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**COURT OF APPEALS, DIV. I
OF THE STATE OF WASHINGTON**

In re the GUARDIANSHIP of ELLA NORA DENNY,
ELLA NORA DENNY, THOMAS ANDERSON, and
RICHARD DENNY, Appellants,
OHANA FIDUCIARY CORPORATION, Respondent.

BRIEF OF APPELLANT ELLA NORA DENNY

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STATE OF WASHINGTON
COURT OF APPEALS, DIV. I
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TABLE OF CONTENTS

I. Procedural Discussion — Parties and Briefing	1
II. Introduction	1
III. Assignments of Error and Questions on Appeal	3
A. Assignment of Erroneous Decisions	3
B. Questions on Appeal	3
IV. Statement of the Case	4
V. Discussion	5
A. Standards of Review	5
B. Anderson has Standing as Next Friend of Ward.	5
C. Process Due Mrs. Denney	5
1. Presumptions	6
2. Fiduciary Duty	8
3. Superior Guardian	10
4. Binding Regulations	11
5. Decision Making	11
D. The Superior Court erroneously ordered medical evaluation of Mrs. Denney for the purpose of adjudicating additional loss of existing rights, by a person to whom she objected, in violation of both her retained right to choose and RCW 11.88.045(4). . . .	12
E. Mrs. Denney, in her adjudicated partial capacity, has a right to remedy for infringement of her retained rights by OFC.	15
F. Mrs. Denney, in her adjudicated partial capacity, has a right to access the courts through a representative, independent from the Guardian, for claims against OFC.	18
G. The Superior Court erroneously modified the guardianship and effected additional loss of Mrs. Denney’s retained rights.	24
H. Guardian violated its duties and infringed Mrs. Denney’s retained rights to such an extent that its replacement became a fiduciary duty of the court as superior guardian.	25
I. The superior guardian has a fiduciary duty to exercise plenary power over its Guardian, and effect discovery.	29
VI. Certification Of Service	31

TABLE OF AUTHORITIES
CASES

Bounds v. Smith, 430 U.S. 817, 828 (1977)	18
Christopher v. Harbury, 536 U.S. 403, 414-15 (2002)	16, 17
Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 287 n.12 (1990)	20
Cummings v. Guardianship Servs., 128 Wn. App. 742, 755 n.33, llO P.3d 796 (2005) 9	
Goodyear Tire & Rubber Co. v. Whiteman Tire, 86 Wn. App. 732, 741, 935 P.2d 628 (1997)	9
Hough v. Stockbridge, 113 Wn. App. 532, 539, 54 P.3d 192 (2002)	18
In re Disciplinary Proceeding Against Petersen, 180 Wn.2d 768, 788, 329 P.3d 853 (2014)	25
In re Guardianship of Eisenberg, 43 Wn. App. 761, 766, 719 P.2d 187 (1986)	9
In re Guardianship of Ingram, 102 Wn.2d 827, 689 P.2d 1363 (1984)	12
In re Riddell Testamentary Trust, 138 Wn. App. 485, 157 P.3d 888 (2007)	9
Marbury v. Madison, 5 U.S. 137, 163 (1803)	16
Niemann v. Vaughn Cmty. Church, 154 Wn.2d 365, 113 P.3d 463 (2005)	9
Raven v. Dep't of Soc. & Health Servs., 177 Wn.2d 804, 306 P.3d 920 (2013)	11, 12, 28
Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 283-84, 358 P.3d 1139 (2015)	6
State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996)	20
Stewart-Graves v. Vaughn, 162 Wn.2d 115, 128, 170 P.3d 1151 (2007)	20

STATUTES, RULES

32nd Congress, March 2, 1853, ch. 90, § 12, 10 Stat. 172, 177 17

An Act To Repeal the Laws of Oregon Territory,
now in Force in Washington Territory,
January 31, 1856, Laws of Washington, p. 640 17

CPG Reg. 401.2 22

Oregon, ch. 177, § 14, 9 stat. 323, 329 (1848) 17

RCW 11.88.010 6, 7, 8, 13, 22, 24, 28

RCW 11.88.030 8, 13, 14

RCW 11.88.040 13, 14

RCW 11.88.045 13, 14

RCW 11.88.120 4, 8, 20

RCW 11.88.120(1)(2015) 20
(See Appeal-1 Denny brief, Appx. A18-A24).

RCW 11.88.120(1990) 4

RCW 11.88.127 27

RCW 11.92.060 19

U.S. Constitution Amendment 14, §1. 5

Washington Constitution, Art. 27, §2 17

CPG Reg. 400 10

CPG Reg. 401.2 28

CPG Reg. 401.3 26

CPG Reg. 402.1 29

CPG Reg. 403.1 28, 29

CPG Reg. 405.1 11, 28, 29

RAP 10.1 1, 5

RPC 1.7 19

OTHER

1 Restatement (Third) of the Law of Trusts 9, 10
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2, Coke, Institutes of the Laws of England, 55 (1641) 15
39 Am. Jur. 2d Guardian and Ward § 1 (1968) 9
Magna Carta, 29 (1225) 15
Oxford English Dictionary, establish, (full online ed. 2013) 7
Oxford English Dictionary, specific, (full online ed. 2013) 6
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SUPERIOR COURT RECORD

Appeal-1: CP1 1-2021.

Appeal-2: CP2 1-491.

RP1: Hearings December 17, 2012; December 17, 2009; April 1, 2010; June 10, 2010; June 25, 2010; December 17, 2010; and March 31, 2011.

RP2: Hearing March 23, 2012.

RP3: Hearing March 29, 2012.

RP4: Hearing April 24, 2012.

RP5: Hearing April 27, 2012.

RP6: Hearing May 10, 2012.

RP7: Hearing May 16, 2012.

RP8: Hearing May 31, 2012.

RP9: Hearing August 24, 2012.

RP10: Hearing September 14, 2012.

RP11: Hearing January 24-25, 2013.

I. PROCEDURAL DISCUSSION — PARTIES AND BRIEFING

Adopted by reference is Appeal-1 brief of Anderson, p. 1. RAP 10.1(g)(2).

II. INTRODUCTION

This appeal is made by Ella Nora Denny, through her Next Friend, nephew Thomas Anderson. Adopted herein by reference are the introductions set forth in the Appeal-1 brief of son Richard Denny.

Ella Nora Denny's estate is the proverbial goose that lays the golden eggs — for OFC. Following establishment of the guardianship, OFC persistently worked towards its own self serving interests by: infringing Mrs. Denny's retained rights; causing the court to silence all opposition and then order additional loss of the infringed rights; thus, giving more authority and work to Guardian, to generate more fees.

Two years into the guardianship, the Superior Court proceeded to abrogate the previously adjudicated and retained rights of the Ward, *sine seriatim*, without any independent fact finding, independent representative of Ward, expert testimony, cross examination, or hearing of Ward. This imposed an irreconcilable and prohibited conflict of interest upon the Guardian, who was simultaneously representing the Ward, while advocating for additional loss of Ward's retained rights — in reality, a tactic to effectively defend itself against Ward's claims of independently acting outside the scope and authority of the guardianship by

prejudicially infringing upon her retained rights. While the Guardian was controlling both sides of the controversy, the court also entered orders to charge Ward's estate for litigating both sides, in addition to approving its fees for doing so.

A gravamen of this appeal is disregard of common law and equity, in favor of civil law. At a time when the courts are overloaded with litigants who self servingly engage in judicial roulette while refusing to do the right thing unless ordered by the court, it is far more expedient to rely upon literalistic application of civil statutes rather than engage in a well considered analysis of how the substance and first-principles of common law and equity apply to the controversy.

Some basic considerations in reviewing the case:

- (1) OFC's independent exercise of power beyond the scope and authority of the guardianship;
- (2) Guardian's priority in applying its subjective view of Ward's best interests, in precedence over substituted judgment in determining and applying Ward's wishes;
- (3) OFC's protracted infringement of Mrs. Denny's adjudicated retained rights, for the purpose of obtaining additional work, and thus receiving additional fees;
- (4) the Superior Court granting all of OFC's requests to have additional authority, and thus receiving additional fees;

(5) Superior Court orders for additional loss of Mrs. Denny rights, not specifically provided in the establishing limited guardianship order — without any due process.

III. ASSIGNMENTS OF ERROR AND QUESTIONS ON APPEAL

A. Assignment of Erroneous Decisions

1. The Superior Court erroneously held that Washington does not recognize standing of a next friend. [RP11 p. 6, Interlocutory].

2. The Superior Court erroneously denied Ward's motion for examination exclusively by the health care professional whom she selected. [CP1 637, Interlocutory].

3. The Superior Court erroneously denied Mrs. Denney's motion for an attorney independent from the Guardian. [CP1 985-988, Interlocutory].

4. The Superior Court erroneously granted an order approving Guardian's annual report for 2011, and denied motions for reconsideration. [CP1 616-620, 1459-1461, FINAL].

5. The Superior Court erroneously denied Ward's motion to replace Guardian and modify guardianship. [CP1 1136-1168, Interlocutory].

B. Questions on Appeal

1. Whether Anderson has standing as Next Friend of Ward.

2. Whether the Superior Court erroneously ordered medical evaluation of Ward, in violation of RCW 11.88.045(4).

3. Whether Mrs. Denney, in her adjudicated partial capacity, has a right to remedy for infringement of her retained rights by OFC.

4. Whether Mrs. Denney, in her adjudicated partial capacity, has a right to access the courts through a representative, independent from the Guardian, for claims against OFC.

5. Whether the Superior Court erroneously modified the guardianship and effected additional loss of Mrs. Denney's retained rights.

6. Whether Guardian violated its duties and infringed Ward's retained rights to such an extent that its replacement became a fiduciary duty of the court as superior guardian.

7. Whether the superior guardian has a fiduciary duty to exercise plenary power over its Guardian, and effect discovery.

IV. STATEMENT OF THE CASE

Thomas Anderson moved the trial court in both his individual capacity, and as next friend of Ward, to replace the Guardian, under "any person" jurisdiction pursuant to RCW 11.88.120(2)(1990). [CP1 1235].

Adopted by reference is the statement of the case set forth in the Appeal-1 brief of Richard Denny, at pp. 6-26; and the Appeal-2 brief of

Richard Denny at pp. 4-8. To minimize repetition and increase clarity, argument on each question begins with relevant statements of the case.

V. DISCUSSION

A. Standards of Review

Adopted by reference is the Standard of Review set forth in the Appeal-1 brief of Thomas Anderson. RAP 10.1(g)(2).

B. Anderson has Standing as Next Friend of Ward.

The Superior Court erroneously held that Washington does not recognize standing of a next friend [RP11 p. 6], and precluded appearance until Anderson posted a \$50,000 bond [CP1 980-982]. That substantially prejudiced Ward by foreclosing all hearing of her interests through any representative, on her claims of wrongdoing by OFC and opposition to resulting court orders. Adopted herein by reference is Appeal-1 brief of Anderson, pp. 6-10 ¶C.

C. Process Due Mrs. Denney¹

Ward remains a person, with all rights retained and inalienable, excepting those explicitly, exactly, and unambiguously set forth by the court. U.S. Constitution Amendment 14, §1 provides in part, “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

1. Adopted by reference is Appeal-1 brief of Richard Denny, pp. 26-30 ¶1, 31-39 ¶¶3-5, and 42-44 ¶8.

protection of the laws.” The relationship between common law and civil law is explained in, *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 283-84, 358 P.3d 1139 (2015):

The common law is free standing, and absent clear legislative intent to modify the common law, its remedies are generally not foreclosed merely because other avenues for relief exist. ...Common law remedies should be preempted by statutory law only where the legislature either implicitly or explicitly expresses an intent to do so. It is incorrect to overlay the exclusivity analysis with an additional adequacy analysis.

1. Presumptions

The presumption is always against the deprivation of any right. Restating and codifying centuries of common law, in the context of guardianships, RCW 11.88.010(2) provides:

A person shall not be presumed to be incapacitated nor shall a person lose any legal rights or suffer any legal disabilities as the result of being placed under a limited guardianship, except as to those rights and disabilities specifically set forth in the court order establishing such a limited guardianship.

All ambiguities of the court order must be construed against deprivation of any right. Unambiguous deprivation is mandated: “specifically set forth in the court order...” Id. The question of unambiguous turns on the word “specifically”, which is the adverb form of “specific”, defined in the, Oxford English Dictionary (full online ed. 2013) as:

A. adj.; 4.a. Precise or exact in respect of fulfilment, conditions, or terms; definite, explicit. b. Exactly named or indicated, or capable of being so; precise, particular.

Thus, deprivation of a right must be by a direct and explicitly observed provision in the court order. Deprivation is not authorized by a consequential and implicitly inferred conclusion from the court order. Deprivation of x and y cannot be inferentially construed to deprive Ward of z .

As a matter of law, Ward's loss of "legal rights" or suffering of "legal disability" from limited guardianship, is strictly and exclusively limited to "the court order establishing such a limited guardianship." RCW 11.88.010(2), *supra*.

The legislature meant what it said and said what it meant; no more and no less. RCW 11.88.010(2) precludes any adjudication in the same action which results in additional loss of legal rights or suffering of legal disability to the Ward — subsequent to "the court order establishing" the guardianship. The Oxford English Dictionary, *supra*, defines "establish" as, among other things:

2. a. To fix, settle, institute or ordain permanently, by enactment or agreement. Sometimes with obj. clause.
5. a. To set up or bring about permanently (a state of things); to 'create' (a precedent); to introduce and secure permanent acceptance for (a custom, a belief).
6. a. To place beyond dispute; to prove (a proposition, claim, accusation); rarely with personal obj. and complement. b. To affirm judicially the validity of (a disputed will).

Once the limited guardianship of Ward's person was instituted, ordained, set up, created, and introduced — it became fixed, settled,

permanent, beyond dispute. Any change, which results in additional loss and suffering to Ward, requires a new action to be established, along with each and every concomitant process due under RCW 11.88.030 et. seq.

The statutory mandate of RCW 11.88.010(2) is entirely different from the process of modifying a guardianship or guardian authority under RCW 11.88.120. The process of modifying a guardianship or Guardian authority, under RCW 11.88.120, need not necessarily result in Ward's additional loss of "legal rights" or suffering of "legal disability", which were previously created and fixed, pursuant to RCW 11.88.010(2).

2. Fiduciary Duty

The classic American guardian-fiduciary duty at common law was explained in, Woerner, *A Treatise on the American Law of Guardianship*, § 60, p. 196 (1897, Little, Brown & Co.):

It results from the nature of the guardian's office that the law cannot permit them to reap any personal benefit therefrom at the cost of the wards; for their office is to protect the interests of the wards. This principle needs no citation of authorities; it is announced in most of the cases adjudicating between guardian and ward, and is self-evident. Hence, it is said that chancery not only punishes corruption in guardians, but treats with suspicion all acts and circumstances evincing a disposition on their part to derive undue advantage from their position.

Washington fiduciary duty at common law was explained in *Goodyear Tire & Rubber Co. v. Whiteman Tire*, 86 Wn. App. 732, 741, 935 P.2d 628 (1997):

Fiduciary relationships include those historically regarded as fiduciary, and also may arise in circumstances in which any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former. In general, a fiduciary relationship imparts a position of peculiar confidence placed by one individual in another.

A full fiduciary duty requires that Guardian place Ward's interests above its own. "A fiduciary is a person with a duty to act primarily for the benefit of another." *Cummings v. Guardianship Servs.*, 128 Wn. App. 742, 755 n.33, 110 P.3d 796 (2005); quoting, *Goodyear*, 86 Wn. App. 741. "A guardianship has been described as 'a trust relation of the most sacred character.'" *In re Guardianship of Eisenberg*, 43 Wn. App. 761, 766, 719 P.2d 187 (1986); quoting, 39 Am. Jur. 2d Guardian and Ward § 1 (1968).

With respect to enforcement of such "trust relation", Washington follows Restatement (Third) of the Law of Trusts. E.g., *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 113 P.3d 463 (2005); *In re Riddell Testamentary Trust*, 138 Wn. App. 485, 157 P.3d 888 (2007). "Despite the differences in the legal circumstances and responsibilities of various fiduciaries, one characteristic is common to all: a person in a fiduciary relationship to another is under a duty to act for the benefit of the other

as to matters within the scope of the relationship.” 1 Restatement (Third) Trusts: General Principles 18, §2 cmt. b. (2003).

The regulatory standard is set forth at, Certified Professional Guardian Standards², CPG Reg. 400:

A guardian is a fiduciary. A fiduciary has the duty to act primarily for another’s benefit. The Guardian shall carry out his or her duties carefully and honestly. The Guardian shall act selflessly and with undivided loyalty to the incapacitated person.

3. Superior Guardian

Acting as an agency of the state’s power of *parens patriae*, a court cannot proceed to impartially adjudicate a guardianship controversy. It has been the Superior Court’s fiduciary duty as superior guardian to protect both the inalienable and the retained rights of Ward, above the interests of both the court and its appointed Guardian in this case. Such duty includes access to the court by the Ward, to effect substituted judgment rather than merely being subjected to a determination of her best interests. The black letter doctrine that, “every person is presumed to know the law (except an impartial judge)”, cannot apply to an adjudicated incapacitated person.

In breach of its fiduciary duty as superior guardian, the court claimed to act in the Ward’s best interests. The record indicated that it

2. CPG Regulations, at: https://www.courts.wa.gov/programs_orgs/Guardian/?fa=guardian.display&fileName=regindex&Reg=400

failed to place Mrs. Denney's interests above those of the court and OFC, and it failed to effect substituted judgment of Mrs. Denney.

The record further indicates that the Superior Court failed to render any remedy for the admitted wrongdoing of OFC, and instead granted additional loss of Mrs. Denny's rights and greater guardianship over the very rights which Guardian had infringed. I.e., the most expedient way to remedy a wrongdoing is to declare it legal.

4. Binding Regulations

"[A] certified professional guardian's conduct is governed by the standards of practice regulations for certified professional guardians." *Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 842, 306 P.3d 920 (2013).

5. Decision Making

Substituted judgment supersedes Ward's best interest, as set forth in, CPG Reg. 405.1:

The primary standard for decision-making is the Substituted Judgment Standard based upon the guardian's determination of the incapacitated person's competent preferences, i.e. what the incapacitated person would have decided when he or she had capacity. The guardian shall make reasonable efforts to ascertain the incapacitated person's historic preferences and shall give significant weight to such preferences. Competent preferences may be inferred from past statements or actions of the incapacitated person when the incapacitated person had capacity.

This was recently confirmed by, *Raven*, 177 Wn.2d at 818; quoting, *In re Guardianship of Ingram*, 102 Wn.2d 827, 689 P.2d 1363 (1984):

[T]he “goal is to do what the ward would do, if she were competent to make the decision.” [Ingram] at 838. “The goal is not to do what most people would do, or what the court believes is the wise thing to do, but rather what this particular individual would do if she were competent and understood all the circumstances, including her present and future competency.” Id. at 839. In other words, courts cannot apply a “reasonable person” test but must apply a subjective test based on the ward’s “attitudes, biases, and preferences.” Id. at 844.

The Superior Court begins each guardianship in prima facie breach of its fiduciary duty as superior guardian, by erroneously advising all guardians that, “your duties are to look out for the best interest of the incapacitated person.” [CP1 35 top¶].

D. The Superior Court erroneously ordered medical evaluation of Mrs. Denney for the purpose of adjudicating additional loss of existing rights, by a person to whom she objected, in violation of both her retained right to choose and RCW 11.88.045(4).

In response to the court’s order to reevaluate the extent of Wards partial incapacity [CP1 602], Ward attempted to exercise her right to choose her doctor [CP1 1349-1367, 655-658, 637], which the court disregarded in violation of due process. Adopted by reference Appeal-1 brief of Richard Denny, pp. 39-41 ¶6.

In short, the process due under RCW 11.88.030 and RCW 11.88.040 are conditions precedent to any medical examination process conducted under RCW 11.88.045(4), and additional loss of rights under RCW 11.88.010(2). The court did not adhere to the process due Mrs. Denney in ordering a medical evaluation for the purpose of effecting additional loss of her retained rights, as requested by Guardian in the Annual Report for 2011, or otherwise. The violation of process due Mrs. Denney, in her adjudicated retained capacity, so tainted the proceedings as to render null and void the consequential orders which were influenced by the offending medical evaluation.

Beyond the improper medical evaluation, any consequent additional loss of retained rights of the person required a new or special proceeding, with formal service of notice and representation by an independent attorney. RCW 11.88.010(2), providing in relevant part with additional underscore:

A person shall not be presumed to be incapacitated nor shall a person lose any legal rights or suffer any legal disabilities as the result of being placed under a limited guardianship, except as to those rights and disabilities specifically set forth in the court order establishing such a limited guardianship. In addition, the court order shall state the period of time for which it shall be applicable.

Any deprived right must be **specifically**, explicitly, exactly, and unambiguously set forth in **the** court order **establishing**, instituting, setting up, and creating such a limited guardianship, into which the

right is to be placed and guarded on behalf of a ward. For additional loss of a legal right, an additional limited guardianship proceeding must be commenced in adherence with the process mandated under RCW 11.88.030, RCW 11.88.040, RCW 11.88.045, et. seq.

The systemic process of the interrelated statutes becomes more apparent when analyzing the relevant language of RCW 11.88.045(2):

In all proceedings for appointment of a guardian or limited guardian, the court must be presented with a written report from a [licensed medical professional]. If the alleged incapacitated person opposes the health care professional selected by the guardian ad litem to prepare the medical report, then the guardian ad litem shall use the health care professional selected by the alleged incapacitated person. The guardian ad litem may also obtain a supplemental examination.

Quite simply, the statutory process of a new limited guardianship must be followed by the Superior Court whenever an additional right is to be lost and placed into additional limited guardianship. As superior guardian, the Superior Court has plenary power over its appointed inferior guardian. But the Superior Court does not have plenary power over the retained rights of any person, including a person who has already lost some rights; and it cannot deprive a person of their existing liberty, property, or other substantive interests in an ex-parte (one side only) proceeding, without the required due process which includes notice, meaningful hearing, and right to representation independent from the adverse party — Guardian in this case. As plainly demonstrated in this

case, without such protection, a limited guardian can foreclose all opposition and expediently acquire all remaining rights of its ward, to their self serving economic advantage.

E. Mrs. Denney, in her adjudicated partial capacity, has a right to remedy for infringement of her retained rights by OFC.

A right to remedy of injury to person or property has been the common law, set forth in, *Magna Carta*, 29 (1225):

N[o] freeman shall be taken or imprisoned or disseised of any freehold, or liberties, or free customs, or outlawed, or banished, or in any other way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny, or delay right or justice.

Analyzed by, 2, Edward Coke, *Institutes of the Laws of England*, 55 (1641):

[E]very subject of this realm, for injury done to him in goods, lands, or person, by any other subject, be he ecclesiastical, or temporall, ...or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.

...[J]ustice must have three qualities; it must be... free; for nothing is more odious than Justice let to sale; full, for justice ought not to limp, or be granted piece-meal; and speedily, for delay is a kind of denial; and then it is both justice and right.

“It is a settled and invariable principle in the laws of England, that every right when with-held must have a remedy, and every injury its proper redress.” 1, William Blackstone, *Commentaries on the Laws of*

England, 23 (1765). Elucidated in, *Marbury v. Madison*, 5 U.S. 137, 163 (1803):

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.

... The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

And, the court in *Marbury*, *id.*, further quoting Blackstone, *Commentaries*, at 109:

“I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.”

“[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong.” *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002). The U.S. Supreme Court has grounded the right of access to the courts in several provisions of the Constitution, including the petitions clause of the First Amendment, the Privileges and Immunities Clause of Article IV, the Due Process Clause of the Fifth Amendment,

and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Christopher*, at 415, n.12 (extensive citation omitted).

It matters not that the Washington Constitution lacks a remedy clause, for it expressly provides the continuation of the common law until abrogated exclusively by the legislative branch. Washington Constitution, Art. 27, §2. Washington common law encompasses British common law through 1889, upon statehood. British common law applied in Oregon Country (Columbia District), from 1818 to 1848. It continued to apply in Oregon Territory from 1848 to 1853, with the continuation clause of, An Act to establish the Territorial Government of Oregon, ch. 177, § 14, 9 stat. 323, 329 (1848). The authority of England common law then continued in Washington Territory from 1853 to 1889, with the continuation clause of, 32nd Congress, March 2, 1853, ch. 90, § 12, 10 Stat. 172, 177. The continuation of existing law which encompassed British common law was next affirmed on January 31, 1856, by the Washington legislature with *An Act To Repeal the Laws of Oregon Territory, now in Force in Washington Territory* (“provided... the common law, in all civil cases, except where otherwise provided by law, shall be in force.”). *Laws of Washington*, p. 640 (Seattle Bar, Tribune Printing, 1896).

When finally when ratified on 1 Oct. 1889, the Washington Constitution continued all laws then in force, at Art. 27, §2:

All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature...

Upon ratification of the State Constitution, the baseline of State Common Law became fixed and could only be abrogated by the legislature. “Access to courts is a fundamental constitutional right.” *Hough v. Stockbridge*, 113 Wn. App. 532, 539, 54 P.3d 192 (2002); citing, *Bounds v. Smith*, 430 U.S. 817, 828 (1977). The purpose of access is remedy of injury. Ward’s right to remedy is effected by the right of access to the courts.

F. Mrs. Denney, in her adjudicated partial capacity, has a right to access the courts through a representative, independent from the Guardian, for claims against OFC.³

Mrs. Denney had disputes with OFC, and demanded remedy of wrongdoing. [CP1 884-885, 899-900, 915, 927-928, 949-950]. To remedy wrongdoing by OFC, Mrs. Denney sought representation by an attorney, independent from OFC. [CP1 1493-1496, 1502-1503, 419 ¶¶XI, 625 ¶VIII]. OFC opposed, and the court denied Mrs. Denney’s efforts to be represented by an independent attorney for the person, to remedy ongoing infringement of her retained rights by OFC. [CP1 645 ¶IV, 988, 419 ¶XI, 443 ¶26, 618 ¶9, 625 ¶VIII].

3. Adopted by reference is Appeal-1 brief of Richard Denny, pp. 30-31 ¶2, pp. 39-41 ¶¶6-7.

Typically, on an estate claim against third persons, Ward would commence action in court through her Guardian. RCW 11.92.060(1). But when partially capacitated Mrs. Denney asserts personal claims against OFC — independently acting outside the scope and authority of the limited guardianship — then an actual conflict of interest in the same matter prohibits limited Guardian of the person from both prosecuting and defending itself.

The order establishing guardianship provides that, “Mrs. Denny shall not have the right to sue or be sued other than through a guardian.” [CP1 22 ¶2.4b]. Thus, OFC would have absolute immunity from any claim by Ward. Such an unlawful condition is naturally severed from the order, as null and void.

Acting outside the scope and authority of the guardianship in its independent corporate capacity, OFC engaged in a campaign of infringing the retained rights of the person of Mrs. Denny, an adjudicated partially capacitated person — who sought remedy in the courts for such infringement. This created an actual conflict of interest between OFC and Mrs. Denny as a person trying to protect and defend her partial capacity from continued infringement. As a matter of law, OFC could not represent Mrs. Denney on such matters, pursuant to RPC 1.7:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client;

...(b)(3)[T]he representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.”

“Our courts construe the federal and state equal protection clauses identically.” *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996). An adjudicated incapacitated person is a distinct class recognized for equal protection. E.g., *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 128, 170 P.3d 1151 (2007); quoting, *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 287 n.12 (1990) (“The differences between the choice made by a competent person to refuse medical treatment, and the choice made for an incompetent person by someone else to refuse medical treatment, are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class.”).

The long standing common law and equity was recently reiterated and partially codified in Chapter 293, Laws of 2015, effective July 24, 2015, amending RCW 11.88.120(1)⁴ to provide (underscore added):

For any hearing to modify or terminate a guardianship, the incapacitated person shall be given reasonable notice of the hear-

4. See Appeal-1 brief of Richard Denny, Appx. A18-A21.

ing and of the incapacitated person's right to be represented at the hearing by counsel of his or her own choosing.

In addition to equity and common law, RCW 11.88.045(1)(a) provides:

When, in the opinion of the court, the rights and interests of an alleged or adjudicated incapacitated person cannot otherwise be adequately protected and represented, the court on its own motion shall appoint an attorney at any time to represent such person.

As a matter of law, Mrs. Denney could not “be adequately protected and represented” by limited Guardian of the person having an actual conflict of interest in the same matter. The court was mandated to, “appoint an attorney at any time to represent such person.” Id. Quite simply, OFC cannot sue itself on behalf of Mrs. Denney.

Frivolous Opposition — Guardian has frivolously opposed an independent attorney for Ward, on the grounds that the order establishing guardianship precludes Ward from entering into a contract. [CP1 646 ll. 1-14]. As a matter of law, all commerce is based in contract. Ward is expressly allowed to engage in contractual commerce up to an amount of \$3,000, with her checking account. [CP1 121]. Ward has been found capable of expressing her wishes to an independent attorney regarding disposition of her estate exceeding \$10 million, while simultaneously found lacking the capacity to express her wishes to an independent attorney regarding protection of her retained rights of the person.

The establishing guardianship order explicitly allows Mrs. Denney to exercise her adjudicated capacity of the person, to contract with health care providers. [CP1 21 ¶2.2b]. Engagement of both doctors and lawyers are not traditional commercial contracts, since a fiduciary duty attaches. Pursuant to RCW 11.88.010(2), the court order establishing limited guardianship of the person did not specifically, explicitly, and unambiguously set forth any loss of right: to access the courts; to representation, or to bring claims against her Guardian by an independent attorney for infringement of the retained rights of the person.

OFC has been controlling both sides of the controversy in order to destroy adversity, eliminate the justiciable requirement for an actual controversy, and deprive Ward of access to the courts to effect her right to remedy. That is a prima facie violation of CPG Reg. 401.2 (“not act outside of the authority granted by the court”); CPG Reg. 403.1 (“The civil rights and liberties of the incapacitated person shall be protected.”); CPG Reg. 406.2 (“avoid even the appearance of self-interest or conflict of interest.”)

Under the present conflict of interest with OFC, Mrs. Denney can only be represented by an independent party, and is best represented by an independent attorney. This is the only option which satisfies the superior guardian’s fiduciary duty to apply the applicable standard of substituted judgment, and adhere to Mrs. Denney’s pre-incapacity pat-

terns, exacting pre-incapacity instructions, and explicit post-incapacity wishes — to be heard through an attorney independent from Guardian [CP1 16]:

Ellanora Denny hereby requests that she retain the following rights: ... 2. Contracts. Ellanora Denny hereby requests that she retain the right to enter into contracts provided that such is solely under the advice and with the assistance of competent independent counsel of her choice and in furtherance of her estate planning.

“Mrs. Denny is a fiercely independent woman who built a significant estate ... in commercial real estate and ... managed several rental properties” [CP1 44-45 ¶8a]; having the experience and aptitude for running a \$10-20 million business enterprise [CP1 147]. Guardian declared that, Ward “is relatively high functioning”, sufficient to enter into contractual commerce and render payment from a checking account. [CP1 53 ¶20]. And, in Ward’s own handwriting, “I want to select my own attorney.” [CP1 1345 ¶3].

At no time has Mrs. Denney been found incompetent to read and comprehend the written word which reflects her wishes, or the incapacity of verbally expressing her wishes. [Entire Record]. Mrs. Denney was adjudicated to retain partial capacity, which she sought to protect and preserve from infringement by OFC, through representation by an independent attorney. The establishing guardianship order did not “specifically” deprive Mrs. Denney of that right. OFC’s opposition to

Mrs. Denney's demand for an independent attorney is merely a preemptive attack to prevent a fair hearing of her meritorious claims, already admitted by Guardian.

G. The Superior Court erroneously modified the guardianship and effected additional loss of Mrs. Denney's retained rights.

The order approving the Annual Report for 2011 effected additional loss of Mrs. Denney's retained rights, in violation of RCW 11.88.010(2). Adopted by reference is Appeal-1 brief of Richard Denny, pp. 26-30 ¶1.

1. Loss of any right to interstate travel was not "specifically set forth in the court order establishing [the] limited guardianship" of the person. [CP1 21-31]. The Superior Court erroneously ordered the additional loss of Mrs. Denney's rights, by imposing interstate travel restrictions. [CP1 618 ll. 13-17; 440-441; 623 l. 19 - 624 l. 16].

2. Loss of any right to own and enjoy personal property was not "specifically set forth in the court order establishing [the] limited guardianship" of the person. [CP1 21-31]. The Superior Court erroneously ordered the additional loss of Mrs. Denney's rights, by depriving her of the ownership and enjoyment of her car — a Mercedes E-Class, which is very comfortable to be driven in, and easy to get into and out of. [CP1 618 ll. 18-21; 624 l. 17 - 625 l. 6].

Ward may be explicitly deprived of the privilege of driving, but was not explicitly deprived of the right of personal property; and therefore, Ward may continue to enjoy owning and being driven in the car of her pre-incapacity choice.

3. Loss of any right to an independent attorney for the person was not “specifically set forth in the court order establishing [the] limited guardianship” of the person. [CP1 21-31]. As addressed above, the Superior Court erroneously ordered the additional loss of Mrs. Denney’s rights, by creating an additional prohibition against the person being represented by an independent attorney to remedy OFC infringement of retained rights. [CP1 618 ll. 4-9; 443; 625 l. 20 - 626 l. 19].

H. Guardian violated its duties and infringed Mrs. Denney’s retained rights to such an extent that its replacement became a fiduciary duty of the court as superior guardian.⁵

The standard for guardian discipline by the CPG Regs. is a preponderance. Approved, *In re Disciplinary Proceeding Against Petersen*, 180 Wn.2d 768, 788, 329 P.3d 853 (2014). Similarly, replacement of the Guardian in this case is a question of remedy through discipline, and the preponderance standard should apply.

5. Adopted by reference is Appeal-1 brief of Richard Denny, at p. 26 ¶1, and pp. 41-45 ¶¶7-10; Appeal-2 brief of Richard Denny, at pp. 10 ¶2, 17-20 ¶¶7-8.

Pursuant to CPG Reg. 401.3, OFC had an affirmative duty to know at all times:

- OFC was authorized as limited guardian of the person [CP1 27 l. 21].
- Mrs. Denney retained the right to control her health care [CP1 21 ¶2.2], a substantive liberty interest,
- Mrs. Denney retained the right to travel (no restrictions specified).
- Mrs. Denney retained the right to own and enjoy personal property (no restrictions specified).

In 2011 and 2012, OFC neglected and breached its fiduciary duties; engaged in fraudulent misrepresentation; violated numerous statutes and CPG Regs.; infringed Mrs. Denney's retained rights; and independently acted outside the scope and authority of the guardianship, with prejudice to Ms, Denny as follows:

- OFC caused the court to issue an invalid letter of guardianship, authorizing OFC as full guardian of the person. [CP1 412 ¶13, 414].
- OFC disseminated the false and invalid letter of guardianship to Mrs. Denney's health care providers, and fraudulently misrepresented that, "Mrs. Denny is no longer able to consent to medical treatment", "All future treatment of Mrs. Denny... must be cleared with... Ohana;... consent must be obtained from the guardianship." [CP1 1327, 1332-3, 1334].

- OFC attorney Tom Keller expressly advised Mrs. Denney’s medical providers that, “Only guardian can do that.” [CP1 1329].

Mrs. Denney repeatedly demanded the OFC cease, desist, and remedy the infringement of her retained right to control her health care. [CP1 1296, 1311, 1323-24, 1345]. OFC refused to cooperatively work with its Ward, in violation of CPG Reg. 402.1 (“When the guardian has limited authority the guardian shall work cooperatively with the incapacitated person”), ignored her requests, and obtained a court order to ignore her written communication. [CP1 618 ¶13]. The oppressive willfulness of OFC in this regard was made undeniably clear, when it later sought and obtained an order which infringed and fully abrogated all of Mrs. Denney’s retained health care rights, “¶The Guardian shall have sole decision-making authority concerning Ella Nora Denny’s health care and medications...” [CP1 1855 ¶3]. “They are full guardian of the person as to medical matters.” [RP11 p. 34:6-10]. “Guardian’s actions... have been in the best interests of Ella Nora Denny...” [CP1 1855 ¶1].

The aforementioned facts are but the tip of the iceberg, since the court did not allow any discovery. As superior guardian, the court has breached its fiduciary duty to Ward, by allowing OFC to:

- operate without a valid letter of limited guardianship of the person, in violation of RCW 11.88.127(1) (“A guardian or limited guardian may

not act on behalf of the incapacitated person without valid letters of guardianship.), while misrepresenting itself as full guardian, in violation of CPG Reg. 401.2 (“The guardian shall not act outside of the authority granted”);

- willfully obstruct Mrs. Denney’s retained right to control her health care, in violation of CPG Reg. 403.1 (“The civil rights and liberties of the incapacitated person shall be protected.);
- knowingly infringe upon Mrs. Denney’s retained rights to control her health care, “specifically set forth in the court order establishing [the] limited guardianship” RCW 11.88.010(2);
- intentionally effect additional loss of legal rights and suffering of legal disability, in violation of RCW 11.88.010(2);
- impose its own judgment of what is in the Ward’s best interests, in violation of CPG Reg. 405.1 (“The primary standard for decision making is the Substituted Judgment Standard based upon the guardian’s determination of the incapacitated person’s competent preferences”), and see, *Raven*, 177 Wn.2d at 818;
- increase the restrictions upon Ward, in violation of CPG Reg. 403.1 (placing the least restrictions on the incapacitated person’s freedom, rights, and ability to control his or her environment.);
- minimize Ward’s independence, in CPG Reg. 403.1 (“The independence and self-reliance of the incapacitated person shall be maxi-

mized”);

- impede Mrs. Denney’s efforts to protect her retained rights of the person, through an independent attorney, in violation of CPG Reg. 403.1 (“The civil rights and liberties of the incapacitated person shall be protected.);
- fail to apply the correct standard, in violation of CPG Reg. 405.1 (“The primary standard for decision making is the Substituted Judgment Standard...”);
- neglect Mrs. Denney’s strong personal preferences, in violation of CPG Reg. 402.1 (“When the guardian has limited authority the guardian shall work cooperatively with the incapacitated person”);
- induce the court to enter erroneous decisions; in violation of CPG Reg. 402.1 (“If the guardian is aware of a court order that may be in conflict with these standards, the guardian shall bring the conflict to the attention of the court”);
- independently act outside the scope and authority of the guardianship.

I. The superior guardian has a fiduciary duty to exercise plenary power over its Guardian, and effect discovery.

Adopted by reference is Appeal-2 brief of Richard Denny, pp. 21-22 ¶10. Discovery was requested in the motion to replace Guardian. [CP1 1237 ll. 4-5]. The superior guardian has a duty to insure the

integrity of Guardian, in protection of Ward. That requires awareness of the truth. However in this guardianship, the objective truth has been largely unavailable.

The Superior Court erroneously precluded hearing of Mrs. Denny, her Next Friend, or Petitioner Richard Denny. Despite OFC admission of misrepresentation and operating without a valid letter of guardianship, along with prima facie documentary evidence of willful misrepresentation and infringement of Mrs. Denny's retained rights — the Superior Court decisions have erroneously presumed the Guardian right and the Ward wrong.

For example, in both her pre and post partial incapacity, Mrs. Denny wanted a full audit, and the GAL agreed, "I recommend that the guardian of the estate audit the books..." [CP1 1221 ll. 9-16, 1232 ll. 1-8]. "I would like a comprehensive audit performed by a disinterested party, to determine if any fraud has been committed." [CP1 1345 ¶4]. The court order establishing the guardianship properly applied substituted judgment and specified that the Guardian shall perform an audit. [CP1 25 ll. 17-21].

Guardian subsequently opposed an audit. [CP1 39 ¶E, 51-52 ¶18]. As always, the Superior Court modified the guardianship accordingly, while disregarding any duty to apply substituted judgment. [CP1 119

¶5]. Guardian shielded itself from any scrutiny, even by the superior guardian.

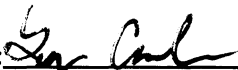
The Court of Appeals now has concurrent jurisdiction as superior guardian, with plenary power over Guardian. It has a fiduciary duty to become aware of the objective truth in order to properly guard the Ward from continued wrongdoing. The Guardianship should be objectively transparent, and the court should allow examination into it.

VI. CERTIFICATION OF SERVICE

I certify that on this date the foregoing papers were served on the following persons in a first class postage paid cover:

- **Marianne Zak**, 32101 Weston Dr., Beverly Hills, MI 48025;
- **Douglas Schafer**, PO Box 1134, Tacoma, WA 98401;
- **Carol Vaughn**, 601 Union St. Ste. 3232, Seattle, WA 98101.
- **Appellate Court Clerk**, Washington Court of Appeals, Div. I, 600 University St., Seattle, WA 98101.

Dated: 30 Nov. 2015
New Haven, CT

Signed: 
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