THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED AMENDMENT TO CODE FOR JUDICIAL CONDUCT CANON 2, RULE 2.3 cmt [3]—BIAS, PREJUDICE, AND HARASSMENT	)	**O R D E R** NO. 25700-A-1400

King County Superior Court Commissioner Jonathon Lack, having recommended the suggested amendment to Code for Judicial Conduct Canon 2, Rule 2.3 cmt [3]—Bias, Prejudice, and Harassment, and the Court having approved the suggested amendment for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendment as attached hereto is to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2022.

(b) The purpose statement as required by GR 9(e), is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2022. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 6th day of December, 2021.

For the Court

González, C.J.

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.

ATTACHMENTS

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
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Denise Diskin
Hon. Christine Schaller