IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D13-0053

IN RE: GUARDIANSHIP OF
LINDA KOSHENINA L.T. No. 16-2012-GA-164

_____

JAMES KOSHENINA,

Appellant,

v.

JOHN L. BUVENS, JR. AND
CAROL ANN DRAPER,

Appellees.
_____/

ON APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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Preliminary Statement

The trial transcripts are included at the end of the record on appeal, volumes three through six. Because the transcripts are not re-paginated, to avoid confusion with the page numbers in the first two volumes of the record, the trial transcripts will be cited with a T followed by volume and page number (*i.e.*, T3.100), and the remainder of the record will be designated with an R (*i.e.*, R1.100).

Statement of the Case and Facts

Appellant, James Koshenina ("Husband"), is the husband of the Ward, Linda Koshenina (R1.1-2), and the trial court appointed him the guardian of Mrs. Koshenina's property (R1.175). Appellees, John L. Buvens, Jr. and Carol Ann Draper ("Siblings"), are Mrs. Koshenina's brother and sister, respectively (R1.2), and the trial court appointed them co-guardians of the person (R1.175). The only issue on appeal is whether the trial court erred in failing to appoint Husband as Mrs. Koshenina's guardian of the person, given that Mrs. Koshenina designated him as her preneed guardian. (*Id.*; R2.212.)

* * *

The Kosheninas have been married for thirteen years. (T5.354.) They never had children, but the family dogs were Mrs. Koshenina's beloved companions. (T5.343; T6.414.) Husband is a senior programmer, enjoying security clearance

with the government; Mrs. Koshenina has not had to work for several years. (T5.356-57, 359.) They have lived in many cities throughout the States, but in recent years have enjoyed a comfortable lifestyle in Jacksonville, living in luxury condominiums or apartments. (T5.342, 358, 361, 362-64.) In 2010, at age fifty-seven, Mrs. Koshenina began to show signs of mental deterioration. (T5.366; R1.132.) She was later diagnosed as suffering from Pick's Disease, a mental illness that is a form of dementia. (T2.136.) "It is a rapidly progressive disease that will result in her death." (T3.43.)

Husband attempted to manage his wife's progressive illness at home for as long as he could. He hired a friend to sit with Mrs. Koshenina while he was at work because she did not like adult day care. (T6.451.) He took her to numerous doctor appointments and researched remedies and developmental medicines on the internet. (T5.369-70, 490.) He arranged for a new home when Mrs. Koshenina became fearful that someone was trying to break into their current apartment. (T5.366-67.) He made sure Mrs. Koshenina ate before he got his own food, and he assisted her when she soiled herself. (T5.336, 337-38.) Friends and relatives of Husband testified to his dedication to Mrs. Koshenina and his desire to make her life as good as possible given her illness. (T5.323.) They also testified to the mutual affection between the two and how Mrs. Koshenina showed affection to Husband throughout her illness. (T5.324, 327, 346, 348.)

Husband also made mistakes when learning how to deal with his wife's unexpected illness. As the Siblings testified at the hearing, Mrs. Koshenina once drove away from her apartment, which Husband did not realize because he thought she was sleeping. (T5.249-50, T6.444-45.) Mrs. Koshenina was later picked up by police in a hotel parking lot, confused, and ultimately Baker Acted. (T6.426.) Mrs. Koshenina apparently told police that she left her apartment because Husband was not adapting well to her illness and she thought they should separate. (R1.26.)

Also, until he found a sitter, Husband allowed Mrs. Koshenina to sit in hotel lobbies or go shopping while he was at work because she did not want to be home alone. (T6.445.) Doctors noted that she was disheveled when she came for appointments and her toenails went long periods of time before being clipped. (T3.43; T4.166; T6.464.) Mrs. Koshenina's treating physician testified that Husband did not always follow her treatment recommendations. (T3.45.) He sometimes gave Mrs. Koshenina too much or different medications from what were prescribed. (T3.45, 47, 49; T6.447-48.) In his defense, Husband testified that he distrusts doctors and explained multiple brushes his family has had with medical malpractice. (T5.383-84.) He also explained that the aspirin regime on which he started Mrs. Koshenina helped her behavior. (T6.447-48, 449.)

In September 2010, Mrs. Koshenina traveled to visit her family in Texas while Husband was moving them into the new apartment. (T4.145-46; T5.368.)

Ms. Draper testified that Mrs. Koshenina was not acting like her usual self and seemed detached. (*Id.*) She could help with some chores around the house, but was unable to communicate about things like being hungry. (T4.147-48.) After she had stayed with Ms. Draper for awhile (she was there a week total), Mrs. Koshenina began to relax, and she seemed more engaged. (T4.149-50.) Ms. Draper then suggested to Husband that he look into adult day care for Mrs. Koshenina because "at that point in time, you know, she was still able to, you know, do certain things. You just had to prompt- kind of prompt her." (T4.150.)

The following month, in October 2010, Mrs. Koshenina was unable to pass cognitive tests administered by her doctors. (R1.135-38.) For example, she could not recall words presented to her or draw a clock face. (*Id.*) Therefore, in November 2010, on the advice of a friend, Husband arranged for Mrs. Koshenina to meet an attorney. (T6.424.) The attorney suggested the documents that Mrs. Koshenina should execute. (*Id.*) Mrs. Koshenina executed, among other things, a Designation of Preneed Guardian ("Designation"), naming Husband as her preferred guardian and Husband's sister as an alternate guardian. (R1.11.)

As evidenced by the Designation, Mrs. Koshenina did not desire to have her Siblings appointed as her guardians of the person. (*Id.*) There is no evidence in the record that Mrs. Koshenina desired her Siblings to be her guardians. In fact,

Mrs. Koshenina went long periods of time without seeing her Siblings. (T4.177-78.)

The attorney who drafted the Designation, Robert Morgan, testified at the hearing. (T4.208.) He stated that he checks competency, before allowing a client to execute documents, by asking questions such as who is the current president, the client's address, and the time and place. (T4.211.) He opined, "Mrs. Koshenina freely, voluntarily and knowingly executed" the Designation. (T4.212.) He also confirmed that Mrs. Koshenina expressed that the documents she signed represented her wishes and that she was competent to execute them. (*Id.*)

Before November 2011 (a year after Mrs. Koshenina executed the Designation), Dr. Doty had recommended only supervised care for Mrs. Koshenina, not the need for a 24-hour facility. (T3.57-58.) On November 29, 2011, however, Mrs. Koshenina went to an appointment with Dr. Doty where she was walking into walls, walked into the doctor, and then bumped her head on Dr. Doty's computer. (T3.55.) Dr. Doty advised Husband that the time had come for around-the-clock care (T3.50; T5.379), and Husband immediately took Mrs. Koshenina to Emeritus Senior Living ("Emeritus") for adult day care. (T5.378.) On the first day there, Emeritus pressured Mr. Koshenina into committing her to round-the-clock care, which he did believing he could cancel the contract on thirty days notice. (T5.377; T6.454-55.)

Also on her first day there, Mrs. Koshenina crashed into a door and fell to the floor, striking her eye on the doorknob on the way down. (T5.380; T6.456.) Husband took Mrs. Koshenina home that evening and the next few evenings. (T6.456.) The blood causing the bruise in Mrs. Koshenina's right eye eventually spread to her left eye, making it appear that she had a new injury. (T6.459-60.) The bruises Mrs. Koshenina sustained in the fall became more apparent over the course of several days. (T6.461.) As a result, Emeritus contacted DCF, accusing Husband of abuse, and DCF began an investigation against Husband. (T3.72; T4.228.)

Despite their concerns, however, Emeritus did not transport Mrs. Koshenina to a doctor or hospital; Husband took Mrs. Koshenina to the hospital himself, where she remained for six days. (T5.381; R1.99-130.) While at the hospital, Mr. Buvens became agitated with Husband because he was not apologetic about Mrs. Koshenina's condition. (T4.257.) Mr. Buvens immediately filed papers to become Mrs. Koshenina's emergency co-guardian, along with Ms. Draper. (*Id.*; R1.1-6.) Husband testified that Mr. Buvens said he and Ms. Draper wanted to be co-guardians so they could move Mrs. Koshenina to Texas, where she had more family, and where they would not have to spend so much money on airfare to Jacksonville. (T5.385.) The trial court, in fact, appointed the Siblings as Mrs. Koshenina's emergency co-guardians of the person. (R1.12-13.)

Meanwhile, concerned about the obvious lack of care Mrs. Koshenina was receiving at Emeritus, Husband tried to remove Mrs. Koshenina within just four (4) days of placing her there, but because the DCF investigation had begun, his thirty-day notice was not accepted. (T6.408, 512.) The Siblings were then appointed as Mrs. Koshenina's temporary emergency guardians. (T4.113.) Although Husband was vehement in his demands that Mrs. Koshenina be moved to a better facility (which he would pay for), it took two more falls, resulting in a broken collar bone, a broken rib, stitches above her eye, a broken nose, and bruising of the brain, before the Siblings consented. (T4.270; T5.365, 387, 388-91, 407; R1.93-94.) Moreover, when Mrs. Koshenina fell and broke her collar bone, neither the Siblings nor Emeritus called Husband to let him know she had been injured. (T5.387, 390.) Mrs. Koshenina had to spend seven and a half months at Emeritus before the Siblings agreed to a new residence. (T5.381, T6.408 (November 2011 to June 15, 2012).)

Husband also asked the Siblings, as emergency co-guardians, to alter his visitation restrictions so that he could spend more time with Mrs. Koshenina following her injuries, but the Siblings refused. (T5.393.) As evident by an e-mail the Siblings introduced into evidence, Mr. Koshenina wrote the Siblings that "[w]hy you both are not allowing me to be with my wife more hours and especially

be with her at the doctors is beyond comprehension and is hurting your sister more than you imagine." (T6.469; R1.93.)

Husband, meanwhile, was cleared of the abuse allegations, and no charges were filed against him. (T5.384-85.) Despite one notation in the hospital records that Mrs. Koshenina said Husband was a "jerk" (R1.125), hospital nurses testified that while Mrs. Koshenina was in the hospital following her falls at Emeritus, Husband was attentive to Mrs. Koshenina, walking with her when she was agitated, helping her relax, getting her drinks and snacks, and attending to her personal hygiene when she needed help. (T5.294-95, 304.) Mrs. Koshenina always responded favorably when he came. (T5.295, 296, 305.) In fact, Mrs. Koshenina called out for Husband when he was not there. (T5.305.)

In addition to not preventing the Ward's falls, Husband had numerous other complaints about Emeritus. (T6.408) For example, they would not assist Mrs. Koshenina with her meals, so she often went hungry. (*Id.*, R1.88, 91.) This was particularly disturbing considering how Mrs. Koshenina paces almost incessantly and had gotten dangerously thin. (R1.88.) At the Siblings' request, Emeritus also prevented Husband from bringing in food that Mrs. Koshenina enjoyed eating. (R1.94, 98.) Emeritus allowed her to go unbathed and would not promptly change her diapers. (R1.88-89, 91.) Husband also was concerned about the wood floors at

Emeritus, as it was more likely Mrs. Koshenina would trip and fall on wood. (R6.406.)

Husband also testified that only one out of five people at Emeritus was polite to him. (R6.410; *see also* R1.94.) On occasion, Husband's frustrations with his wife's treatment caused him to lose his temper with the staff. (T4.231-33.) Yet, when he was with Mrs. Koshenina, the Emeritus staff reported that he was loving and affectionate with her. (T4.131.) The Emeritus staff also described him as passionate about his wife's care. (T4.134.) Even Ms. Draper recognized that the Kosheninas have an emotional attachment to one another and that Husband loves Mrs. Koshenina. (T4.183.)

As a result of one verbal confrontation with the Emeritus staff, the Siblings, as Mrs. Koshenina's temporary guardians, prevented Husband from visiting his wife at all until he signed a paper agreeing to certain conditions. (T5.393-94; T6.414-16; R1.98.) Those conditions were: (1) he would quietly leave Emeritus if asked to do so by Mrs. Koshenina; (2) he would quietly leave Emeritus if asked to do so by any member of the Emeritus staff; (3) he would not raise his voice, curse, or threaten any member of the Emeritus staff; and (4) he would not bring any food into Emeritus for Mrs. Koshenina. (R1.98.) The agreement also required Husband to consent to these terms upon fear that his "right to visit [his] wife may be further restricted or eliminated altogether." (*Id.*) Husband was blocked from visiting Mrs.

Koshenina for three days until he agreed to behave as the Siblings deemed appropriate. (R1.98; T6.415.) During those three days, Mrs. Koshenina cried on the phone for Husband. (T6.416.) And it was during this period of restricted access that Mrs. Koshenina fell again, requiring hospitalization. (R1.98, R1.165; T5.399.)

Aside from those three days, his visits with Mrs. Koshenina have been daily, and he has brought her beloved dogs to come see her once a week as well. (T4.133, T6.414.) Even the Emeritus staff testified that Mrs. Koshenina was happy to see Husband when he arrived and that they would walk together, holding hands, or sit together on the couch and visit. (T5.309-13.)

In contrast, the Siblings, who reside in Texas, made only infrequent visits to see Mrs. Koshenina even after being named her temporary guardians. (T4.181, 267). Prior to Mrs. Koshenina's incapacity, she saw them at most only one time per year, for just a few hours, during a large extended family Thanksgiving. (T4.178-79; T5.376.) Husband testified that of the thirteen years of their marriage, Mrs. Koshenina elected to skip Thanksgiving with her family for nine of those years. (T5.375)

There is no evidence that Mrs. Koshenina's family was particularly fond of Mr. Koshenina. Before Mrs. Koshenina's illness, Mr. Buvens never visited her and Husband in Jacksonville. (T4.267.) The Siblings both testified that they

would like to move Mrs. Koshenina back to Texas (T4.195-96, 264), even though that move obviously would separate Mrs. Koshenina from Husband, given his job was in Jacksonville (T5.361).

Just before the evidentiary hearing to determine Mrs. Koshenina's plenary guardians, the Siblings allowed Mrs. Koshenina to move to Sunrise. (T4.270.) Mrs. Koshenina now has a nicer room, more caregivers, and better meals at Sunrise. (T6.408.) Although this move was made while the Siblings were the emergency temporary guardians, it was not because of them that Mrs. Koshenina is receiving better care. (T4.270.) It was because Husband was insistent on making sure that his wife had the best possible care. (T6.406-07.) Husband has no intention of removing Mrs. Koshenina from the facility. (T6.410.) Indeed, he recognized that she often cannot be controlled without three people on hand. (T6.409.)

At the two-day evidentiary hearing, the Siblings tried to prove that the Designation "is invalid either because [Mrs. Koshenina] was incompetent when she made that or because of the undue influence of [Husband] to procure that at a time when he knew that his wife was mentally incapacitated." (T3.9.) The Siblings offered no expert testimony that Mrs. Koshenina was incapacitated or incompetent at the time she executed the Designation. Dr. Doty, Mrs. Koshenina's treating physician, attested merely that her capacity "would be called into

question." (T3.52.) Dr. Doty also confirmed that she did not see Mrs. Koshenina until February 2011, when her condition likely would have been worse than in November 2010 when she executed the Designation. (T3.65.) Finally, Dr. Doty recognized that families often report dementia patients have "lucid intervals, where they can have more meaningful conversation with the patient." (T3.65-66.)

Following a two-day evidentiary hearing, the trial court issued an Order Appointing Guardian ("Appointment Order"). (R1.172-76.) The trial court made the following relevant factual findings:

1. All petitioners in this case have [Mrs. Koshenina's] best interest at heart. [Mrs. Koshenina] is blessed to have so many people care so deeply for her. It will certainly be in [Mrs. Koshenina's] best interest if all of the petitioners continue to cooperate on matters concerning her care and the time that the petitioners are able to spend with her.
2. [Mrs. Koshenina] suffered no abuse at the hands of her husband. [Mrs. Koshenina's] injuries occurred from her several falls which were not caused by the husband, nor did they even occur when he was present.
3. [Mrs. Koshenina] has done better in the care of the Emergency Temporary Guardians then she did prior to their appointment while she was in the husband's care. Though her mental condition continues to deteriorate, as must be expected of those who suffer from [Mrs. Koshenina's] disease, she is receiving better care and attention at the direction of her brother and sister who are serving as Emergency Temporary Guardians.
4. The husband submits that the Designation of Preneed Guardian executed by [Mrs. Koshenina] in 2010 gives him a statutory priority and preference in appointment. The Court finds that this Designation of Preneed Guardian was executed by [Mrs. Koshenina] after the dementia process has seriously compromised her ability to understand what she was doing. Although she may have had a "lucid interval" at the time this document was executed, the Court seriously questions whether she could have fully understood what the document provided. In any event, the Court finds that it is not in [Mrs. Koshenina's] best interest to honor this

preference expressed in that document as it relates to guardianship of her person, because of the Court's findings regarding events subsequent to the execution of this document.

5. The husband's personality and social skills are not conducive to making appropriate decisions for the care of [Mrs. Koshenina's] person which are in her best interest. The husband has not made appropriate judgments concerning her care although the Court is satisfied that the acts he took were thought by him to be in her best interest.
6. [Omitted because it relates to Mrs. Koshenina's property.]
7. It is in the best interest of [Mrs. Koshenina] for her brother and sister to be appointed plenary co-guardians of her person. However, the Court further finds that it is in [Mrs. Koshenina's] best interest that she have daily contact with her husband and that she continue to reside in her present treatment facility so that her husband can continue to visit with her each day (and bring her dogs to visit her as well).

(R1.173-75.) Based on these findings, the trial court appointed Siblings as plenary co-guardians of Mrs. Koshenina's person. (R1.175.) It appointed Husband as the plenary guardian of Mrs. Koshenina's property. (R1.175.)

Husband moved for rehearing, arguing both that the trial court overlooked the facts that led to Mrs. Koshenina's multiple hospitalizations and that the Appointment Order unconstitutionally interfered with the Kosheninas' constitutional rights to substantive due process and privacy. (R1.177, 183-87; R2.192-207.). Husband raised an "as applied" constitutional challenge to the guardianship statutes. (R2.202-06.) As argued at the hearing, Mrs. Koshenina twice selected Husband as the person whom she trusted with her care: once when she married him and again when she selected him as her designated preneed guardian, health care surrogate and attorney-in-fact. (R2.244-45.) Although the

trial court, the Siblings, "or anyone for that matter, may question Mrs. Koshenina's wisdom in selecting [Husband]; [] she had a constitutional right to make those decisions." (R2.245.) The trial court's "analysis under the best interest finding gives insufficient consideration to what Mrs. Koshenina thought would be in her best interest and the importance of the marital relationship." (R2.250.) Further, Husband argued that whatever the wisdom of his early decisions in caring for Mrs. Koshenina, "they cannot override his wife's wishes that he be the one to make the most intimate, personal decisions at the end of her life." (R2.251.)

The Siblings also moved for rehearing, contesting the restrictions that prevented them from removing Mrs. Koshenina from Sunrise and restricting Husband's visitation. (R1.179-82.) Husband agreed that the Siblings should be able to take Mrs. Koshenina to doctor's appointments outside of Sunrise and the Appointment Order was modified accordingly. (R2.271-72; R2.208.)

After taking the motions under advisement, the trial court entered an Order Denying Cross Motions for Rehearing ("Rehearing Order"). (R2.209-12.) In the Rehearing Order, the trial court stated that it did not overlook any evidence, but considered Mrs. Koshenina's medical treatment and the role of the Emeritus caregivers in Mrs. Koshenina's condition and injuries. (cite at ¶ 1.) The trial court found that neither Florida's guardianship laws nor the Appointment Order violated

the Kosheninas' fundamental privacy rights. (R2.210 at ¶ 2.) Specifically, the trial court found:

> Nor was the right to marital privacy violated anymore than is inevitably implicit in incapacity and guardianship proceedings where the alleged incapacitated person/Ward is a married person. In fact, this Court's Order appointing guardians was crafted in a manner that best protected [Mrs. Koshenina] as her best interest dictated and yet to preserve her relationship with her husband with as little disruption except as was inherently necessary under the particular circumstances of this case. Though not couched in terms of constitutional rights (as they were not raised as such in the trial) the remedy fashioned by the Court was designed to provide maximum protection to [Mrs. Koshenina] with as little interference with her martial privacy as was necessary given the degree of her incapacity.

(*Id.*)

The trial court went on to clarify its factual findings, explaining:

> It is in the best interest of [Mrs. Koshenina] to override her designation of pre-need guardian considering the injuries she sustained, and the failure of care she suffered, while under the care and control of her husband. Though the Court has found that the evidence does not support the allegations or implications that he willfully and intentionally abused [Mrs. Koshenina], there is no question that she suffered injuries and neglect while on his "watch." After the appointment of [Mrs. Koshenina's] brother and sister as the emergency temporary guardians of the person, [Mrs. Koshenina] improved greatly under the direction of her care that they provided. To revert back to the pre-filing state where her care was under her husband's direction would in no way be in her best interest.

(R2.211.) The trial court then found that the Siblings' motion for rehearing was "without merit." (*Id.* at ¶ 3.) It reiterated that it is "important and appropriate that

the husband retain a voice in any removal decisions made by the guardians of the person." (*Id.*) This timely appeal followed. (R2.214.)

SUMMARY OF ARGUMENT

Mrs. Koshenina chose Husband. She chose him when she married him and remained married to him for thirteen years preceding her incompetency. She chose him when, before her incompetency, she designated him as her preneed guardian. Husband should be making the personal, private, and intimate decisions for Mrs. Koshenina in her final days, even if others, like Siblings, may question the wisdom of Mrs. Koshenina's decision to choose her Husband for this task.

The trial court gave insufficient deference to Mrs. Koshenina's choice. The court substituted its preference for Mrs. Koshenina's preference. Its appointment of Siblings as co-guardians of the person violated legislative and constitutional policies favoring the appointment of a ward's designated guardian, especially where, as here, the designated guardian is the ward's spouse.

The trial court's discretion did not permit it to disregard Mrs. Koshenina's choice merely because it had "serious questions" whether Mrs. Koshenina "fully understood" her Designation of Husband as guardian. The law presumes Mrs. Koshenina was competent when she executed the Designation. The trial court did not find that Mrs. Koshenina was incompetent or incapacitated when executed the Designation. The Siblings failed to present competent substantial evidence to

support any such finding. Dr. Doty merely speculated that Mrs. Koshenina's capacity "would be called into question." The trial court's reliance on mere "serious questions" to disregard the Designation was contrary to the Third District's decision in *Estate of Salley*.

The trial court also erred in overriding Mrs. Koshenina's choice based on what, it thought, were Mrs. Koshenina's best interests. The trial court's discretion in determining a ward's "best interests" is limited by legislative and constitutional policies that give significant deference to a ward's preferred guardian. "Best interests" cannot mean in this context that the court may appoint as guardian whoever, it thinks, would best serve the ward's interests. Such unfettered discretion in a trial judge would render meaningless the legislative policy favoring the appointment of the ward's preferred guardian, and it would allow trial judges to run roughshod over the constitutional right to privacy. Discretion to appoint a guardian must be exercised in the least intrusive manner possible, and thus, a ward's designated guardian should be appointed unless such an appointment would cause actual or imminent harm to the ward.

The trial court misapplied the "best interests" standard. It never found any actual or imminent harm if Husband were to be appointed. To the contrary, it found no evidence of abuse by Husband of Mrs. Koshenina. Though neglect and injuries may have occurred on Husband's "watch," they also occurred on Siblings'

watch and while Mrs. Koshenina was under 24-hour care at a facility. Her disease and tendency to fall are the cause of her injuries; neither Husband nor Siblings should be penalized for this. Granted, Husband made mistakes when, unlike Siblings, he faced the daunting task of caring for a spouse entering dementia. But those mistakes did not justify stripping the Kosheninas of their statutory and constitutional rights.

The Kosheninas, however, were stripped of these rights. The trial court, in applying the guardianship laws, unconstitutionally interfered with the Kosheninas' right to privacy and substantive due process. The federal and state constitutions protect "intimate and personal choices" that are "central to personal dignity and autonomy." A guardianship is intrusive. A guardian is empowered to make a whole range of intimate and personal choices for a ward. While the State may have a compelling interest to appoint a guardian to make these choices for an incapacitated person, constitutional respect for the ward's autonomy requires that a trial judge employ the least intrusive means in appointing a guardian. The least intrusive means require appointment of the ward's preferred guardian unless actual or imminent harm will occur, especially where the preferred guardian is a spouse.

Finally, the trial court confused procedural and substantive due process, and it did not provide the "maximum protection" to the Kosheninas' marital right to privacy. Marriage is not about just visiting one's spouse. In a marriage, two

people make many difficult, personal decisions together. The Kosheninas made a difficult, personal decision; they decided Husband should be Mrs. Koshenina's guardian. The trial court should have respected this decision; instead, it intruded on the Kosehninas' privacy by appointing Siblings as the guardians of the person. This intrusion should be reversed.

ARGUMENT

I. HUSBAND SHOULD HAVE BEEN APPOINTED AS MRS. KOSHENINA'S PLENARY GUARDIAN OF THE PERSON UNDER FLORIDA'S STATUTORY GUARDIANSHIP LAWS.

Standard of Review. This Court reviews the trial court's decision appointing a guardian for an abuse of discretion. *Wilson v. Robinson*, 917 So. 2d 312, 313 (Fla. 5th DCA 2005); *see also In re Guardianship of Davidson*, 259 So. 2d 762, 762 (Fla. 1st DCA 1972). However, the trial court's discretion in appointing a guardian is a "limited discretion" that "must be exercised consistent with the Florida Statutes." *Wilson*, 917 So. 2d at 313 (citing *Poteat v. Guardianship of Poteat*, 771 So. 2d 569, 572 (Fla. 4th DCA 2000)).

Merits.

A. Introduction.

The trial court abused its discretion in naming the Siblings as Mrs. Koshenina's co-guardians of the person, instead of Husband, because its decision

was inconsistent with Florida's guardianship laws. Husband should have been appointed as Mrs. Koshenina's plenary guardian of the person

A guardianship is an intrusion of the State into the private affairs of the incapacitated ward. It strips the ward of many individual rights and liberties. A ward may lose the right to travel, marry, vote, and seek employment. *See* § 744.3215(2), Fla. Stat. (2012). A ward also may lose other rights that may be delegated to her guardian: the right to contract, to sue and defend lawsuits, to manage property or to make any gift, to determine her residence, to consent to medical or mental health treatment, and to make decisions about her social environment or other social aspects of her life. *See* § 744.3215(3), Fla. Stat. (2012). In short, a ward may lose the right to decide for herself about her housing, medical care, social life, and property, and she is effectively relegated to the status of a child.[1]

[1] It is for these reasons that a trial court appoints an attorney for the alleged incapacitated person when a petition to determine incapacity is filed. *See* § 744.331(2), Fla. Stat. (2012). That attorney "shall represent the expressed wishes of the alleged incapacitated person." § 744.102(1), Fla. Stat. (2012). Unfortunately, Mrs. Koshenina's appointed attorney did not advocate consistent with her expressed wishes in the designation of preneed guardian. (*See* T3.16-19.) Instead, the appointed attorney aligned himself with Siblings and expressed his personal preference (*id.*), going against his statutory directive to represent Mrs. Koshenina's "expressed wishes." Thus, Mrs. Koshenina was effectively denied her right to counsel. *See* § 744.3215(1)(l).

Florida's guardianship laws must be construed and implemented in accordance with legislative and constitutional policies.[2] To mitigate against the intrusive nature of a guardianship, the Legislature established a policy allowing wards to participate in decisions affecting their lives as much as possible. *See* § 744.1012, Fla. Stat. (2012) (stating the guardianship laws were intended to establish "a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them"). The guardianship laws "shall be liberally construed to accomplish this purpose." *Id.* Thus, every decision under Florida's guardianship laws – including the decision on whom to appoint as guardian – should comport with the ward's preferences as much as possible. *See Acuna v. Dresner*, 41 So. 3d 997, 999 (Fla. 3d DCA 2010) ("Where a ward's preference as to the appointment of a guardian is capable of being known, that intent is the polestar to guide probate judges in the appointment of their guardians" (internal quotations omitted).) Florida's guardianship laws also must comport with the constitutional right to privacy and to freely make personal decisions. *See infra* Argument II, at 34-44; *see, e.g., Powell v. State*, 345 So. 2d 724, 725 (Fla. 1977)

[2] *See G.S. v. T.B.*, 969 So. 2d 1049, 1053 (Fla. 1st DCA 2007) (Thomas, J. dissenting), *approved by* 985 So. 2d 978, 984 (Fla. 2008) (opining that a trial court's discretion under the adoption statutes was "limited by public policy constraints and the parents' constitutional right to make child rearing decisions without state interference").

(holding that, "if reasonably possible[,] a statute should be construed so as not to conflict with the constitution").

In accordance with the statutory and constitutional policy of honoring a ward's preferences, the guardianship laws provide that a competent adult's designation of a preneed guardian "shall constitute a rebuttable presumption that the [designated] preneed guardian is entitled to serve as guardian." § 744.3045(1) and (4), Fla. Stat. (2012). The Designation showed Mrs. Koshenina's express preference for Husband to be the guardian. (R1.11.) Even without the Designation, the other evidence overwhelmingly suggested that Mrs. Koshenina preferred Husband to serve as her guardian. In particular, Mrs. Koshenina expressed her preference for Husband by her life choices: her 13-year marriage to Husband, her moves with him around the country, and her continuing daily displays of enthusiasm for him during his visits at her facility. (T5.295, 309-13, 354, 358, 469). In contrast, little or no evidence suggested that she preferred her Siblings to be her guardians. In the years preceding her disease, she saw the Siblings, at most, once a year for a span of only several hours. (T5.374-76; T6.413.) Moreover, Mrs. Koshenina designated her sister-in-law (not Siblings) as the back-up preneed guardian in the event Husband was unable to serve. (R1.11.)

The trial court, however, gave two reasons to appoint Siblings rather than honor Mrs. Koshenina's Designation and preference for her Husband. First, it

"seriously question[ed]" whether Mrs. Koshenina "fully understood" the Designation given that the "dementia process had seriously compromised her ability to understand what she was doing." (R1.173.) Second, the trial court found that it would be in Mrs. Koshenina's "best interests" to appoint the Siblings. (R1.174; R2.) Both reasons were an abuse of discretion.[3]

B. The Trial Court's "Serious Questions" About Mrs. Koshenina's Ability to "Fully Understand" the Designation were Not Sufficient Grounds to Disregard the Designation and Mrs. Koshenina's Preference for Husband.

A person is presumed competent unless proven otherwise. *Rodriguez v. Pino*, 634 So. 2d 681, 685 (Fla. 3d DCA 1994). The trial court never found that Mrs. Koshenina was incompetent or incapacitated when she executed the Designation. Nor did Siblings offer any evidence that Mrs. Koshenina was incompetent or incapacitated when she designated Husband as her preneed guardian. The closest they came to offering such evidence was the testimony of Dr. Doty, Mrs. Koshenina's treating physician. She speculated that Mrs. Koshenina's capacity "would be called into question," (T3.52), though she

[3] The Siblings also suggested that Husband was unqualified to serve as guardian due to conflicts of interest and a history of abuse. *See* § 744.309 (3), Fla. Stat. (2012); (T6.499). But the trial court specifically found that Mrs. Koshenina "suffered no abuse at the hands of the husband" and that her "injuries occurred from her several falls which were not caused by the husband, nor did they even occur when he was present." (R1.173 at ¶ 2.) Thus, the trial court did not deny Husband's request to serve as guardian because he was unqualified.

admitted that she did not begin treating Mrs. Koshenina until months after she executed the designation. (R3.52-54.)

The most on-point, relevant precedent is *In re Estate of Salley*, 742 So. 2d 268 (Fla. 3d DCA 1997). *Estate of Salley* establishes that a trial court's mere "doubt" or "serious questioning" of a ward's ability to understand her designation of a preneed guardian is, by itself, insufficient grounds for declining to appoint the designated preneed guardian. In *Estate of Salley*, a nephew petitioned to determine the capacity of his aunt, and subsequent to the petition, the aunt designated a "longtime friend" to be her preneed guardian. *Id.* at 269, 271. Just twenty-two days after this designation occurred, the trial court adjudicated the aunt incompetent because of Alzheimer's disease. *Id.* The aunt's family resisted the appointment of the designated preneed guardian (the friend) because of an unsupported concern. *Id.* at 269-270. The trial court declined to appoint the designated preneed guardian and instead appointed the family's proposed guardian. *Id.* at 270.

The appellate court reversed. *Id.* It did so because a mere "doubt" about the competence of the aunt on the day she designated her preneed guardianship was not sufficient grounds to disregard the aunt's designation of a preneed guardian. *See id.* Specifically, the court reasoned:

> The parties disagree about the validity and effect that should be given to the pre-need declaration executed by [the aunt]. The statute

> provides that such a declaration may be executed by a "competent" adult. § 744.3045(1), Fla. Stat. (1995). [The aunt's family] contend[s] that [the aunt's] competence on the day that she signed the declaration is in doubt given the fact that she signed the declaration some twenty-two days before the court determined she was incapacitated. [The aunt's friend], in turn, points out that a person is presumed competent until an adjudication of incompetence is rendered. *See Baskin v. Sherburne*, 520 So.2d 103 (Fla. 2d DCA 1988).
>
> . . . . [S]ection 744.312(3)(a) of the Florida Guardianship Law required the court to "consider the wishes expressed by the incompetent as to who shall be appointed guardian." Hence, it appears that the trial court, incorrectly, was more interested in placating unsubstantiated family concerns than honoring the wishes of the incapacitated person. Consequently, it was plain error for the court to deny [the friend's] petition to become appointed guardian of the person of [the aunt].

Id. (emphasis added). Elsewhere in its opinion, the appellate court noted that a ward's preference, if known, is the "polestar to guide probate judges in the appointment of [a] guardian." *Id.*

Mrs. Koshenina, like the aunt in *Estate of Salley*, was suffering from a disease causing mental deterioration at the time she designated her preneed guardian. But the trial court never found, and the Siblings never offered any evidence, that Mrs. Koshenina was incompetent or incapacitated when she designated Husband as preneed guardian. Therefore, Mrs. Koshenina was legally competent to make decisions for herself until she was adjudicated incapacitated in April 2012 (T3.5). *See Baskin*, 520 So. 2d at 104. Just as in *Estate of Salley*, mere "doubts" or "serious questioning" about Mrs. Koshenina's ability to "fully

understand" the provisions of the Designation were not sufficient grounds for the trial court to disregard the Designation. Like the aunt suffering from Alzheimer's disease in *Estate of Salley*, Mrs. Koshenina, despite her mental deterioration, was allowed to designate a preneed guardian, and the trial court, like the court in *Estate of Salley*, had to honor that Designation.

The trial court abused its discretion because it disregarded the rule of law that Mrs. Koshenina's preference – even if expressed during a diminished (but not incapacitated) mental state – should have been the "polestar" for its decision on whom to appoint as the guardian. *See Estate of Salley*, 742 So. 2d at 271.

C. The Trial Court Erroneously Applied the "Best Interests" Standard in Overriding Mrs. Koshenina's Preference for Husband to Serve as Guardian of the Person.

1. Properly construed, the "best interest" standard must respect the ward's designated, preferred guardian absent a showing that appointing the designated guardian will actually or imminently harm the ward.

Section 744.312(4), Florida Statutes, provides: "If the person designated is qualified to serve pursuant to s. 744.309, the court shall appoint any . . . preneed guardian, unless the court determines that appointing such person is contrary to the best interests of the ward." (Emphasis added.) The trial court's discretion to determine "best interests" under this statute must be limited by legislative public policies and the constitutional right to privacy. *See G.S. v. T.B.*, 969 So. 2d 1049, 1053 (Fla. 1st DCA 2007) (Thomas, J. dissenting), *approved by* 985 So. 2d 978,

984 (Fla. 2008) (opining that a trial court's discretion to determine "best interest" under the adoption statutes was "limited by public policy constraints and the parents' constitutional right to make child rearing decisions without state interference").

In this context, "best interests" must mean the "best interests" as the ward, Mrs. Koshenina, would have preferred. Obviously, neither Mrs. Koshenina nor any ward would think it is in one's best interests to suffer abuse or harm at the hands of a guardian, even a designated preneed guardian. But absent a showing of actual or imminent harm, a trial court should not be permitted to disregard the ward's preference, i.e., the designated preneed guardian.

"Best interests" cannot mean that a trial court may disregard the ward's preference and choose for itself which person, it thinks, would do a "better job" of serving the ward's interest as guardian. A "better job" showing is too light of a burden. It gives insufficient respect and deference to the ward's personal preference, choice, and liberty. A "better job" interpretation of "best interests" would render meaningless the presumption attaching to a ward's preneed guardianship designation. *See* § 744.3045(4), Fla. Stat. (2012). It would also render meaningless the Legislature's policy of allowing incapacitated persons to participate in decisions. *See* §§ 744.312(3)(a), 744.1012, Fla. Stat. (2012); *see, e.g., Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260,

1265-66 (Fla. 2008) (holding that a part of a statute must not be read in isolation but in context with entire legislative scheme to ascertain the overall legislative intent). It would also run afoul of the constitutional right to privacy. *See infra* Argument II, at 34-44; *see, e.g., Powell*, 345 So. 2d at 725 (holding that, "if reasonably possible[,] a statute should be construed so as not to conflict with the constitution").

Our interpretation of the "best interest" standard – an interpretation that gives significant deference to a ward's autonomy and pre-incompetency designation – is the only interpretation that can be reconciled with the Legislature's policy of respecting the ward's preferences and with every citizen's constitutional right to be self-autonomous and to have the freedom to decide for one's self matters that do not harm others or society. *See supra* Argument I.A, at 19-22; *infra* Argument II, at 34-44. Other persons – like the trial judge and Siblings – may question the wisdom of Mrs. Koshenina's decision to designate Husband to serve as her guardian. But, in Florida and the United States, we allow citizens to make personal decisions, even unwise decisions, out of respect for the citizen's liberty and personal freedom. *See infra* Argument II, at 34-44

In this case, the trial court incorrectly applied the "best interest" standard because it did not give appropriate deference to Mrs. Koshenina's personal preference. The trial court substituted its own preference for Mrs. Koshenina's

preference, which she had expressed in her Designation and by her life choices. Just because someone else (Siblings) might do a "better job" than Husband did not mean the trial court could disregard Mrs. Koshenina's Designation and preference for Husband, absent a showing of actual or imminent harm to Mrs. Koshenina. We next explain how the trial court misapplied the "best interests" standard.

2. The trial court misapplied the "best interest" standard.

The trial court made two findings in the Appointment Order supporting its "best interest" conclusion:

> 3. The Ward has done better in the care of the Emergency Temporary Guardians than she did prior to their appointment while she was in the husband's care. . . . she is receiving better care and attention at the direction of the brother and sister who are serving as Emergency Temporary Guardians.
>
> 5 The husband's personality and social skills are not conducive to making appropriate decisions for the care of the Ward's person which are in her best interest. The husband has not made appropriate judgments concerning her care although the Court is satisfied that the actions he took were thought by him to be in her best interest.

(R1.173-74.) On rehearing, the trial court attempted to bolster its findings, adding:

> It is in the best interest of [Mrs. Koshenina] to override her designation of pre-need guardian considering the injuries she sustained, and the failure of care she suffered, while under the care and control of her husband. Though the Court has found that the evidence does not support the allegations or implications that he willfully and intentionally abused [Mrs. Koshenina], there is no question that she suffered injuries and neglect while on his "watch." After the appointment of [Mrs. Koshenina's] brother and sister as the emergency temporary guardians of the person, [Mrs. Koshenina] improved greatly under the direction of her care that they provided.

> To revert back to the pre-filing state where her care was under her husband's direction would in no way be in her best interest.

(R2.211.)

None of these findings is sufficient to support the conclusion necessary under section 744.312, that appointing Husband is contrary to Mrs. Koshenina's best interests. Some of these findings – like the ward has "done better" under Siblings' care – are the trial judge's personal opinion that Siblings will do a "better job" than Husband as guardian. Most notable is the trial court's criticism of Husband's "personality and social skills." Surely, Mrs. Koshenina, after thirteen years of marriage, was well aware of the deficiencies in Husband's "personality and social skills," yet she chose him to be her guardian and continued to choose him to be her marital partner. As argued above, these types of judicial findings must be insufficient because, if they were not, every trial judge could substitute his or her own personal preferences for the pre-incompetency preference expressed by the ward, thereby making a mockery of Florida's statutory and constitutional policies favoring personal choice. *See supra* Argument I.C.1, at 26-29.

Importantly, the trial court found that "the evidence does not support the allegations or implications that [Husband] willfully and intentionally abused [Mrs. Koshenina]," and it further found that Husband was taking actions that, he thought, were in Mrs. Koshenina's best interest. (R1.173-74.) Admittedly, the court also found that Mrs. Koshenina suffered "injuries" on Husband's "watch." (R2.211.)

These latter findings, however, were not sufficient to disregard Mrs. Koshenina's preference for Husband. The undisputed evidence is that Mrs. Koshenina suffered numerous injuries from falls and hospitalizations while on both Siblings' and Husband's "watches" and even while under the care of a 24-hour facility. (T5.380, 387.) These injuries were not caused by Siblings or Husband, either intentionally or through neglect. They were caused by Mrs. Koshenina's disease.

Moreover, Husband appropriately remedied Mrs. Koshenina's disease when he placed Mrs. Koshenina in a 24-hour care facility, Emeritus, with which Siblings were satisfied for the next seven months. (T5.270, 379-81.) As soon as Dr. Doty advised Husband to place Mrs. Koshenina in a facility, he did so.[4] (T5.378-80.) And Husband later insisted, over the resistance of Siblings, that Mrs. Koshenina be moved to a different 24-hour facility, Sunrise, where she could receive better care. (T6.406-07.)

The trial court's findings are also unjust to Husband in two respects, and these unjust findings should not be used as grounds to override Mrs. Koshenina's preference for Husband. First, the findings unfairly give Siblings credit for Mrs. Koshenina's improvement while they were emergency temporary guardians. Siblings were emergency temporary guardians only because Husband was falsely

[4] Granted, initially and quite naturally for any spouse, Husband took Mrs. Koshenina home in the evenings. (T6.455-56.) Later, however, Husband acknowledged that Mrs. Koshenina must remain in the 24-hour facility. (R1.175; R2.201; T6.409-10.)

accused of abusing Mrs. Koshenina and thus prevented from serving in that capacity. But for this unfortunate event, the care that Mrs. Koshenina received at the 24/7 facilities on the Siblings' "watch" would have been the same care that she would have received on the Husband's "watch" (except that Husband would have moved her to better care at Sunrise even earlier). (T4.270; *see also* T6.454-55 (Husband testifying on cross examination by Siblings' counsel that Husband, not Siblings, decided to place Mrs. Koshenina at initial 24-hour care facility).)

Second, the findings unjustly fault Husband for decisions that he made during the early stages of Mrs. Koshenina's disease under circumstances that Siblings themselves never have had to confront. Admittedly, with 20/20 hindsight, one can fault Husband for some decisions. But Siblings, unlike Husband, never had to face the difficult, heart-wrenching decisions that Husband had to face as his spouse's disease steadily took hold and diminished her abilities. To err is human. Neither Mrs. Koshenina nor Husband should have their personal liberties discarded merely because Husband may have made mistakes on his "watch." Those liberties should be intruded upon only if appointing Husband as guardian would actually or imminently harm Mrs. Kosehnina, something that the trial court never found.

Not only are the trial court's findings unjust, they also mistakenly look backwards rather than forward. In particular, the findings focus on issues concerning Mrs. Koshenina's care. The issues of care are largely settled. No

matter who is the guardian of the person, Mrs. Koshenina's care, as a practical matter, will not "revert back to" where it was before she entered Emeritus. Both Husband and Siblings recognize that Mrs. Koshenina must be under the care of a 24/7 facility. (T6.409-10; R1.36.) If appointed as guardian of the person, Husband would consent to the trial court placing the same restrictions on him (i.e., no removal of Mrs. Koshenina from the facility) that it placed on the Siblings. (R1.175; R2.201.)

Rather than look backwards at largely settled issues, the trial court should have looked forward at the issues facing Mrs. Koshenina in the immediate future. Mrs. Koshenina soon will be facing some of the most delicate, intimate, private decisions of her life. They will be decisions about how she will die.[5] (T3.43.) These upcoming decisions were not considered in the trial court's orders.

Who will make these highly personal decisions for Mrs. Koshenina? Not the person to whom she made the sacred vows of marriage and to whom she remained married for thirteen years before her disease. Not the person whom she designated to make these choices. The Siblings do not even allow Husband to attend Mrs. Koshenina's doctor appointments, much less assist in decisions regarding her care.

[5] Under direct examination from Siblings' counsel, Dr. Doty testified that Mrs. Koshenina's prognosis was poor and that Pick's Disease was rapidly progressing and will cause her death. (T3.43.) At the hearing on the rehearing motions, Siblings' counsel incorrectly asserted there was no evidence that Mrs. Koshenina was dying. (R2.253.)

(R1.93.) Instead, Siblings will decide these personal matters for Mrs. Koshenina. They will decide Mrs. Koshenina's personal matters because a government official, the trial judge,[6] believed that he knew better than Mrs. Koshenina what was best for her. The trial judge unlawfully substituted his personal judgment for Mrs. Koshenina's judgment on a matter that was highly personal and private to her.

* * *

In conclusion, the trial court abused its discretion in two ways. First, its "serious questions" about Mrs. Koshenina's ability to "fully understand" the Designation were not sufficient to set aside her chosen preneed guardian (Husband). *See supra* Section I.B, at 23-26. Second, it misapplied the "best interest" standard by giving insufficient deference to Mrs. Koshenina's personal preference and by substituting its own preference. *See supra* Section I.C., at 26-34.

II. FLORIDA'S GUARDIANSHIP LAW, AS APPLIED BY THE TRIAL COURT, UNCONSTITUTIONALLY INTERFERES WITH THE KOSHENINAS' RIGHT TO PRIVACY AND SUBSTANTIVE DUE PROCESS.

Standard of Review. The question of whether "a state statute is constitutional is a pure issue of law, subject to *de novo* review. *Fla. Fish and*

[6] The powers of judicial officers, just like their executive and legislative counterparts, are restricted by the constitutional rights that all citizens enjoy. *See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984) ("The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment.").

Wildlife Conserv. Com'n v. Caribbean Concern. Corp., Inc., 789 So. 2d 1053, 1054 (Fla. 1st DCA 2001). A statute may be constitutional on its face but unconstitutional as applied to a particular party. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). "Statutes that interfere with a fundamental right are presumptively unconstitutional and subjected to strict scrutiny, meaning that the proponent of the statute is required to demonstrate that the statute furthers a compelling government interest through the least intrusive means." *T.M.H. v. D.M.T.*, 79 So. 3d 787, 792-93 (Fla. 5th DCA 2011). "Florida's right of privacy is a fundamental right warranting 'strict' scrutiny." *N. Fla. Women's Health and Counseling Servs., Inc. v. State*, 866 So. 2d 612, 626 (Fla. 2003).

Merits. Florida's guardianship laws (Chapter 744, Florida Statutes), as applied by the trial court, unconstitutionally interfered with the Kosheninas' right to privacy in their marriage.[7] The trial court's Appointment Order unconstitutionally interfered with an intimate decision made by Mrs. Koshenina prior to her incapacity. It interfered with a decision private to the Kosheninas' marriage, about who would make choices for Mrs. Koshenina's care for the

[7] Husband has standing to assert Mrs. Koshenina's privacy rights because he has also suffered an injury, he stands in a close relation with his wife, and Mrs. Koshenina's mental capacity is a hindrance to her ability to protect her own rights. *See Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002) (citing *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991)).

duration of her life. It overrode Mrs. Koshenina's autonomy, liberty, and personal choice upon a mere determination that doing so was in Mrs. Koshenina's "best interests," but without any proof of demonstrable harm to Mrs. Koshenina. A statute must be construed "to protect all constitutional rights [an individual] might have or else the statute would be unconstitutional." *E.g.*, *Corbett v. D'Alessandro*, 487 So. 2d 368, 370 (Fla. 1986). The only way to uphold section 744.312(4), Florida Statutes as not violating Mrs. Koshenina's constitutional right to privacy (in her marriage and her life) is by construing "best interests" to defer to Mrs. Kosheninas' personal preference for a guardian, absent a showing that her preferred guardian would actually or imminently harm her.

A. The Constitutional Right to Privacy is the Right to be Let Alone and Free from Governmental Intrusion into Private Decisions; Interference with this Right Violates Substantive Due Process.

Article I, Section 23 of the Florida Constitution provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." As our supreme court has explained, the "right to privacy protects Florida's citizens from the government's uninvited observation of or interference in those areas that fall within the ambit of the zone of privacy afforded under this provision." *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995). The right to privacy in

Florida's constitution is even broader than the rights granted by the federal constitution, which itself protects "such fundamental interests as marriage." *Id.*

The supreme court has approved and upheld the right to be let alone as "'the most comprehensive of rights and the right most valued by civilized men.'" *In re T.W.*, 551 So. 2d 1186, 1191 (Fla. 1989) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Moreover, the supreme court has concluded that there is "no basis for drawing a constitutional line between the protections afforded to competent persons and incompetent persons." *In re Guardianship of Browning*, 568 So. 2d 4, 12 (Fla. 1990).[8] Accordingly, despite being adjudicated incapacitated, Mrs. Koshenina's private, marital decisions, made before her incapacity, are entitled to constitutional protection.

Operating in conjunction with Florida's constitutional right to privacy is the rule that unwarranted governmental encroachment into individual rights also violates substantive due process rights. As the supreme court has explained:

> The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without

[8] The Siblings argued on rehearing that by virtue of her incompetency, Mrs. Koshenina no longer has a fundamental right to privacy in her marriage or martial decisions she made prior to her incapacity. (R2.258-59.) The cases cited by the Siblings, however, deal with the constitutionality of placing restrictions on the right of inmates to marry while in jail. *See Dep't of Corr. v. Roseman*, 390 So. 2d 394, 395 (Fla. 1st DCA 1980); *Johnson v. Rockefeller*, 365 F.Supp. 377, 381 (S.D.N.Y. 1973). Notably, the cases do not hold that a person who becomes incapacitated loses fundamental rights previously established, *e.g.*, a prisoner already married does not lose his right to continue his marriage by virtue of incarceration. Thus, the cases are inapplicable to the present facts.

> due process of law." Art. I, § 9, Fla. Const. Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government.

Dep't of Law Enforcement v. Real Prop., 588 So. 2d 957, 960 (Fla. 1991) (emphasis added). Similarly, under the federal constitution, the "liberty" protected by the Due Process Clause "includes more than an absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). The Due Process Clause affords protection to personal decisions, including those decisions "relating to marriage." *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003). Such decisions involve "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment." *Id.* at 574 (quoting *Planned Parenthood of S.E. P. v. Casey*, 505 U.S. 833, 851 (1992)).

Consistent with the principle that martial decisions are entitled to the rights of privacy and substantive due process, the Supreme Court of the United States has consistently recognized that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). While marriage is a social relation, subject to the state's police power, the state's power to regulate marriage is not unlimited. *Id.* at 7. This is because "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479,

486 (1965). Accordingly, laws which operate "directly on an intimate relation of husband and wife" may be struck down where they are "repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 486; *see also Franklin v. White Egret Condo., Inc.*, 358 So. 2d 1084, 1088 (Fla. 4th DCA 1977) (citing *Griswold* for the proposition that the right to marital privacy is a fundamental right). The courts have a "solemn duty to ensure the protection of constitutional rights" even where the Legislature has an important role in shaping state policy on a given issue. *T.M.H.*, 79 So. 3d at 799.

B. This Court Should Find that the Trial Court Unconstitutionally Applied Florida's Guardianship Law to Deprive the Kosheninas of Their Rights to Privacy and Substantive Due Process.

Section 744.312(4), Florida Statutes, permits a trial court to override Mrs. Koshenina's designated preneed guardian if it determines that appointing such a person is "contrary to the best interests of the ward." As applied, this directive is not constitutional where, as here, a ward has expressed a preference that her spouse serve as her guardian, but the court appoints someone other than the spouse as guardian without finding actual or imminent harm to the ward if the spouse is appointed as guardian.

"Statutes that interfere with a fundamental right are presumptively unconstitutional and subjected to strict scrutiny, meaning that the proponent of the statute is required to demonstrate that the statute furthers a compelling government

interest through the least intrusive means." *T.M.H.*, 79 So. 3d at 792-93; *see also In re T.W.*, 551 So. 2d at 1192 (challenged regulation must serve "a compelling state interest and accomplish[] its goal through the use of the least intrusive means."). The State may have a compelling interest to appoint a guardian for Mrs. Koshenina because "the protection of incompetents is a particular duty of the state and the courts." *Goldberg v. Goldberg*, 643 So. 2d 656, 658 (Fla. 4th DCA 1994) (emphasis added). However, even where the State has a compelling interest, it still must exercise its will over an individual in the least intrusive means available. *See Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996). Here, there was a far less intrusive alternative available that would have furthered the State's interest and protected the Kosheninas' privacy and due process rights: appointing Husband as the plenary guardian with reasonable restrictions limiting him from removing Mrs. Koshenina from the 24-hour facility. (T6.409-10; R2.252.) Instead, the trial court elected to override Mrs. Koshenina's private and personal decision that Husband serve as her guardian without any finding that Husband would cause her actual or imminent harm if appointed as guardian.

In the context of whether a simple "best interest" test is sufficient to override constitutional rights, the *Beagle* decision – which addresses the fundamental right of parents to raise their children without government intrusion – is instructive. The spousal relationship where one spouse is incapacitated is analogous to the parent-

child relationship and should be held to similarly high constitutional standards before the state is permitted to interfere. In *Beagle*, grandparents sought visitation rights under a Florida statute even though both parents opposed the application. 678 So. 2d at 1273. The court began its analysis with Article I, Section 23 of the Florida Constitution, noting that it "was intentionally phrased in strong terms." *Id.* at 1275. "The drafters of the amendment rejected the words 'unreasonable' or 'unwarranted' before the phrase 'governmental intrusion' in order to make the privacy right as strong as possible." *Id.*

The court then explained that because the right of privacy is fundamental, the challenged regulation must serve a compelling state interest and accomplish its goal through the use of the least intrusive means. *Id.* at 1276. For example, the State may interfere with parents' privacy rights "to prevent demonstrable harm to a child," but may not interfere in the absence of such harm. *Id.; see also Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998) ("'[n]either the legislature not the courts may properly intervene in parental decision-making absent significant harm to the child threatened by or resulting from those decisions.'"); *Wakeman v. Dixon*, 921 So. 2d 669, 671-72 (Fla. 1st DCA 2006) (recognizing that statutes cannot override parental decisions in the absence of "demonstrable harm" to the child).

The court held that, while it may be in a child's "best interests" to have a relationship with grandparents, "a best interest test without an explicit requirement

of harm cannot pass constitutional muster in this specific context." *Beagle*, 678 So. 2d at 1276*; see also id.* at 1277 (quoting *Hawk v. Hawk*, 855 S.W.2d 573, 582 (Tenn. 1993)) ("It is irrelevant, to this constitutional analysis, that it might in many instances be 'better' or 'desirable' for a child to maintain contact with a grandparent.'") Thus, because the grandparent visitation statute did not explicitly require a showing of harm or detriment before allowing the state to interfere with a fundamental privacy right, the court held that the challenged paragraph was facially flawed. *Id.* Similarly, because Florida's guardianship laws, as interpreted by the trial court, allow the State (i.e., the trial court) to interfere with the fundamental rights of substantive due process and to privacy without a showing of harm or detriment, the statute is unconstitutional as applied to married persons like the Kosheninas. Indeed, much like parental decisions, a decision of the marriage should be entitled to deference "not based upon the wisdom of the decision, but upon the fundamental right" of the spouses to make it. *Williams v. Spears*, 719 So. 2d 1236, 1242 (Fla. 1st DCA 1998).

Rather than looking at actual or threatened harm going forward, however, the trial court focused solely on its perception of Mrs. Koshenina's best interests. For this reason, the Appointment and Rehearing Orders run afoul of the constitutional rights to privacy because they override a private, martial decision without adequate deference to Mrs. Koshenina's own personal preferences. Here,

the trial court specifically found that Husband did not abuse Mrs. Koshenina. (R1.173 at ¶ 2.) Even on rehearing, the most the trial court found was that:

> Though the Court has found that the evidence does not support the allegations or implications that he willfully and intentionally abused [Mrs. Koshenina], there is no question that she suffered injuries and neglect while on his "watch." After the appointment of [Mrs. Koshenina's] brother and sister as the emergency temporary guardians of the person, [Mrs. Koshenina] improved greatly under the direction of her care that they provided. To revert back to the pre-filing state where her care was under her husband's direction would in no way be in her best interest.

(R2.211.)

These findings highlight the conflict between the "best interest" standard, as understood by the trial court, and the constitutional right to privacy. The trial court implied that, under section 744.312(4), it had the authority to override the Kosheninas' constitutional due process and privacy rights by simply finding that Mrs. Koshenina's preference for a guardian would be contrary to her "best interests." However, to pass constitutional standard muster, the trial court should have given significant deference to Mrs. Koshenina's personal preferences. The trial court should not have overridden Mrs. Koshenina's personal preferences absent an explicit finding of actual or imminent harm. *See Beagle*, 678 So. 2d at 1277.

The constitution protects an individual's right to choose, regardless of the wisdom of a given decision, and regardless of whether the trial court could make a

"better" decision. *See In re Guardianship of Browning*, 568 So. 2d at 10 (constitutional privacy rights involve an individual's right to choose, not what is thought to be in their best interests). Here, the trial court gave insufficient deference to Mrs. Koshenina's choice. (R1.173-74.) It overrode her choice without any finding of actual or imminent harm to Mrs. Koshenina should Husband – who agreed Mrs. Koshenina should remain living in Sunrise (T6.410) – be appointed her plenary guardian of the person. All instances of past "neglect" (unclipped toe nails, disheveled appearance, not enough supervision, medication deviations), cannot be repeated at Sunrise where Mrs. Koshenina's care will be provided by independent personnel who are trained to handle Mrs. Koshenina's disease. By Husband's consent, the trial court was free to restrict Husband's right to remove Mrs. Koshenina from Sunrise just as it placed that restriction on the Siblings.[9] (R2.201.) By failing to exercise this option – consistent with both Mrs. Koshenina's constitutional rights and her safety – the trial court failed to act in the least restrictive manner available. Thus, the trial court unconstitutionally applied Florida's guardianship laws.

[9] Further, the trial court may be assured that Husband continues to provide Mrs. Koshenina with her current high-level of care through the Husband's initial and annual guardianship plans. *See* §§ 744.362, 744.3675, Fla. Stat. (2012).

C. The Trial Court's Reasons for Concluding that the Appointment Order Was Constitutional Were Erroneous.

The trial court defended the constitutionality of its Appointment Order by reasoning that it "was crafted in a manner that best protected [Mrs. Koshenina] as her best interest dictated and yet . . . preserve[d] her relationship with her husband with as little disruption except as was inherently necessary under the particular circumstances of this case." (R2.210-11.) It further reasoned that its remedy "provide[d] [the] maximum protection to [Mrs. Koshenina] with as little interference with her martial privacy as was necessary given the degree of her incapacity." (*Id.*) These reasons were erroneous.

The trial court unconstitutionally interfered with, and overrode, an intimate, private martial decision. It overrode Mrs. Koshenina's choice that, if she were unable to do so, her Husband should make decisions for her, including the intimate, personal decisions that must be made as her life draws to an end. By overriding Mrs. Koshenina's choice, the trial court interfered with and encroached on Mrs. Koshenina's right to privacy.

The trial court incorrectly implied that so long as Husband could visit Mrs. Koshenina at Sunrise, then the Kosheninas' marital rights were preserved. (R2.210-11.) This implication understates and misapprehends what is protected by the right to marital privacy. Marriage is not simply about cohabitating, or spending

time, with one's spouse. It is much more than that. Marriage is a lifelong journey where two people join together and frequently make difficult, personal decisions together. *See Griswold*, 381 U.S. at 486. Two people decide where to live and work; whether to have children; how to spend or save their money, etc. And, at the end of life, they often decide together how they will die and the disposition of their remains. Simply allowing Husband to visit Mrs. Koshenina does not protect the Kosheninas' marital right to privacy. Protecting the Kosheninas' right to privacy required the trial court to defer to, and respect, their personal decisions, absent a finding of imminent or actual harm.

The trial court also incorrectly reasoned that Mrs. Koshenina's due process rights were "scrupulously protected by the system employed in incapacity and guardianship proceedings and were not violated by the application of those laws in this case." (*Id.*) This reasoning confused procedural and substantive due process. Procedural due process "'serve[s] as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue.'" *E.g., J.B. v. Fla. Dep't Child. and Family Servs.*, 768 So. 2d 1060, 1063-64 (Fla. 2000) (citation omitted). For example, procedural due process requires that a party receive an unbiased decision-maker, notice and an opportunity to be heard, and in some instances, the appointment of counsel. *Id.* at 1064, 1068. Whereas "'[s]ubstantive due process under the Florida Constitution protects the full panoply

of individual rights from unwarranted encroachment by the government.'" *Id.* at 1063 Even if Mrs. Koshenina's procedural due process rights were protected, *but see supra* note 1, that would not mean her substantive due process rights were protected. Her substantive due process rights were not protected because, without any finding of actual or imminent harm, the trial court overrode her private, marital decision that her Husband serve as her guardian.

D. The Kosheninas' Constitutional Arguments were Preserved.

The trial court noted in the Rehearing Order that the Kosheninas' constitutional arguments were not raised during the evidentiary hearing. (R2.210.) However, the arguments were preserved for appeal when raised in the motion for rehearing. *See Fitchner v. Lifesouth Comm. Blood Ctrs., Inc.*, 88 So. 3d 269, 278 (Fla. 1st DCA 2012). Trial courts have the discretion under Rule 1.530 to consider new issues raised for the first time on rehearing. *Id.* Here, the trial court exercised its discretion to consider the constitutional issues and reached a legal conclusion based on those arguments. (R2.210-11.)

Moreover, the constitutional issues appeared for the first time on the face of the Appointment Order. It was not until the trial court found both that Husband did not abuse Mrs. Koshenina but also that her Designation would not be honored, that it was apparent the Kosheninas' constitutional rights had been adversely impacted. Parties may, and indeed are required, to preserve by rehearing issues

that appear for the first time on the face of an order. *See Holland v. Cheney Bros., Inc.*, 22 So. 3d 648, 650 (Fla. 1st DCA 2009).

In short, the constitutional arguments were preserved.

* * *

In conclusion, the trial court erred in denying Husband's petition to serve as Mrs. Koshenina's guardian because it unconstitutionally applied Florida's guardianship laws to override a private, martial decision. As applied in the Appointment Order, the guardianship laws violate the due process rights of the married couple and interfere with the fundamental right of privacy.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the Appointment Order as it pertains to the plenary guardianship of Mrs. Koshenina's person with instructions to appoint Husband as Mrs. Koshenina's plenary guardian of both the person and property, subject to reasonable restrictions such as the present restriction limiting Mrs. Koshenina's removal from Sunrise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing has been furnished via electronic mail to **Krista A. Parry, Esq.** at kparry@bowerselderlaw.com, counsel for Appellees, **Jeffery A. Cramer, Esq.** at jeff@cramerlawcenter.com, counsel for Appellees, and **D. Craig Calley, Esq.** at ccalley@calleylaw.com, counsel for the Ward, this 12th day of April, 2013.

/s/ Jessie L. Harrell
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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