

**IN THE COURT OF APPEALS FOR THE STATE OF NEVADA**

IN THE MATTER OF THE GUARDIANSHIP OF:  
CHRISTINE B. JOHNSON, A/K/A, CHRISTINE B.  
WEIDERMAN, AN ADULT PROTECTED PERSON.

CHRISTINE B. JOHNSON, A/K/A,  
CHRISTINE B. WEIDERMAN,

Appellant,

vs.

KAREN KELLY, CLARK COUNTY PUBLIC  
GUARDIAN; AND MOUNTAIN VIEW CARE CENTER,

Respondents.

**Case No. 83912-COA**

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**APPEAL**

From the Eighth Judicial District Court, Clark County  
The Honorable Linda Marquis, District Judge  
District Court Case No. G-21-055340-A

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***AMICUS CURIAE BRIEF***

of the Attorney for the Rights of Older Persons and Persons with a  
Physical Disability, an Intellectual Disability, or a Related Condition  
under NRS 427A

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## **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. The Aging and Disability Services Division (ADSD) is a governmental entity under the Department of Health and Human Services for the State of Nevada. No publicly traded company owns or has any interest in this governmental entity or appointed office.

Dated this 4/21/2022.

By: /s/ Jennifer M. Richards  
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NEVADA BAR NO. 14109  
*AMICUS CURIAE*

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## **INTEREST OF AMICUS CURIAE**

The Office of Attorney for the Rights of Older Persons and Persons with a Physical Disability, an Intellectual Disability, or a Related Condition (“Rights Attorney”) was established under NRS 427A.123.

As a gubernatorial appointee, the Rights Attorney works to advance systemic improvement throughout the aging and disability services network through legal and policy advocacy to ensure that Nevadans can live independent, meaningful, and dignified lives. In addition, the office acts as the designated Legal Assistance Developer under the Older Americans Act. *42 U.S.C. § 3058j*. The Rights Attorney

may “appear as amicus curiae on behalf of older persons, person with a physical disability, persons with an intellectual disability or persons with a related condition in any court in this state.” *NRS*

*427A.1234(2)(g)*. Pursuant to NRAP 29(a), as an Officer of the State of Nevada, neither party consent nor leave of court is required to submit an amicus brief.

Amicus joins to clarify that the requirement of a physician’s certificate is a pleading standard, and the court misapplied the holding of the *Rubin* decision when it denied the proposed protected person’s hearsay objection and demand for an evidentiary hearing. *Matter of Guardianship of Rubin*, 137 Nev. Adv. Op. 27, 491 P.3d 1, 4 (2021).

## **SUMMARY OF ARGUMENT**

In the wake of Nevada’s guardianship reform, the courthouse is effectively closing its doors to people with disabilities when it denies them the full consideration of the evidence against their ongoing civil liberties. The wholesale denial of an evidentiary hearing violates the due process rights of the proposed protected person and slams the door on advocacy protected person’s counsel might offer.

## **STANDARD OF REVIEW**

The Supreme Court reviews the district court’s factual determinations under an abuse of discretion standard. *In re Guardianship of N.M.*, 131 Nev. 751, 754 (2015). The lower court must apply the correct legal standard and no regard is given to legal error. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, (2010); *United States v. Silva*, 140 F.3d 1098, 1101 n.4 (7th Cir. 1998). Statutory interpretations are given *de novo* review. *Dewey v. Redev. Agency of Reno*, 119 Nev. 87 (2003). Ultimately, this court “must be satisfied that the district court's decision was based upon appropriate reasons.” *In re Guardianship of L.S. & H.S.*, 120 Nev. 157, 163, 87 P.3d 521, 525 (2004).

## ARGUMENT

- I. The Liberty Interests of a Proposed Protected Person are Comparable to the Liberty Interests of a Criminal Defendant or Person Subject to Involuntary Civil Commitment.

Guardianship of an adult affects the most fundamental rights of an individual and a state may not deprive a person of these rights without notice and a meaningful opportunity to be heard. *U.S. Const. Amends. 5, 14; Mathews v. Eldridge*, 424 U.S. 319 (1976). At its core, guardianship is a legal mechanism for substitute decision making that comes in the guise of benevolence.

Adult guardianship has been recognized as the “most punitive civil penalty that can be levied against an American citizen.” Susan G. Haines, Esq., John J. Campbell, Esq., *Defects, Due Process, and Protective Proceedings: Are Our Probate Codes Unconstitutional?*, 14 Quinipiac Prob. L.J. 57, 59 (1999) (citing House Subcomm. on Health & Long-Term Care, House Spec. Comm. on Aging, H.R. Doc. No. 100-641, at 4 (1987)). For example, liberty interests implicated in guardianship include “the right to choose where to live and with whom to associate; the right to make medical decisions regarding one’s body; the right to marry and associate freely, the right to travel or pursue in

privacy the activities of daily living, and the right to be free from unwanted constraints or incarceration.” *Id* at 70. In guardianship cases, it is critically important to recognize that “a person is no less incarcerated in a locked nursing home ward than in a psychiatric hospital or juvenile detention center.” *Id* at 86.

It is well settled that guardianship involves a significant loss of civil liberties similar to involuntary commitment.<sup>1</sup> Both the civil

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<sup>1</sup> See, e.g., *In re Guardianship of Reyes*, 152 Ariz. 235, 236, 731 P.2d 130, 131 (Ariz.Ct.App.1986); see also *Youngberg v. Romeo*, 457 U.S. 307, 324, 102 S. Ct. 2452, 2462 (1982) (intellectually or developmentally disabled person committed to state institution has constitutionally protected right to reasonable care and safety, reasonably non-restrictive confinement, and reasonable training ‘to ensure his safety and to facilitate his ability to function free from bodily restraints’); *Heller v. Doe by Doe*, 113 S. Ct. 2637, 2645 (1993) (‘It is true that the loss of liberty following commitment for mental illness and intellectual or developmental disability may be similar in many respects.’); *Association for Retarded Citizens v. Olson*, 561 F.Supp. 473, 492 (D.N.D. 1982)) (‘[M]entally retarded residents [of state institutions] possess a right to free association guaranteed under the First Amendment.’); *In re Guardianship of Braaten*, 502 N.W.2d 512, 518 (N.D.1993) (‘The intrusion upon individual liberty by the involuntary imposition of a guardianship upon an incapacitated ward sufficiently resembles the involuntary commitment of a mental health patient’); *In re Boyer*, 636 P.2d 1085, 1090 (Utah 1981) (‘Although the restrictions on, and deprivation of, personal freedom by appointment of a guardian are less in extent and in intrusiveness than by involuntary commitment, nevertheless, the loss of freedom may be substantial.’).

commitment process and guardianship process require a certificate regarding the incapacity of the individual and provide for the right to counsel. *NRS 433A.200(1), NRS 433A.270 (1); NRS 159.044, NRS 159.0485*. The Supreme Court has long recognized that due process includes the right to confront and cross examine witnesses. *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004)*. Therefore, as guardianships are akin to involuntary commitment proceedings, a similar Confrontation Clause right must apply to satisfy due process.

Here, the court's analysis that a proposed protected person does not have a similar right to confront and cross examine witnesses in a guardianship proceeding was flawed. While the proceedings are not always initiated by the government, they are an exercise of the state's *parens patriae* authority. Consequently, this court must uphold the rights of individuals to confront and cross examine witnesses in guardianship proceedings.

## II. The Physician's Certificate is a Pleading Standard and Not a Substitute for Testimony of the Evaluating Professional

The court committed reversible error when it relied upon the contents of a physician's certificate despite a hearsay objection and

demand for evidentiary hearing from protected person's counsel. On appeal, this court must hold that the physician's certificate opens the door to further guardianship proceedings, but the decision cannot hinge on that document without meaningful due process afforded to the proposed protected person. Since this case establishes an apparent circuit split on this issue, appellate review is necessary. *Compare In Re Guardianship of Baron Beaver, Second Judicial District Court GR16-00033 (2016)* with *Rubin*, 491 P.3d 1 (2021).

Nevada law requires a petitioner in a guardianship case to meet certain minimum pleading requirements. Among those requirements a petitioner must attach a physician's certificate or, in emergent circumstances, a letter from an investigative agency such as Adult Protective Services or law enforcement. *NRS 159.044 (2)(i)(1); NRS 159.0523 (1)(a); NRS 159.0525 (1)(a)*. In *Rubin*, the Supreme Court interpreted the statute to require a physician's certificate compliant with NRS 159.044 in the petition and a failure to do so would warrant dismissal. *Rubin*, 491 P.3d 1 (2021). The court held that the statute did not require in person physical examinations and experts may rely on hearsay as a basis for their expert opinions. *Id.* Since the court found

the pleading standard had not been met or adequately supported the need for guardianship, discovery and petitioner's demand for an evidentiary hearing was denied and the case dismissed. *Id.*

Due to a proposed protected person's substantial liberties at risk of being taken away or curtailed in guardianship, a petitioner must meet minimum pleading requirements. These pleading standards serve to guard against individuals being dragged into guardianship court and subjected to lengthy and expensive legal battles based upon scant allegations. If the court deems that sufficient information has not been pled demonstrating a need for a guardianship, it is within the court's sole discretion to dismiss the case. Recognizing the *de minimus* rights of the petitioner, the Supreme Court in *Rubin* affirmed the denial of the petitioner's request for additional discovery and an evidentiary hearing. The Supreme Court pronounced that it is within the district court's discretion ascertain "whether the contents of the petition and certificate demonstrate a need for a guardianship." *Id citing Guardianship of L.S. & H.S.*, 87 P.3d at 525. Thus, the *Rubin* decision merely recognizes the physician's certificate as an initial burden, a key, to unlocking further proceedings before the court. It did not reach the issue faced in

*Johnson*, which is what consideration the court should give the physician's certificate in the context of a contested hearing.

While a physician's certificate must be in hand to cross the threshold to further guardianship proceedings, the Nevada legislature did not evince that it would constitute an evidentiary exception. Such a result leaves involuntary litigants on the courthouse steps without meaningful access to be heard and participate.

The Nevada Supreme Court has clearly stated that the Nevada Rules of Civil Procedure apply to guardianship proceedings. *See In re the Creation of a Comm. to Study the Creation & Admin. of Guardianships*, ADKT 507 (Order, July 22, 2016) (clarifying that the civil procedure rules "apply in guardianship matters, unless there is a specific statute ... regarding a procedure or practice that conflict with the NRCP"); *Rubin* at 6. It reasonably follows that the rules of evidence apply in guardianship proceedings as well. *NRS 47.020(1)(a)*; *Rubin*, 491 P.3d 1 (2021)(Court applied hearsay analysis under NRS 50.285). The predominant trend in other jurisdictions demonstrate that the rules of evidence apply in guardianship. *Beaver, Second Judicial District Court GR16-00033*; *See, e.g., Colo. Rev. Stat. §15-14-308(1), Fla.*

Rob. R. Rule §5.170, KY ST § 387.540, Or. Rev. Stat. §125.050, 20  
Pennsylvania C.S.A. § 5511, 5518 (testimony or deposition), RCW  
§11.99.045(3), Tex. Code §1055.101, VA Code 64.2-2007(A), N.Y. Mental  
Hyg. §81.11.

In Nevada, the case of *In Re Guardianship of Baron Beaver*  
grappled with the weight and admissibility of a physician's certificate,  
in light of a hearsay objection and demand for hearing. In *Beaver*, the  
court opined that,

“It is unclear whether the presence of a signed Physician's  
Certificate exists as a filing requirement designed to meet an  
initial burden establishing there is incapacity that warrants a  
guardianship proceeding. Or, whether the Physician's Certificate  
acts as some substitute for the testimony of the evaluating  
professional.” *Beaver, Second Judicial District Court GR16-00033*.

Unlike the District Court below, the decision in *Beaver* recognized the  
similar liberty interests in guardianship and involuntary commitment  
proceedings. The court reasoned that the legislature did not, “specify  
that an evidentiary exception exists as to the physician's certificate in a  
contested hearing.” *Id.* Consequently, the court held that the certificate  
is merely a pleading requirement, and the court would “afford it little to  
no evidentiary weight.” *Id*; See also *In Re Guardianship of Joseph*

*Hughes*, Second Judicial District Court GR14-00081 (2014) (Court dismissed petition in light of hearsay objection to physician's certificate and due process rights of individual implicated.)

Here, the District Court stated, "I believe that under *Rubin*, I am required to consider all of the evidence produced at the citation hearing that we have been provided with...." AA 00377. Regarding the physician's certificate, the district court indicated that it could "rely upon its contents without the necessity of live testimony from the physician." AA0335. This reasoning was legal error. *Rubin* merely recognized the physician's certificate as a pleading standard and that, consistent with the rules of evidence, experts can rely on a variety of sources as a basis for their expert opinion -- including hearsay.

### III. The District Court Misapplied the *Rubin* Decision When It Denied the Request for an Evidentiary Hearing.

Finally, the District Court committed an error of law when it added a "good cause" requirement to holding an evidentiary hearing. Nevada's guardianship statute only indicates that a "hearing" will be held. *NRS 159.0535*. Statutory interpretations are given *de novo* review and, thus, this Court should hold that, to comport with constitutional

due process, the hearing contemplated by the Nevada Legislature is an evidentiary hearing or contested hearing/bench trial.

At least twenty-six states have established a statutory right for the proposed protected person to demand a jury or bench trial in guardianship. Am. Bar Ass'n, *Conduct and Findings of Guardianship Proceedings*; See also Jennifer L. Wright, Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings, 12 Elder L.J. 53, 66 (2004). California, along with numerous other jurisdictions, have recognized the right to confront and cross examine the recommending medical physician in such a hearing. *Conservatorship of Tian L.*, 149 Cal. App. 4th 1022 (2007); see also *Matter of Guardianship of R.S.*, 470 N.W.2d 260, 265 (Wis. 1991) (right to present evidence and to cross-examine witnesses, including the physician or psychologist reporting to the court).

It is worth noting that an evidentiary hearing is not required in some situations in which liberty interests are affected, particularly when the deprivation of liberty is temporary. For example, a person can be arrested on a warrant issued upon an affidavit setting forth probable cause, *NRS 171.106*; a judicial officer can set bail for a criminal

defendant, *NRS 178.484*; a person can be involuntarily committed to a psychiatric institution for up to three days, *NRS 433A.145–.150*; and putative parents and their children can be required to undergo blood testing, *NRS 126.121*. Plenary guardianship is not a temporary circumstance and implicates fundamental constitutional rights.

Recently, the Nevada Supreme Court recognized the right to a jury trial in misdemeanor domestic violence cases, in part because a conviction would trigger a prohibition of the right to control or possess a firearm. *Andersen v. Eighth Jud. Dist. Ct.*, 135 Nev. 321, 322 (2019). Therefore, in Nevada, a decorated wartime Veteran suffering from dementia is not currently afforded the same due process rights afforded a defendant charged with misdemeanor domestic violence.

Here, the court misapplied the *Rubin* decision and added a “good cause” requirement. While the *Rubin* decision recognized that a request from the petitioner for an evidentiary hearing is within the sole discretion of the court, it does not abrogate the due process rights of the proposed protected person to demand an evidentiary hearing. Such a result is not what was contemplated by the Nevada Legislature and is not the practice in other District Courts in the state. Since there is now

a statutory right to counsel in Nevada, trial strategies may result in stipulations or waiver of objections as permitted under the Statewide Rules for Guardianship and the Nevada Rules of Professional Conduct. SRG 9; NRPC 1.2, 1.14, 2.1. As noted in a California appellate opinion, “where the parties do not object to the use of affidavits in evidence, and where both parties adopt that means of supporting their positions the parties cannot question the propriety of the procedure on appeal.” *Estate of Nicholas*, 177 Cal. App. 3d 1071, 1088 (1986).

While most cases are resolved, for nearly a decade district courts in other parts of the state regularly preside over contested hearings upon demand of the proposed protected person without adding a “good cause” showing. In this way, the proposed protected person is afforded an opportunity to fully present and refute evidence, call witnesses, and cross examine the evaluating professional. *See, e.g., Hughes*, Second Judicial District Court GR14-00081(2014)(“The legislature cannot abrogate the due process rights of an individual to cross exam the substantive reports for purposes of sustaining a guardianship.”); *In re Guardianship of Johnny Kelley*, Second Judicial District Court GR17-00413 (2017) (Closed evidentiary hearing for the evaluating physician

to testify); *In Re Guardianship of William Wisckol, Second Judicial District Court GR19-00038 (2019)* (Evidentiary hearing for physician testimony and denied the petition for failing to establish incapacity); *In Re Guardianship of Robert Veloz, Second Judicial District Court GR19-00222 (2019)* (Court dismissed petition despite evaluating physician being present after Petitioner's counsel failed to appear and prosecute the case); *In Re Guardianship of Gary Horas, 21-PT-01072, Third Judicial District Court (2021)* (Evidentiary hearing on continuation of temporary guardianship with testimony of physician subject to cross examination).

Consequently, the court need not reach Appellant's argument regarding the incapacity determination made below. The denial of an evidentiary hearing and misapplication of *Rubin* serves as a clear basis for reversal.

## **CONCLUSION**

For the foregoing reasons, Amicus submits that this Court reverse the district court's order granting guardianship over the person and estate.

## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook size 14.
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,998 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this this 4/21/2022,

By: /s/ Jennifer Richards

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### **CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of the State of Nevada, and  
that on the 4/21/2022 served a true and correct copy of the foregoing:  
**BRIEF OF AMICUS CURIAE**

  x   BY ELECTRONIC FILING: by electronically filing the  
document(s) listed above with the Clerk of the Court via the ECF  
system which will send a notice of electronic filing to the following set  
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/s/ Cynthia Maravan

An employee of the State of Nevada