NO. 69117-1-I
(consol. with No. 69610-6-I; linked with No. 70312-9-I)

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

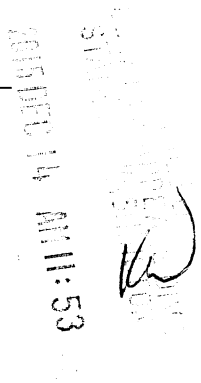
In re the GUARDIANSHIP of ELLA NORA DENNY,

ELLA NORA DENNY, THOMAS ANDERSON, and

RICHARD DENNY, Appellants,

OHANA FIDUCIARY CORPORATION, Respondent.

BRIEF OF APPELLANT THOMAS ANDERSON



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30 November 2015

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I. PROCEDURAL DISCUSSION — PARTIES AND BRIEFING

These appeals from final decisions, and related interlocutory decisions, include the following parties, In re Ella Nora Denny, King Co. Sup. Ct. case no. 09-4-04984-7:

Appeal-1, Consolidated under Appeal no. 69117-1-I:

Thomas Anderson, petitioner/appellant; Ohana Fiduciary Corp., respondent/appellee; Appeal no. 69117-1-I.

Ella Nora Denny, petitioner/appellant; Ohana Fiduciary Corp., respondent/appellee; Appeal no. 69117-1-I.

Richard Denny, petitioner/appellant; Ohana Fiduciary Corp., respondent/appellee; Appeal no. 69610-6-I.

Appeal-2, Consolidated under Appeal no. 70312-9-I; linked with Appeal-1 no. 69117-1-I:

Ella Nora Denny, petitioner/appellant; Ohana Fiduciary Corp., respondent/appellee; Appeal no. 70312-9-I.

Richard Denny, petitioner/appellant; Ohana Fiduciary Corp., respondent/appellee; Appeal no. 70610-1-I.

Under RAP 10.1(g), "Briefs in Consolidated Cases and in Cases Involving Multiple Parties. In cases consolidated for the purpose of review and in a case with more than one party to a side, a party may (1) join with one or more other parties in a single brief, or (2) file a separate brief and adopt by reference any part of the brief of another."

Both Thomas Anderson individually, and Ward Ella Nora Denny represented through Next Friend Anderson, jointly filed a single notice in appeal no. 69117-1-I.; [CP1 1530, 1570, 1629]. "More than one party may join in filing a single notice of appeal." RAP 5.3(d). "The appellate court will disregard defects in the form of a notice of appeal... if the notice clearly reflects an intent by a party to seek review." RAP 5.3(f). This brief addresses only those assignments of error directly pertaining to Anderson, individually.

Ella Nora Denny is referred to as Mrs. Denney for her partial capacity of the person, and as Ward for her partial incapacity of the person.

Ohana Fiduciary Corp. is referred to as OFC for its independent conduct outside the scope and authority of the guardianship, and as Guardian for its conduct in accordance with the guardianship.

II. INTRODUCTION

This appeal is made by Thomas Anderson in his individual capacity. Adopted herein by reference are the introductions set forth in the Appeal-1 opening briefs of Ella Nora Denny and Richard Denny.

III. ASSIGNMENTS OF ERROR AND QUESTIONS ON APPEAL

A. Assignment of Erroneous Decisions of Trial Court

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

2. The Superior Court erroneously granted an order requiring Anderson to post $50,000 bond. [CP1 980-982, 1161, Interlocutory].

3. The Superior Court erroneously granted an order allowing, and entered judgment for, costs and fees against Anderson. [CP1 1426-1430, Interlocutory].

4. The Superior Court erroneously denied Anderson's motion to replace Guardian and modify guardianship. [CP1 1163-1168, FINAL].

B. Questions on Appeal

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

2. Whether the Superior Court lacked authority to require Anderson to post $50,000 bond, as a condition precedent to being heard.

3. Whether the Superior Court lacked authority to tax costs and fees under RCW 11.196A.150.

4. Whether costs and fees were taxable to Anderson on causes expressly admitted by Ohana Fiduciary Corp.

5. Whether costs and fees accrued to Anderson for proceedings which were stayed by statute and court order, and in which Anderson was barred from being heard.

6. Whether Anderson was a party to the proceedings.

7. 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.

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]. He did not move to remove any guardian, on the grounds that Ward had regained capacity.

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

Questions of law are reviewed de novo. The meaning of a statute is a question of law reviewed de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The application of an incorrect legal standard is an error of law that we review de novo. *Jongeward v. BNSF Ry.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012). The application of a statute to a fact pattern is a question of law fully reviewable on appeal. *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 887, 658 P.2d 1267 (1983). The interpretation of case law is reviewed de novo. *State v. Willis*, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004).

At no point in this guardianship proceeding has the court heard sworn testimony, allowed any fact witness to appear, or examined any physical evidence. [Entire Record]. The issues were decided upon the written record. Oral argument generally excluded Anderson / Next Friend. Explained in, *State v. Kipp*, 179 Wn.2d 718, 727, 317 P.3d 1029 (2014); quoting, *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969):

> [W]here the record both at trial and on appeal consists entirely of written and graphic material — documents, reports, maps, charts, official data and the like — and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo."

B. Standard of Judgment

Washington follows the American rule that attorney fees are not available as costs or damages absent a contract, statute, or recognized ground in equity. *City of Seattle v. McCready*, 131 Wash. 2d 266, 275, 931 P.2d 156, 161 (1997). As superior guardian, the court has plenary power over its officers, which include the Guardian. Explained in, *In re Disciplinary Proceeding Against Petersen*, 180 Wn.2d 768, 783, 329 P.3d 853 (2014):

> Like attorneys, guardians are officers of the court. The court having jurisdiction of a guardianship matter is said to be the superior guardian of the ward, while the person appointed guard-

> ian is deemed to be an officer of the court. Like with attorney discipline, with guardian discipline we have the inherent power to promulgate rules of discipline, to interpret them, and to enforce them.

Conversely, the court does not have plenary power over a "civilian" — who moves for relief from Guardianship misconduct under "any person" jurisdiction pursuant to RCW 11.88.120(2)(1990); or who appears as next friend for the Ward in this case. All references to "plenary power" and "TEDRA" / RCW 11.96A by the Superior Court in this case, pertaining to Anderson's efforts or Ward individually and as Next Friend, are clearly erroneous as a matter of law. See, RCW 11.96A.080(2), *infra*.

C. Anderson has standing as Next Friend of Ward.

Ward has a justiciable controversy which is adverse to Guardian, who is flatly prohibited from appearing on Ward's behalf with actual non-waivable conflicts of interest in matters at issue in these proceedings. Ward had disputes with Guardian, and demanded remedy of Guardian wrongdoing. [CP1 884-885, 899-900, 915, 927-928, 949-950].To remedy wrongdoing by Guardian, Ward sought representation by an attorney independent from Guardian. [CP1 1493-1496, 1502-1503, 419 ¶XI, 625 ¶VIII]. Guardian opposed and the court denied Ward's efforts to be represented by an independent attorney for the

person, to remedy wrongdoing by OFC. [CP1 645 ¶IV, 988, 419 ¶XI, 443 ¶26, 618 ¶9, 625 ¶VIII].

Ward was partially incapacitated, precluded from legal representation independent from Guardian, and had claims of wrongdoing against OFC, for independent conduct outside the scope and authority of the guardianship. Anderson then appeared as Next Friend of Ward. [CP1 1235, 621, 1346, etc.]. Anderson individually, and as Next Friend, moved to replace Guardian [CP1 1235], among other things.

> Court: "He claims to be some sort of "next friend," which he has not — which position he has not been appointed to, and which legal theory is, to my knowledge, not recognized in the state of Washington." [RP11 p. 6:11-14].
>
> Court: "Under no theory will Mr. Anderson be allowed to file any pleadings in this case, nor will he be — nor will any counsel be required to read or respond to any of his pleadings filed in this case, unless and until he posts a bond, cash, with the clerk of the court in the sum of $50,000..." [RP11 p. 6:20-25].

Standing is a question of law. *In re Guardianship of Karan*, 110 Wn. App. 76, 81, 38 P.3d 396 (2002). The Washington legislature has recognized and codified the preexisting common law doctrine of next friend standing. E.g., RCW 26.50.020 (underscore added): "A person under sixteen years of age who is seeking relief under subsection (1)(b) of this section is required to seek relief by a parent, guardian, guardian ad litem, or next friend." "One necessary condition for 'next friend' standing ... is a showing by the proposed 'next friend' that the real party ... is

unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." *State v. Dodd*, 120 Wn.2d 1, 838 P.2d 86 (1992); quoting, *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990). The common law right to appear through a representative is summarily explained in, Woerner, *A Treatise on the American Law of Guardianship*, § 143, p. 474 (1897, Little, Brown & Co.)(citatons omitted):

> Since all persons of unsound mind are capable not only of holding, but also of acquiring property, the law gives to them, as an inseparable concomitant to such right, the right of action. By a uniform and uninterrupted current of authorities, from the time of Fitzherbert to the present period, it has been established that an idiot or lunatic may sue and be sued. The appearance in an action by a person of unsound mind is by attorney, or any competent person as next friend (prochein ami)...

"An infant may sue by next friend... where the action is against the guardian." Id., §143, p. 474; citing, *Apthorp v. Backus*, 1 Kirby 407, 409 (Conn. 1788), in which the court further explained at 411:

> The admission, as in our courts, is merely a tacit one. — Any person who will befriend the infant, brings a bill as prochein ami to him, without his consent, or any appointment of court; and if the court disapprove of him, or of his proceedings, they dismiss him, and, if need be, appoint another...
>
> The prochein ami comes in therefore here, as in chancery in England, without any previous appointment, or formal admission; and if the court disapprove of him, they will, upon motion, or without, when he comes to appear, or in any stage of the suit, displace him, and if the case requires it, appoint another.— Tacit admission, from the nature of the case, and the

> mode of process here used, is sufficient, and all that practice has made necessary.

Woerner's Treatise is cited with approval in, *Seattle-First Nat'l Bank v. Brommers*, 89 Wn.2d 190, 201, 570 P.2d 1035 (1977). Also explained by, *In re Ivarsson*, 60 Wn.2d 733, 736, 375 P.2d 509 (1962)(underscore added):

> If there is an aggrieved or interested person entitled to appeal, it is the ward. It is her money that is being so freely and generously distributed. Her right to appeal must be conceded; but inasmuch as she is unable to exercise it, there must be a determination as to who is entitled to appeal in her behalf. The right of appeal by a prochein ami, or "next friend," in such circumstances, has long been recognized. *William v. Cleaveland*, 76 Conn. 426, 56 Atl. 850 (1904), and cases cited.

Further explained by the court in, *William v. Cleaveland*, at 431:

> At common law, infants were required to both sue and defend by guardian. In England they were authorized by statute to sue by next friend as well as by guardian. The rule established by the statute of Westminster became part of our common law. The remedy thus given has been held to be cumulative, leaving it optional with the infant to sue either by guardian or next friend. (Citations omitted).

This case is a prime example which perfectly fits all criteria for next friend standing to appear. Quite simply, Guardian cannot sue itself on behalf of Ward. In opposition, OFC erroneously contends without explanation, that the applicable standard for next friend standing is that for a habeas corpus proceding — requiring a significant and substantial relationship between the alleged criminal and next friend. [CP1 1109 - 1110]. "These limitations on the next friend doctrine are driven by the

recognition that it was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends." *Whitmore*, 495 U.S. at 154.

This exemplifies OFC's perspective that innocent Ward's rights should be given no more regard than those of a convicted criminal, and her family should be prohibited from helping her in any way.

D. The Superior Court lacked authority to require Anderson to post $50,000 bond, as a condition precedent to being heard.

The court ordered Anderson to post bond of $50,000 [CP1 982]; and concluded [CP1 981 ll. 21-24]:

> This Court has authority under RCW 11.96A.020, RCW 11.96A.060, RCW 4.84.210 and its plenary powers over guardianship matters to order Thomas Anderson to post a bond to secure the payment of attorneys' fees and costs that may be assessed against him under RCW 11.96A.150.

RCW 4.84.210 is expressly limited:

> When a plaintiff in an action, or in a garnishment or other proceeding, resides out of the county, or is a foreign corporation, or begins such action or proceeding as the assignee of some other person or of a firm or corporation, as to all causes of action sued upon, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant or garnishee defendant. When required, all proceedings in the action or proceeding shall be stayed until a bond...

That is, a bond may only be "required"; (a) upon a real party in interest; (b) who commences; (c) the "action"; (d) which is subject to "costs and charges which may be awarded against such plaintiff."

(a) Real Party in Interest — Anderson, whether individually or as next friend, has been neither a real party in interest nor assignee of any interest, since he has no legally protectable interest in this guardianship proceeding, and derives no benefit or protection from the relief sought solely for Ward. [Entire record]. For example under federal procedure, "We have seen that parties who are not real parties in interest but who must be made plaintiff or defendant, as the next friend where the real plaintiff is an infant... are formal or nominal parties." 3A, J. Moore, *Federal Practice*, ¶19.02.

(b) Who Commences — Pursuant to CR 3, "a civil action is commenced by service of a copy of a summons..." This guardianship proceeding was commenced not by Anderson, but by Richard Denny on 28 Sep. 2009, under RCW 11.88.030. [CP1 1]. The motion to replace was brought under RCW 11.88.120 (1990), "(1) At any time after establishment of a guardianship..."

(c) Action — Pursuant to CR 7, "An application to the court for an order shall be by motion..." Under RCW 11.88.120, a motion to replace is part of existing proceedings, not an action unto itself. The intervening motion by Anderson did not commence a separate action, and the clerk did not assign a new case number.

(d) May be Awarded — As argued above, the "plenary powers" established under TEDRA, RCW 11.96A, are expressly precluded from

application to these guardianship proceedings under RCW chapters 11.88 and 11.92, pursuant to 11.96A.080(2).

All criteria were not satisfied, and the Superior Court was without authority, under the statute upon which it relied, to order Anderson to post bond, whether individually or as Next Friend. Hence, it was also without authority to stay and preclude Anderson from appearing in the proceeding as "any person", whether individually or as Next Friend. Upholding such a requirement would merely serve to chill the purpose of RCW 11.88.120, and preclude persons from protecting the interests of an incapacitated family member, as the Superior Court did here.

E. The Superior Court lacked authority to tax costs and fees under RCW 11.96A.150.

The guardianship was originally established pursuant to RCW 11.88 [CP1 21 l.2] and 11.92 [CP1 22 l. 18]. Anderson moved to replace the Guardian and modify the guardianship, pursuant to RCW 11.88.120(2) (1990) [CP1 1235 l. 15-16]. The court ordered that Anderson post bond, "to secure the costs and attorneys' fees that may be awarded against him in this action under RCW 11.96A.150." [CP1 982 ll. 8-10].The court entered an order taxing costs and fees to Anderson as follows [CP1 1166 ¶19]:

> Pursuant to RCW 11.96A.150, the Court finds that it is equitable to order Mr. Anderson to reimburse the guardianship estate for the reasonable attorneys' fees and costs incurred by the

> Guardian in responding to the Motions to Modify Guardianship and Replace Guardian...

The court further ordered [CP1 1429 ll. 20-22]:

> Pursuant to RCW 11.96A.150, ... Thomas Anderson should be required to reimburse the guardianship estate $4411.50 for attorneys' fees that were previously awarded against them.

Judgment for fees and costs was subsequently entered. [CP1 1432].

The provisions of RCW 11.96A (TEDRA) expressly preclude its application to guardianship proceedings under RCW 11.88 and 11.92, as provided under RCW 11.96A.080(2):

> The provisions of this chapter apply to disputes arising in connection with estates of incapacitated persons unless otherwise covered by chapters 11.88 and 11.92 RCW. The provisions of this chapter shall not supersede, but shall supplement, any otherwise applicable provisions and procedures contained in this title, including without limitation those contained in chapter 11.20, 11.24, 11.28, 11.40, 11.42, or 11.56 RCW.

The provisions of TEDRA may, "supplement any <u>otherwise</u> applicable provisions and procedures contained in this title", but are prohibited from supplementing sections 88 or 92. OFC has admitted as much [CP2 308 ll. 1-7]:

> The provisions of RCW 11.96A.080(2) also make it clear that the guardianship statutes govern the notice requirements for guardianship annual reports, not the provisions of RCW 11.96A et. seq. governing "judicial proceedings" otherwise commonly known as TEDRA proceedings.

The Superior Court was without legal authority to tax fees and costs to Anderson pursuant to RCW 11.96A.150. Neither OFC nor the

court cited any other legal basis therefore.[1] Even if other authority applies, RCW 4.84.010 precludes attorney fees, and OFC did not specify the costs enumerated under that statute. On this assignment alone, the orders at, CP1 1426, CP1 1167 ¶4, and the judgment at, CP1 1432, should be reversed.

F. Costs and fees were <u>not</u> taxable to Anderson, on causes expressly admitted by Ohana Fiduciary Corp.

OFC proceeded with unclean hands. Taxation of costs "embodies a practice long recognized in equity." 10, Wright, Miller, Kane, *Federal Practice and Procedure*, § 2668. Thus, consideration of equitable doctrines are within the discretion of the court. "Misconduct on the part of the prevailing party is one factor that might render a case 'extraordinary.'" *Association of Mexican-American Educators v. Cal.*, 231 F.3d 572, 593 (9th Cir. 2000).

The Superior court authorized a limited guardian of the person. [CP1 21 l. 3; CP1 34]. Thereafter, OFC engaged in a prolonged concerted effort to breach and nullify Ward's retained rights. Knowing it was without authority, OFC asserted full power over Ward's medical care, by willfully misrepresenting itself as full guardian of the person.

1. The same arguments apply to the order for costs and fees against Richard Denny

OFC ignored Ward's written demand to cease and desist, and refused to remedy the wrong. See, Richard Denny Appeal-1, pp. 8-15.

For the express purpose of obtaining "Letters of Guardianship of the Person and Estate" [CP1 414], OFC filed false records with the court misrepresenting itself as guardian of the person and concealing that it was merely limited guardian of the person. [CP1 175 ll. 25-26; CP1 412 ll. 19-21]. When confronted by the court at the 27 Apr. 2012 hearing, Guardian expressly admitted its wrongdoing, but then Guardian proceeded to misrepresent the nature, scope and duration thereof, in an effort to minimize its bad faith conduct in breach of fiduciary duty. [RP5 p. 6].

OFC confirmed the validity of multiple causes upon which Anderson founded his motion to replace — misrepresentation by Ohana as full guardian of the person, in violation of CPG Reg. 401.2; operating without a valid letter of guardianship in violation of RCW 11.88.127(1); infringement of Ward's retained right of medical consent, in violation of CPG Reg. 401.3; willful refusal to remedy the problem when expressly demanded in writing by Ward, in violation of CPG Reg. 402.1.; etc...The fact that OFC ignored Ward's written demand for remedy, and continued enjoying the benefit of its misrepresentation, plainly distinguishes its culpability from innocent or harmless error.

"[D]eliberate ignorance and positive knowledge are equally culpable." *United States v. Jewell*, 532 F.2d 697, 703 (9th Cir. 1976).

As a matter of law, the motion to replace Guardian was not frivolous. Ultimately, the OFC admission confirmed that Anderson was fully justified in moving to replace the Guardian. OFC was proceeding with unclean hands while the court taxed costs and fees to Anderson and Richard Denny. "A person must come into a court of equity with clean hands." *In re Marriage of Buchanan*, 150 Wn. App. 730, 207 P.3d 478 (2009); quoting, *Pierce County v. State*, 144 Wn. App. 783, 832, 185 P.3d 594 (2008); and citing, *Income Investors, Inc. v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940), which explains (citations omitted):

> It is a well-known maxim that a person who comes into an equity court must come with clean hands. A person may, by his misconduct, be precluded from a right to an accounting in equity by virtue of the maxim stated. Equity will not interfere on behalf of a party whose conduct in connection with the subject matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy. Other authorities might be cited, but the rule appears to be universal.

Equity bars OFC from the benefit of, or immunity from, costs and fees arising from action on its acknowledged wrongdoing.

G. Costs and fees <u>did not</u> accrue to Anderson for proceedings which were stayed by statute and court order, and in which Anderson was barred from being heard.

While the court stayed proceedings and barred Anderson from being heard, it simultaneously adjudicated identical proceedings without any hearing of Anderson. It then denied replacement of the Guardian, and taxed Anderson for the proceeding.

The motion to replace Guardian was filed on 9 Apr. 2012. [CP1 1235]. On 11 Apr. 2012, the court entered an order which denied Anderson's motion to replace, on the grounds that there were other pending proceedings; but then stated: "The Court Will Review This Request Following Determination Of The Pending Motions On 5/31/12." [CP1 632]. At hearing on 27 Apr. 2012, OFC acknowledged impropriety that gave reasonable, arguable, and nonfrivolous cause for Anderson's motion to replace Guardian. [RP5 6].

Two weeks later on 10 May 2012, the court ordered Anderson to post $50,000 bond pursuant to RCW 4.84.210, which mandates that, "all proceedings in the action or proceeding shall be stayed until a bond... be filed with the clerk..." The order likewise stated: "All motions, discovery, and objections filed by Thomas Anderson are stayed pending proof of compliance with this Order." [CP1 982 ll. 13-14]. Nonetheless on 31 May 2012, the court heard a motion to replace Guardian, and issued an order denying it on 19 Jun. 2012. [CP1 1163].

If Anderson's motion to replace was stayed as a matter of law — under RCW 4.84.210 and express court order — then the court was

without authority to adjudicate it. Thus, it was not Anderson's motion which yielded the costs and fees to OFC.

Taxation of costs and fees to Anderson for his motion to replace Guardian — that was stayed as a matter of law and he was not heard — violated the procedural process due Anderson, and the resultant taxation of costs and fees are null and void. The court's awareness of its violation of procedural due process is evident in the final paragraph of its order; "Mr. Anderson is permitted to file a response to the petition for attorneys' fees notwithstanding the prior order requiring him to post bond." [CP1 1168 ll. 1-2].

H. Anderson was not a party to the proceedings.

Anderson appeared as a nominal party, both in his individual and Next Friend capacities. Guardian admitted wrongdoing of operating without a valid letter of guardianship, and misrepresenting itself as full guardian of the person. That prima facie obviated any assertion of frivolity.

Prochein ami or next friend is presumed to proceed justly, acting solely in the interests of the incapacitated person, and is immune from liability for costs unless specifically allowed by statute. Washington has no such a statute, and does not allow costs against a nominal party. *Cathcart v. Andersen*, 10 Wn. App. 429, 437, 517 P.2d 980 (1974)("costs should not be taxed against the nominal parties"); *In re Point Allen Serv.*

Area, 128 Wn. App. 290, 306, 115 P.3d 373 (2005); *State v. Nolan*, 141 Wn.2d 620, 625, 8 P.3d 300 (2000); applying, RAP 14.2:

> A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

"Such a rule of practice," it has been said, "is absolutely essential to the safety and security of a large number of persons who are entitled to the protection of the law — indeed, stand most in need of it — but who are incompetent to know when they are wronged, or to ask for protection or redress." *United States v. Equitable Trust Co.*, 283 U.S. 738, 744 (1931); citing, *Voorhees v. Polhemus*, 36 N.J. Eq. 456, 458 (1883); 9 A.L.R. 1537, 1541.

In a prior motion, OFC successfully argued that Anderson lacked standing as next friend, and was subject to $50,000 bond, citing, *Whitmore*, supra. [CP1 1109 l. 25]. However, OFC concealed that the court in *Whitmore* also explained that, "A next friend does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest." *Whitmore*, 495 U.S. at 163.

OFC was subject to issue preclusion by its own successful erroneous argument, and could not reverse position to contend that Next Friend Anderson was a party subject to costs and fees. See e.g., *Williams V. Leone Keeble Inc.*, 171 Wn.2d 726, 731, 254 P.3d 818 (2011).

Assuming arguendo, that the court was somehow authorized to tax costs and fees under RCW 11.96A.150, which provides in part, "(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings..." (underscore added). Neither the court nor OFC identified any definition of a "party", under RCW 11.96A.030(5), which covered Anderson [Entire Record]: he was not "duly appointed", under subsection (5)(k); he was not a "virtual representative" or "agent" having legal authority to receive service of summons on behalf of Ward, under subsection (5)(l-m); he had no authority to bind Ward in any manner, as required for the doctrine of virtual representation, pursuant to RCW 11.96A.120. The Superior Court erroneously granted an order allowing, and entered judgment for, costs and fees against Anderson.

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

Adopted by reference is Appeal-1 brief of Ella Nora Denny, pp. 25-29 ¶H; Appeal-1 brief of Richard Denny, p. 26 ¶1, and pp. 41-45 ¶¶7-10; Appeal-2 brief of Richard Denny, pp. 10 ¶2, 17-20 ¶¶7-8.

The Superior Court erroneously denied Anderson's motion to replace Guardian and modify guardianship. [CP1 1163-1168].

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.
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Dated: 30 Nov. 2015
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