data for the public, in partnership with the Washington State Center for Court Research [WSSCR], the Washington State Institute for Public Policy, the University of Washington and the Urban Indian Health Institute." Sec. 36(d).

Co-Leads: Judge Cindy Smith (Suquamish Tribal Court) and Judge Tanya Thorp (King County Superior Court)

This group held its first spring-deliverable meeting on January 3, 2022. We provided attendees with a memo, from AOC, describing the protection order-related data fields that the Washington State Judicial Information Systems (JIS) is currently capable of capturing. Then, at our meeting on February 7, 2022, AOC personnel (Charlotte Jensen) gave an oral presentation elaborating on the memo, including an explanation of which data fields are mandatory and which are discretionary. Our longer-term plan is to compare this information with the results of our recent data request to AOC, covering all non-ERPO protection order cases for the past year, to determine which of the JIS data fields courts are currently submitting. Our new member, Ashley Rousson (WSSCR) is drafting survey questions, regarding data-collection practices, that our group will send to court clerks and administrators.

Ultimately, we will evaluate our findings to address, among other issues: (1) if / how court staff could benefit from further training in data-collection and entry; (2) which data elements best promote future research, including research into protection order efficacy, protection order-related demographic disparities, and unintended consequences; and (3) how we can minimize administrative burdens on court staff, such as by eliminating duplicative data-entry.

Litigant Rights and Access

Spring directives: "[C]onsider and develop recommendations regarding . . . [i]mproving access [for] unrepresented parties in protection order proceedings, including promoting access [to] pro bono attorneys for remote protection order proceedings, in consultation with the Washington State Bar Association . . . [and] [d]eveloping best practices for courts when there are civil protection order and criminal proceedings that concern the same alleged conduct." Sec. 36 (b) & (c). "[D]evelop for the courts: . . . [s]tandards for filing evidence in protection order proceedings in a manner that protects victim safety and privacy, including evidence in the form of text messages, voice mails, and other recordings, and the development of a sealed cover sheet for explicit or intimate images and recordings." Sec. 16(2)(a).

Co-Leads: Judge Averil Rothrock (King County Superior Court) and Riddhi Mukhopadhyay (Sexual Violence Law Center)

This group held its first spring-deliverables meeting on January 12, 2022, as well as meeting on January 28th and February 9th. Members self-selected into two sub-groups, one of which will address the evidence standards directive while the other addresses the directive related to unrepresented litigants. We have determined that the deliverable for the third directive, relating to concurrent civil and criminal proceedings, will be educational materials (*e.g.*, bench cards) outlining the statutory and constitutional requirements implicated by this situation. See Sec. 53(4).

Technology

Spring directives: "[D]evelop for the courts: . . . [r]equirements for private vendors who provide services related to filing systems for protection orders, as well as what data should be collected." Sec. 16(2)(b). "[C]onsider and develop recommendations regarding: . . . [u]ses of technology to reduce administrative burdens in protection order proceedings." Sec. 36(1)(a).

Co-Leads: Tim Fitzgerald (Spokane County Superior Court Clerk) and Elizabeth Hendren (Northwest Justice Project)

This group held its first spring-deliverables meeting on January 10, 2022, and also met on February 14, 2022. We have divided this group's work into two immediate action items: (1) gathering examples of the requirements courts have already established for contracting with private document-management services (*e.g.*, Odyssey) and (2) understanding the data privacy implications of e-filing technology.

The first action item appears to be complicated by protections for trade secrets: it is unclear to what extent our group can access existing contracts between courts and private vendors. Investigation into this issue is ongoing, led by Tim. The second action item is complicated by the emerging and technical nature of the problem: our stakeholder-members are not experts in the digital data economy, yet courts should be concerned about the potential for private entities to collect and profit from the highly sensitive information found in protection order filings. Elizabeth has taken the lead on this issue and formed a subcommittee that will solicit outside expertise to inform our discussions. Furthermore, the Technology Group is looking at the options to provide judicial officers with access to court records across county lines in an efficient and timely manner via the Digital Archives.

Several of the Technology Group's efforts are in tandem with the other groups' efforts requiring an integrated approach to solutions.