

No. 69117-1-I (consolidated w/ 69610-6-I and linked w/ 70312-9-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Guardianship of:
ELLA NORA DENNY, an incapacitated person.

Richard Denny and Thomas Anderson, Appellants,

v.

Ohana Fiduciary Corporation, Full Guardian of the Estate and Limited
Guardian of the Person of Ella Nora Denny, Respondent.

**BRIEF OF RESPONDENT GUARDIAN OHANA FIDUCIARY
CORPORATION IN RESPONSE TO OPENING BRIEF OF
APPELLANT RICHARD DENNY**

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ORIGINAL

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I. INTRODUCTION

Guardianships are not adversarial proceedings between the guardian and the ward as the appellant Richard Denny (Richard)¹ posits. Guardianships are equitable creations of the courts, designed to protect vulnerable people who cannot manage their personal and financial affairs on their own, where the superior court is not a referee between competing adversaries, but “the superior guardian of the ward,” and the guardian is not an adversary of the ward, but an officer of the court with a fiduciary duty to pursue the best interests of the ward. The ultimate responsibility of the guardian and the superior court is to protect the ward’s person and estate. In re the Guardianship of Lamb, 173 Wn.2d 173, 185, 190, 265 P.3d 876 (2011); In re Guardianship of Decker, 188 Wn. App. 429, 451, 353 P.3d 669, *rev. denied* 184 Wn.2d 1015 (2015).

In this role, the Superior Court of King County adjudicated Ella Nora Denny (Mrs. Denny) to be an incapacitated person in 2009, at Richard’s request, and established a full guardianship of Mrs. Denny’s estate and a limited guardianship of her person. Also at the request of Richard, the superior court appointed a certified professional guardian, Ohana Fiduciary Corporation (Ohana), as Mrs. Denny’s guardian, instead

¹ The appellant refers to himself as “Richard” in his opening brief; therefore, for consistency and clarity, this brief refers to the appellant by his first name.

of one of her two children, due to conflict between Richard and his sister. In 2012, Richard and cross appellant Thomas Anderson (Anderson) began a campaign to disrupt the guardianship that has spawned five appeals² challenging 22 separate orders of the superior court,³ and several interlocutory motions to this Court and the Washington Supreme Court.⁴

Richard's opening brief requests that this Court reweigh the evidence, render its own findings of fact, and substitute its judgment – or rather Richard's judgment – for the superior court's determinations of what is in Mrs. Denny's best interest. This is not the proper role for an appellate court, and it disregards the superior courts' constitutional role in overseeing the welfare of incapacitated persons. *See Wash. Constitution art. 4 § 6* (granting superior courts original jurisdiction over all matters in “probate”). This Court should affirm the trial court, deny Richard's request for attorney fees, and award reasonable attorney fees and costs to Mrs. Denny's guardianship estate.

II. RESTATEMENT OF ISSUES

The issues are properly stated as:

² No. 69117-1-I (July 18, 2012 by Anderson); No. 69610-6-I (October 10, 2012 by Richard); No. 70312-9-I (April 30, 2013 by Anderson); No. 70610-1-I (June 24, 2013 by Richard); and No. 72014-7-I (May 6, 2014 by Anderson). This Court consolidated and linked the first four appeals and stayed the fifth and final appeal until conclusion of the first four.

³ The challenged orders are listed in the Appendix at 1 -2.

⁴ The appellate motions and orders are listed in the Appendix at 3.

A. Should this Court adopt an interpretation of the superior court order that established Mrs. Denny's guardianship in 2009 (the "2009 Order") that contradicts the plain language of the order? (*Assignment of Error 1*).

B. Did the superior court abuse its discretion in denying the requests to appoint counsel for Mrs. Denny? (*Assignment of Error 2*).

C. Did the superior court abuse its discretion in supervising the guardian and approving its annual reports? (*Assignment of Error 3*).

D. Did the superior court abuse its discretion when it affirmed the guardian's authority to make health care decisions for Mrs. Denny and restricted Richard's involvement? (*Assignment of Error 4*).

E. Did the superior court abuse its discretion when it ordered Richard to stop procuring Mrs. Denny's signature on documents related to the guardianship? (*Assignment of Error 5*).

III. RESTATEMENT OF THE CASE

A detailed restatement of the facts and procedure below precedes the discussion of each assignment of error.

IV. ARGUMENT

A. Richard's Assignments Of Error Are Improper.

Assignments of Error 1, 2, and 3 violate *RAP 10.3(a)(4)* by failing to identify the orders of the trial court that Richard wants this Court to

review. Title 10 requires a “separate concise statement of each error a party contends was made by the trial court[.]” *RAP 10.3(a)(4)*. Richard asserts that the trial court erroneously ruled, but does not cite to the rulings of the trial court, the Clerk’s Papers or the Report of Proceedings. It is not the appellate court's function to sort through the record searching for the factual basis of a party's assignments of error. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992).

B. Challenges To The Trial Court Orders Entered December 17, 2010, March 29, 2012, and May 16, 2012 Are Untimely.

A notice of appeal must be filed within 30 days after entry of the trial court decision. *RAP 5.2(a)*. If a notice of appeal is not filed “within 30 days of entry of an appealable order, the appellate court is without jurisdiction to consider it.” In re Marriage of Maxfield, 47 Wn. App. 699, 710, 737 P.2d 671 (1987). Richard’s notice of appeal was filed on *October 10, 2012*, CP 1585-6, and requested review of the following three orders entered more than 30 days prior to the date of filing: (1) Order Reaffirming Court’s Prior Order of December 17, 2010 entered *March 29, 2012* (CP); (2) Order Approving Interim Report entered *December 17, 2010* (CP); and (3) Findings of Fact, Conclusions of Law and Order on Motion entered *May 16, 2012* (CP). When an appellant fails to file a timely notice of appeal, the appellate rules preclude extending the deadline except “in extraordinary circumstances and to prevent a gross miscarriage

of justice[.]” *RAP 18.8(b)*. See also Schaefco, Inc. v. Columbia River Gorge Comm'n., 121 Wn.2d 366, 367-368, 849 P.2d 1225 (1993). No extraordinary circumstances justify extension in this case.

C. Orders Entered In A Guardianship Are Reviewed For Abuse Of Discretion And Substantial Evidence.

“The management of a guardianship by the superior court is reviewed for abuse of discretion.” In re Guardianship of Cornelius, 181 Wn. App. 513, 528, 326 P.3d 718 (2014) (citing In re Guardianship of Johnson, 112 Wn. App. 384, 387-88, 48 P.3d 1029 (2002)). A trial court’s decision will not be reversed for abuse of discretion unless it is “manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.” In re Guardianship of Lamb, 173 Wn.2d at 189. “A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *Id.* (citations omitted).

Richard wrongly assumes that this Court will reweigh the evidence and make its own findings. There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. Fisher Props., Inc. v. Arden-Mavfair Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990). "Substantial evidence is evidence in sufficient quantum to persuade a fair minded person of the truth of the declared premise."

Ridgeview Prop. v. Starbucks. 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

An appellate court “heavily relies on the trial court's determination of what is in the best interest of the ward.” In re Guardianship of Cornelius, 181 Wn. App. at 536 (citing In re Guardianship of Pawling, 101 Wn.2d 392, 401, 679 P.2d 916 (1984)). A superior court is in a better position to determine factual disputes in a guardianship case because it has a more extended opportunity to consider documentary evidence, hear arguments of and question counsel, and clarify conflicts in the record. Stern v. Singleton, 68 Wn. App. 922, 929, 846 P.2d 1387 (1993).

D. Response To Assignment Of Error 1: Richard Mischaracterizes The 2009 Order And Fails To Identify The Trial Court Decisions He Is Challenging.

Assignment of Error 1 asserts: “The superior court erred in its interpretations of its 2009 Order.” *App. Op. Brf.* at 4. Although Richard quotes remarks made by Judge Armstrong on revision, he does not challenge a single ruling by the trial court in the section of his brief discussing Assignment of Error 1. *See App. Op. Brf.* at 26 – 31. Moreover, Richard’s interpretation of the 2009 Order disregards its plain meaning and blatantly manipulates the Order’s language to fit Richard’s agenda.

1. Facts and procedure relevant to the issues presented by Assignment of Error 1.

Richard’s Petition for Full Guardianship. In 2009, Richard petitioned for guardianship of Mrs. Denny, CP 1, 1RP at 5, because

Alzheimer's disease had made her unable to recall signing conflicting legal documents and placed her at risk of undue influence. CP 6-7. Richard alleged that Mrs. Denny's incapacity was "moderate" and that she "require[d] full support and assistance in managing her finances [and] moderate assistance in managing health care and residential issues." CP 1, 3. Richard requested a full guardianship of both the person and estate of Mrs. Denny, CP 3, and wanted a professional guardian. CP 6-7.

Retained Rights Requested by Mrs. Denny. Independent counsel Timothy Austin represented Mrs. Denny in responding to the guardianship petition filed by Richard in 2009. CP 18-32, 1RP at 5. Mrs. Denny selected Mr. Austin because he had represented her on other matters before. CP 10, 1223. In Mrs. Denny's response to the guardianship petition, she asked to retain the right to do estate planning using Mr. Austin. CP 16. Mrs. Denny did not ask to retain counsel for any other purpose. CP 15-17. Mrs. Denny also requested that no information about the guardianship be shared with her brother Martin Anderson. CP 16.

Preparation of 2009 Order by Richard's Counsel. Richard's attorney prepared and presented the order establishing the guardianship for Mrs. Denny on December 17, 2009 (the "2009 Order"). CP 32, 1RP at 5. Richard and Mrs. Denny both attended the hearing. 1RP at 3. No objections were made to entry of the 2009 Order. 1RP at 5-6.

Adjudication of Incapacity. The 2009 Order provides: “The powers of the Guardian and the rights retained, limitation and restrictions placed on EllaNora Denny shall be as set forth in Conclusion of Law.” CP 27.

Conclusion of Law 2.1 provides:

EllaNora Denny is an Incapacitated Person within the meaning of RCW Chapter 11.88, and a Full Guardian of the Estate and a Limited Guardian of the Person should be appointed. CP 21.

Mrs. Denny’s Retained Rights. Fifteen pages in length, the 2009 Order contains “Findings of Fact” (CP 18-20), “Conclusions of Law” (CP 21-27), the Order (CP 27-31), and signatures (CP 32). Conclusion of Law 2.2 identifies the rights Mrs. Denny retained after the guardianship:

- a. Mrs. Denny shall retain the right to make or revoke a will, trust or other testamentary device under the direction of competent independent counsel. This estate planning may include, but not be limited to, gifting and transfer of interests to a family trust.
- b. Mrs. Denny shall retain the right to consent to or refuse medical treatment, **subject to the conditions set forth herein.**
- c. Mrs. Denny shall retain the right to decide who shall provide care and assistance, **subject to the conditions as set forth herein.**
- d. Mrs. Denny shall retain the right to make decisions regarding the social aspects of her life **subject to the conditions as set forth herein.**

CP 21 (emphasis supplied).

Termination of Right to Contract. Consistent with Mrs. Denny’s response to the guardianship petition, CP 15-17, the 2009 Order also

expressly terminated Mrs. Denny's right to enter into contracts except in the furtherance of her estate planning through court-appointed counsel:

- a. Mrs. Denny shall have the right to enter into contract provided it is solely under the advice and direction of competent independent counsel and in furtherance of her estate planning. Mrs. Denny shall also have the right to appoint someone to act on her behalf pursuant [sic] provided such appointment is solely in a testamentary devise. **In all other areas, Mrs. Denny shall not have the right to enter into a contract.**
- b. Mrs. Denny shall not have the right to sue or be sued other than through a guardian.
- c. Mrs. Denny shall not have the right to possess a license to drive.
- d. Mrs. Denny shall not have the right to buy, sell, mortgage or lease property other than through the guardian.

CP 22 (emphasis supplied).

Guardian's Authority. Conclusions of Law 2.3, 2.4, 2.5, and 2.6 of the 2009 Order detail the authority and responsibilities of the guardian, with express reference to the guardianship statute, Chapter 11.92 RCW. CP 21-26. Ohana received "[a]ll of the powers of a Guardian of the estate pursuant to the provisions of Chapter 11.92 RCW," CP 24, and [a]ll of the powers and responsibilities of a Guardian of the person pursuant to the provisions of Chapter 11.92 RCW, limited by the language of this Order[.]" CP 22.

Decision-Making Criteria. The 2009 Order specified the decision-making standard as follows:

[T]he guardian shall make reasonable efforts to ascertain EllaNora Denny's state, current and historic preferences and shall give significant weight to such preferences. When the competent preferences of EllaNora Denny cannot be ascertained, the Guardian is responsible for making decisions which are in EllaNora Denny's best interest. A determination of her best interest shall include consideration of her stated preferences, as well as consultation with Richard Denny and Marianne Zak [Mrs. Denny's daughter]. CP 27.

2. Richard cannot modify the terms of the 2009 Order by now asserting it was "poorly drafted."

Richard improperly attempts to rewrite the 2009 Order that his attorney prepared and presented, claiming it was "poorly drafted" and "poorly edited." *App. Op. Brf.* at 1, 26, 29. "If an attorney is authorized to appear, the jurisdiction over the defendant is perfect, and the subsequent action of the attorney, not induced by the fraud of the adverse party, is binding on the client at law and in equity." Haller v. Wallis, 89 Wn.2d 539, 544, 573 P.2d 1302 (1978) (citation omitted). Many cases have adhered to this general rule, holding that attorney negligence or incompetence is an insufficient ground to justify relief from a judgment against the client. Lane v. Brown & Haley, 81 Wn. App. 102, 109, 912 P.2d 1040 (1996); Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 679, 41 P.3d 1175 (2002). The 2009 Order that Richard now wants to edit⁵ was prepared and presented by his

⁵ See *App. Op. Brf.* at 30 ("So these two introductory passages should have been edited and merged into a single introductory sentence as follows...").

attorney, after input from Mrs. Denny through her counsel, and cannot be modified unless the standards for reopening a judgment are satisfied. In re Marriage of Thompson, 97 Wn. App. 873, 878, 988 P.2d 499 (1999).

3. Richard’s interpretation of the 2009 Order violates its plain meaning.

Generally, a court order is enforced according to the plain meaning of its terms, read in light of the issues and purposes surrounding its entry. R/L Assocs. v. City of Seattle, 113 Wn.2d 402, 410, 780 P.2d 838 (1989); Zink v. City of Mesa, 162 Wn. App. 688, 707-708, 256 P.3d 384 (2011).

If a court order or decree is ambiguous, the reviewing court applies general rules of construction to ascertain the intent of the court that entered the order or decree. Thompson, 97 Wn. App. at 878. However, unambiguous orders do not require interpretation. In re Marriage of Bocanegra, 58 Wn. App. 271, 275, 792 P.2d 1263 (1990).

The 2009 Order is not ambiguous.⁶ Mrs. Denny’s retained rights are set forth in just nine lines of the 15-page decision, and are expressly qualified by reference to the other portions of the lengthy order. CP 21. Meanwhile, the guardian’s authority is defined as including “all powers of a Guardian of the estate,” CP 24, and “all powers and responsibilities of a Guardian of the person,” CP 22, except as “limited by the language of this

⁶ For a side-by-side comparison of the 2009 Order’s language setting forth Mrs. Denny’s retained rights with the Guardian’s authority, see *Appendix at 13-15*.

Order.” CP 22. Richard argues that the guardian’s authority is limited to exclude one of the most basic functions of a guardian of the person – health care decision-making – not by reference to “the language of this Order,” CP 22, but by implication from general principles and his opinion that the 2009 Order was not well written. *App. Op. Brf. 1, 26, 29*. For these reasons, and because Richard fails to identify the trial court decisions that he is challenging in Assignment of Error 1, this Court should reject Richard’s arguments.

E. Response to Assignment of Error 2: The Superior Court Did Not Abuse Its Discretion By Denying Requests To Appoint Additional Counsel For Mrs. Denny.

Assignment of Error 2 asserts: “The superior court erred by denying Ms. Denny’s constitutional and statutory rights to due process when restricting or revoking her fundamental rights.” *App. Op. Brf. at 4*. Richard does not assign error to any of the superior court’s findings of fact as required by RAP 10.3(g)⁷ and 10.4(c);⁸ therefore, the findings made below should be treated as verities on appeal, and this Court should decline to consider any factual challenges. *See State v. Kindsvogel*, 149

⁷ “A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.” RAP 10.3(g).

⁸ “[W]hen a party challenges findings of fact, he or she must include them verbatim in the brief or attach a copy of them in an appendix to the brief.” *State v. Neeley*, 113 Wn. App. 100, 104, 52 P.3d 539 (2002) (citing RAP 10.4(c)).

Wn.2d 477, 481, 69 P.3d 870 (2003); M/V La Conte v. Leisure, 55 Wn. App. 396, 401, 777 P.2d 1061 (1989). Moreover, Mrs. Denny's due process rights were not denied at any stage of the trial court's proceedings.

1. Facts and procedure relevant to the issues presented by Assignment of Error 2.

Events Precipitating the Guardianship. When Richard petitioned for the guardianship in 2009, he observed:

I have learned that over the past few years she [Ella Nora Denny] has visited several lawyers and has executed at least four Durable Powers of Attorney in that time. She has appointed my sister, or me, or both of us in successive documents. She does not remember any of them. ... This short term memory loss makes her vulnerable to undue influence and the serial Durable Powers of Attorney make it very difficult for health care and financial providers to provide necessary assistance.

CP 6-7 (Internal numbering omitted).

Adjudication of Incapacity. In the 2009 Order, the superior court adjudicated that Mrs. Denny was "an Incapacitated Person within the meaning of RCW Chapter 11.88[.]" CP 21. Among the restrictions imposed on Mrs. Denny was termination of her right to enter into a contract, CP 22, and "to sue or be sued other than through a guardian." *Id.*

2012 Mark Wilson Petition for Appointment. In March 2012, attorney Mark Wilson petitioned the superior court pursuant to RCW 11.88.045 to appoint him to represent Mrs. Denny, whom he referred to as "the alleged incapacitated person," in responding to the guardian's Petition

for Approval of Second Annual Report. CP 1493-9. Mrs. Denny, *pro se*, filed a companion motion to continue hearing, two declarations (both sworn under penalty of perjury), an ex parte motion to shorten time, and petition for appointment of independent counsel, which appear to have been prepared by Mr. Wilson's firm. 1500-1515.

March 23, 2012 Hearing. As requested in the Motion to Shorten Time signed by Mrs. Denny, CP 1510-2, the superior court held a hearing March 23, 2012. Mrs. Denny was confused about why she was in court and asked whether her son was in trouble. 2RP at 28 – 29. Also during the March 23, 2012 hearing, Commissioner Velategui observed that Mrs. Denny did not know who Mr. Wilson was, and believed that he was the judge. 11 RP at 29-30.

Mrs. Denny's Contradictory Statements about Mr. Wilson. Three days before Mrs. Denny signed multiple documents stating she wanted Mr. Wilson to represent her, she signed the following notarized statement directed to Mr. Wilson:

I withdraw my authorization for you to act as my attorney. You breached your agreement to enter an appearance in my case within a retainer of \$20,000. You breached your alternate agreement to complete a petition to replace the guardian in my case within a retainer of \$20,000. Having failed to enter an appearance or complete a petition to replace the guardian, you requested additional funds and charged additional fees.⁹ CP 815.

⁹ This notarized termination statement was attached as an exhibit to Anderson's Motion to Modify Guardianship and Replace Guardian filed April 9,

Updated Evaluation. In response to petition to appoint Mr. Wilson, the superior court ordered an updated report from the psychologist who evaluated Mrs. Denny in 2009, Renee Eisenhauer, Ph.D. CP 612. Dr. Eisenhauer's updated report concluded in pertinent part:

Ms. Denny's cognitive functioning has deteriorated over the last two and a half years. ... She showed greater confusion and impaired problem solving at her current evaluation than she did at her previous evaluation. Her thinking is presently more disorganized.

CP 1375; *see also* CP 1368-1377.

Mrs. Denny's Contradictory Statements About Dr. Eisenhauer.

Mrs. Denny and Richard were present when the superior court ordered the updated evaluation by Dr. Eisenhauer, 2 RP at 2, and did not object to Dr. Eisenhauer or request a different evaluator. 2RP at 23-4. When Dr. Eisenhauer then met with Mrs. Denny on April 3, 2012 to conduct her evaluation, Mrs. Denny was "agreeable to the evaluation." CP 1370, 1371. However, two weeks after consenting to Dr. Eisenhauer's evaluation, Ms. Denny signed a document stating "I do not agree to be evaluated by Dr. Eisenhauer. I will only be evaluated by Dr. Gorman."¹⁰ CP 1363.

2012, in which Anderson represented that Mrs. Denny no longer wanted to deal with Mr. Wilson's firm. CP 704, 745, 815.

¹⁰ Richard erroneously contends that Mrs. Denny had a statutory right under RCW 11.88.045(4) to select the health care professional who conducted the updated evaluation. *App. Op. Brf.* at 40. However, by its plain terms, RCW 11.88.045(4) applies to "proceedings for appointment of a guardian or limited guardian[.]" Similarly, Richard over-relies on In re Guardianship of Way, 79

Hearing On Petition To Appoint Counsel. After receiving Dr. Eisenhauer's report, the guardian scheduled a hearing to consider its "Motion on Updated Medical Evaluation to Dismiss Petition for Appointment of Independent Counsel" on May 7, 2012. CP 642. The Guardian served the hearing notice, motion and proposed order by mail on all notice parties, including Mrs. Denny, Richard's attorney and Mark Wilson. CP 643, 653-4, 964-5, 984. None of the notice parties appeared at the hearing or filed any response to the guardian's motion. 7RP at 1-3.

Unchallenged Findings. The superior court entered the unopposed "Findings of Fact, Conclusions of Law and Order on Motion" proposed by Ohana's attorney on May 16, 2012, which include:

1.3 The April 3, 2012 evaluation by Dr. Eisenhauer of EllaNora Denny shows that Ms. Denny is highly susceptible to influence from third parties and that she lacks the mental capacity to understand whether the influence of others is contrary to her own best interests.

1.4 The April 3, 2012 evaluation by Dr. Eisenhauer of EllaNora Denny shows that Ms. Denny lacks the mental capacity to understand and remember written documents that she signs.

1.5 The April 3, 2012 evaluation by Dr. Eisenhauer of EllaNora Denny shows that Ms. Denny's condition since her prior examination by Dr. Eisenhauer on October 22, 2009 has worsened.

....

1.8 The Court was not presented with credible admissible evidence establishing that Ms. Denny wishes to retain Mr. Wilson.

Wn. App. 184, 901 P.2d 349 (1995), *App. Op. Brf.* at 43, which concerned the procedures to be followed in establishing a guardianship.

1.9 The evidence did not establish any reason for which Ms. Denny needs independent counsel other than for estate planning purposes, for which she is already represented by independent counsel Tim Austin.

2.0 The evidence did not establish that appointment of a second independent counsel for Ms. Denny would benefit her or her estate, but rather that such appointment would result in the expenditure of additional funds of her estate with no discernible benefit to Ms. Denny. CP 986-7.

2013 Request to Appoint Counsel. In December 2012, Ohana filed a petition for instructions after it received notification from Mrs. Denny's doctor that she had tested positive for cocaine. CP 1860-1873. The petition for instructions requested that the superior court approve unrestricted contact between Mrs. Denny and her children, additional medication monitoring by the staff at Mrs. Denny's assisted living facility, and the hiring of a caregiver. CP 1866-7. In response to Ohana's petition for instructions, Richard filed an emergency motion requesting that this Court stay the guardianship proceedings until counsel was appointed for Mrs. Denny, CP 1828-34. This Court denied Richard's motion for stay, CP 1835-7, and the superior court denied Richard's request to appoint counsel for Mrs. Denny, finding:

Under the terms of the Order Appointing Guardian, entered December 17, 2009, Mrs. Denny did not retain the right to retain counsel except as to estate planning matters. The Court does not find good cause or sufficient basis for reinstating Mrs. Denny's right to retain counsel for matters other than estate planning. Mrs. Denny's retained rights and welfare are adequately protected by the Guardian, her children, and the Court. CP 1853.

2. Mrs. Denny did not have a constitutional or statutory right to have counsel appointed to represent her in the guardianship after she was adjudicated incapacitated.

Richard argues that the superior court deprived Mrs. Denny of procedural due process by declining to appoint counsel for her. Richard conflates the right to due process with the right to appointed counsel. The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, provides that no State shall deprive any person of life, liberty, or property without due process of law. For due process protections to be implicated, there must be an individual interest asserted that is encompassed within the protection of life, liberty, or property. In re Guardianship of Cornelius, 181 Wn. App. at (citing Attorney Gen.'s Office, Pub. Counsel Section v. Uals. & Transp. Comm'n, 128 Wn. App. 818, 831, 116 P.3d 1064 (2005)).

In civil cases, the constitutional right to legal representation is presumed to be limited to those cases in which the litigant's physical liberty is threatened, such as when a guardianship petition is filed, or where a fundamental liberty interest is at risk. *See, e.g., In re Marriage of King*, 162 Wn.2d 378, 391-2, 174 P.3d 659 (2007) (holding no right to counsel in custody disputes between parents) (citing Dependency of Grove, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995)). “There is a presumption that civil litigants do not have a right to appointed counsel

unless their physical liberty is at risk.” *Id.* at 395 (citing Lassiter v. Dept. of Social Services, 452 U.S. 18, 27 (1981)).

The presumption against the right to appointed counsel in civil cases can be overcome only when the Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) balancing factors weigh heavily enough against that presumption. Those factors are “[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” In re Marriage of King, 162 Wn.2d at 395.

Under Washington’s guardianship statutes, RCW 11.88.045(1)(a) guarantees counsel for persons who are alleged to be incapacitated and for persons already subject to a guardianship when “the rights and interests of ... [the] adjudicated incapacitated person cannot otherwise be adequately protected and represented.” RCW 11.88.045(1)(a). The right to counsel after an adjudication of incapacity also exists where fundamental liberty interests are at stake such as commitment to an institution, electroshock therapy, psychosurgery, or psychiatric procedures that restrict freedom of

movement. *See* RCW 11.92.043(5).¹¹ In re Guardianship of Decker, 188 Wn. App. at 440, held that persons subject to a limited or a full guardianship have been adjudicated to be incapacitated within the meaning of RCW Chapter 11.88, and specifically rejected the argument that because a person agreed to a limited guardianship they were not adjudicated incapacitated.

3. The amendments to RCW 11.88.120 did not expand the right to counsel in guardianships and confirmed the broad authority of the superior courts.

The pronouncement by Richard’s attorney that he “championed” new law that expanded the right to counsel in guardianships to affect the outcome of this case, *App. Op. Brf. at 38-9*, reflects a distorted view of the legislative process, statutory construction, and the retroactive application of new law. Statutory amendments must be read in accord with pre-existing law. When enacting new law, the Legislature is presumed to be aware of pre-existing law and judicial construction of prior statutes.

Freitag v. McGhie, 133 Wn.2d 816, 823, 947 P.2d 1186 (1997) (citing In re Marriage of Williams, 115 Wn.2d 202, 208, 796 P.2d 421 (1990)).

¹¹ *See also* In re Guardianship of Hayes, 93 Wn.2d 228, 234, 608 P.2d 635 (1980) (requiring independent GAL before superior court may grant a petition for sterilization based on the “fundamental right to procreate”); In re Guardianship of K.M., 62 Wn. App. 811, 817, 816 P.2d 71 (1991) (independent counsel required because of the “gravity and finality of an authorization to sterilize”); and In re Ingram, 102 Wn.2d 827, 689 P.2d 1363 (1984) (independent counsel appointed where the Guardian sought authority to remove the ward’s larynx).

Absent an express indication otherwise, new legislation will be presumed to be consistent with prior judicial decisions. In re Marriage of Williams, 115 Wn.2d at 208. Under established law prior to the amendments Richard relies on, persons adjudicated incapacitated had the right to counsel only under the limited circumstances discussed *supra*.

There is no suggestion from the text of the amendments that the legislature intended to create a new or expanded right to counsel for adjudicated incapacitated persons in guardianships. The legislature did not amend RCW 11.88.045 or RCW 11.92.043, which are the specific statutory provisions addressing appointment of counsel in guardianships. The Final Bill Report does not even refer to the right to counsel.¹² The opinion of Richard's counsel as to what the legislature "no doubt" meant by this incidental reference to the right to counsel, *App. Op. Brf. at 38*, is irrelevant. Richard's attorney is not a member of the legislature; he apparently lobbied for a change in the statute to affect the outcome of this case. *Id.* Courts give very little weight to the opinion of a single legislator in discerning legislative intent, Convention Ctr. Coalition v. Seattle, 107 Wn.2d 370, 375, 730 P.2d 636 (1986), and even less weight to the views of lobbyists. Western Telepage v. City of Tacoma, 140 Wn.2d 599, 611, 998 P.2d 884 (2000).

¹² The Final Bill Report for ESSB 5607 appears in the *Appendix* at 11-12.

Under the plain language of the amendment, incapacitated persons are entitled to notice of their right to representation at a “**hearing** to modify or terminate a guardianship.” RCW 11.88.120(1) (emphasis supplied). No “hearing to modify or terminate the guardianship” occurred in this case. *See* RP Vol. 1 – 11. The only petition to modify the guardianship was filed by *pro se* Anderson, CP 701-746, and Richard acknowledges that Anderson’s motion to modify was dismissed without a hearing. *App. Op. Brf. at 2, 15*. The denial of meritless petitions **without a hearing** was, and still is, authorized by RCW 11.88.120.¹³

Moreover, the amendments confirmed the broad authority of the superior court serving as the “superior guardian” to summarily dismiss meritless complaints without scheduling a hearing, whether filed by an attorney or a layperson, and to grant relief that the court “deems just and in the best interest of the incapacitated person.” RCW 11.88.120. The legislature also codified the superior court’s plenary authority to sanction persons who file meritless complaints as follows:

If after consideration of the complaint, the court believes that the complaint is made without justification or for reason to harass or delay or with malice or other bad faith, the court has the power to levy necessary sanctions, including but not limited to the imposition of reasonable attorney fees, costs, fees, striking pleadings, or other appropriate relief.

¹³ For a comparison of the statutory language of RCW 11.88.120 before and after the July 24, 2015 amendments, *see Appendix 4-10*.

RCW 11.88.120(2)(d).

4. The superior court did not abuse its discretion in declining to appoint additional counsel for Mrs. Denny.

The interests at stake in this case did not trigger a right to counsel under either state law or constitutional due process. Mrs. Denny was adjudicated to be incapacitated by Conclusion of Law 2.1 of the 2009 Order, and at that time, the superior court did not authorize continued representation for Mrs. Denny except for estate planning. CP 21; *Appendix* at 13-15. When the request for counsel was made in 2012, the superior court commissioner correctly inquired about the reasons Mrs. Denny wanted counsel to assess whether the issues involved a fundamental right or triggered appointment under RCW 11.92.043 or RCW 11.88.045. 2 RP at 5-6.

Substantial evidence supports the trial court's finding that "the evidence did not establish any reason for which Ms. Denny needs independent counsel other than for estate planning purposes[.]" CP 986. In 2012, when the first request for counsel occurred, the superior court was in the process of reviewing the guardian's second annual report, which reviewed the guardian's activities over the prior twelve months and approved its fees. None of the issues concerned fundamental rights -- there was no request to institutionalize Mrs. Denny, to compel invasive medical treatment, or to restrict her contact with her children.

Furthermore, none of the routine issues raised by a guardian's annual report would justify appointment of counsel under the Matthews balancing factors. *See supra* at 19.

In 2013 when Richard renewed the request for appointed counsel, Ohana's petition for instruction proposed that Mrs. Denny's children have unrestricted contact with her, that they not be permitted to have a key to her apartment, and that Mrs. Denny's medications be monitored by staff at her assisted living facility under the supervision of the guardian. CP 1866-7. Richard erroneously asserts that hiring a caregiver for Mrs. Denny after she tested positive for cocaine amounted to such a denial of liberty that it was tantamount to the type of deprivation recognized to trigger the right to counsel -- "extraordinary, irreversible procedures that would seriously affect a person's bodily integrity." In re Ingram, 102 Wn.2d at 827. Even if this were true, however, the selection and hiring of a caregiver for Mrs. Denny, management of Mrs. Denny's health care and medications, and control of medical records are functions expressly authorized by the 2009 Order, not new deprivations. The 2009 Order gave Ohana authority "[a]fter consultation with Ms. Denny, to select or discharge any health care or medical provider[,]" "[t]o provide for or contract for case care or management services[,]" and "[t]o provide for such other personal assistance as the incapacitated person requires." CP 23.

No right to counsel attached to decisions by the guardian to implement the authority already conferred to it under the 2009 Order, unless such decision-making met the high threshold for appointment of counsel under RCW 11.88.045 for incapacitated persons: “the rights and interests of ... [the] adjudicated incapacitated person cannot otherwise be adequately protected and represented.” RCW 11.88.045(1)(a). The superior court found in 2012 and in 2013 that Mrs. Denny’s rights were adequately protected without appointment of additional counsel. CP 986; 1853. These findings were not challenged on appeal, and, moreover, are supported by ample substantial evidence.

F. Response to Assignment of Error 3: The Superior Court Did Not Abuse Its Discretion In Approving The Actions Of The Guardian.

Assignment of Error 3 asserts: “The superior court erred by failing to supervise OFC [Ohana] and address its fiduciary misconduct.” *App. Op. Brf. at 5*. In the argument relating to Assignment of Error 3, Richard requests that this Court order Ohana to disgorge the fees it received during the guardianship. *App. Op. Brf. at 45*. In addition to other procedural errors already discussed *supra* at 3-4, the issue of disgorgement of guardianship fees is not properly before this Court because it was never requested below. An appellant cannot raise issues for the first time on appeal because it deprives the appellate courts of an adequate record on review. *See RAP 2.5(a)*; Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d

432, 441, 191 P.3d 879 (2008).

1. Facts and procedure relevant to the issues presented by Assignment of Error 3.

Letters of Limited Guardianship 12/21/09 to 6/17/11. For the first 17 months of Mrs. Denny's guardianship, Letters of Limited Guardianship of the Person were in effect from December 21, 2009 through May 16, 2011. CP 34, 414.

April 1, 2010 Court Review. Ohana filed a "Beginning Inventory, Report and Care Plan," which were approved in an unappealed order on April 1, 2010 after notice to Richard and Mrs. Denny. CP 43-117, 118-120, 1467-8.

Ohana 2010 Correspondence with Physicians. Richard emphasizes letters from Ohana staff to Mrs. Denny's medical providers in 2010. *App. Op. Brf. at 8-13.* The correspondence did not represent that Ohana was full guardian of the person, but that Mrs. Denny was "adjudicated incapacitated" and that Ohana was appointed "guardian of her person and estate." CP 794-5, 799-802. Moreover, the correspondence enclosed Ohana's letters of guardianship, which at the time were Letters of Limited Guardianship of the Person. CP 34, 794, 799, 801.

December 17, 2010 Court Review. Ohana filed an "Interim Report on Changes in Circumstances," which was approved on December 17, 2010 after notice to Richard and Mrs. Denny. CP 130-164, 165-8, 1473-4.

Ohana's "Interim Report" was not a mandatory report, but was filed by the guardian to apprise the court of the events that led to the guardian's correspondence with physicians discussed above. CP 123-4. On October 10, 2012, almost two years after the superior court entered the December 17, 2010 order, Richard filed an untimely notice of appeal. CP 1585-6.

March 31, 2011 Court Review. Ohana filed its first "Annual Report and Care Plan," which was approved in an unappealed order on March 31, 2011 after notice to Richard and Mrs. Denny. CP 178-409, 410-413, 1478-9. The guardian's first Annual Report correctly identified Ohana as Mrs. Denny's "limited guardian of the person," CP 178, and did not request that the superior court change the scope of the limited guardianship. CP 182. The March 31, 2011 order directed the Clerk of the Court to reissue Ohana's Letters of Guardianship, however, by a drafting error of Ohana's attorney, it did not specify that Letters of Guardianship of the person should be limited. CP 412.

Incorrect Letters of Guardianship 6/17/11 to 4/9/12. On June 17, 2011, the guardian's Letters of Guardianship were reissued without specifying that the guardianship of the person was limited. CP 414. These letters of guardianship remained in effect for just under 10 months, from June 17, 2011 through April 9, 2012. *Id*; CP 1768. The incorrect Letters of Guardianship were discovered by Ohana on or about September

22, 2011. CP 546. Ohana requested that its attorney obtain corrected letters of limited guardianship. *Id.* As the attorney explained to the court commissioner, because the error was not discovered “until nine months into the second year,” the decision was made to correct the letters at the next annual review, rather than through an interim report and review. 5RP at 6. As represented, the error was corrected in the Letters of Limited Guardianship of the Person issued April 9, 2012. CP 1768.

Ohana’s Actions Under Incorrect Letters of Guardianship. During the 10 months that the incorrect Letters of Guardianship were in effect, Ohana’s actions fell within the scope of the 2009 Order. The letters from Ohana staff to Mrs. Denny’s medical providers that Richard complains about (*App. Op. Brf. at 8-13*) occurred in 2010, before the incorrect Letters of Guardianship were issued. CP 794-5, 799-802. The Guardian’s billing records for June through December 2011 reflect no significant health care decisions by Ohana, CP 516-580, and document the involvement of Mrs. Denny’s children in her health care. *See, e.g.*, CP 542-5. 548, 574.

March 29, 2012 Court Review. Actions undertaken by the guardian between January 1, 2011 and December 31, 2011 were described in its second “Annual Report and Care Plan” dated March 9, 2012, CP 428-585, which was approved on March 29, 2012 after notice to Richard,

Mrs. Denny and other notice parties. CP 616-620, 1484-5.¹⁴ The guardian's second Annual Report correctly identified Ohana as Mrs. Denny's "limited guardian of the person," CP 433, and did not request that the superior court change the scope of the limited guardianship. *Id.* Correct Letters of Limited Guardianship of the Person were issued April 9, 2012. CP 1768.

No Objection to Second Annual Report. Richard has designated the Order Approving the Second Annual Report as a decision he wants reviewed, however, Richard did not raise any objections to the Second Annual Report, 3RP at 2, 3, even though he was given an extension of time to file a response. 2RP at 25-26, CP 612. Anderson filed a motion to reconsider the Order Approving the Second Annual Report, and Richard joined Anderson's motion. CP 621-628.

Anderson's Motion to Replace Guardian. In 2012, Anderson filed numerous pleadings in this guardianship, which asserted the right to speak for Mrs. Denny as her "next friend." CP 702, 710-2. Anderson is the son

¹⁴ Throughout Richard's statement of the case, he inaccurately refers to "ex parte" hearings and orders. For example, Richard asserts "Commissioner Velategui granted OFC's requests by *ex parte* orders entered March 29, 2012," *App. Op. Brf. 21*, even though all parties received advance notice of the hearing, CP 1484-5, which was attended by Mark Wilson who purported to represent Mrs. Denny. CP 615, CP 620. Except for the motion for revision, all hearings were conducted by the King County Superior Court "Ex Parte and Probate Department" with notice to parties of record pursuant to local rules applicable to guardianship proceedings. *See* King County Local Rule (KCLR) 0.7(a)(4) (establishing Ex Parte and Probate Department); KCLR 98.20 (Guardianship and Trust rules for hearings before the Ex Parte and Probate Department).

of Mrs. Denny's brother, Martin Anderson, who she requested not receive copies of guardianship pleadings. CP 16, 30, 1803, 1969. Among Anderson's filings was a pleading entitled "Motions to Replace Guardian and Modify Guardianship," in which he requested that the superior court replace Ohana due to the mistaken Letters of Guardianship and "Disgorge all fees claimed on this guardianship by attorney Thomas Keller from Sep. 12, 2011 forward [sic]." CP 704, 744-5. Richard expressly represented to the superior court that he did not join Anderson's Motions to Replace Guardian and Modify Guardianship. CP 1030, 1164.

April 27, 2012 Hearing. A hearing was conducted April 27, 2012 to consider the guardian's request to retain additional counsel to respond to the multiple motions filed by Anderson. During this hearing, the guardian's attorney Mr. Keller explained the drafting error that had led to the incorrect Letters of Guardianship, and took responsibility for the mistake that had led to the incorrect Letters of Guardianship. 5RP at 6.

Order Denying Anderson's Motion to Replace Guardian. On June 19, 2012, the superior court denied Anderson's Motion to Replace Guardian. CP 1163-8. In an unchallenged finding of fact, the superior court found "Ohana Fiduciary Corporation has properly performed the functions of Limited Guardian of the Person for Ella Nora Denny. This has included taking affirmative action to preserve and enhance Mrs.

Denny's retained rights to make decisions about her health care." CP 1165-1166. Even though Richard had not joined Anderson's Motion to Replace Guardian, he filed a motion for revision of the court commissioner's denial of Anderson's motion. CP 1171-82. Judge Sharon Armstrong denied the motion for revision and ordered Richard to pay attorney's fees and costs under *RCW 11.96A.150*. CP 1663-1664.

2. The superior court did not abuse its discretion in not finding misconduct by the guardian or by not sanctioning the guardian.

For the first time on appeal, Richard requests that Ohana be required to disgorge fees it received as guardian based on the alleged "misconduct" Anderson described in his Motions to Replace Guardian. *App. Op. Brf. at 44-5*. Superior court decisions relating to the management of guardianships and the approval of guardianship fees are reviewed for abuse of discretion. *In re Guardianship of Cornelius*, 181 Wn. App. at 528; *In re Guardianship of Lamb*, 173 Wn.2d at 183. Richard's argument disregards the abuse of discretion standard of review and requests that this Court impose sanctions based on a *de novo* reweighing of the evidence in disregard of unchallenged factual findings.

The superior court's findings of fact are supported by substantial evidence and the findings support the trial court's conclusions of law and order. Ohana's mistake in referring to the guardianship of the person as

“full” rather than “limited” was explained to the superior court and did not result in any decisions beyond the scope of the 2009 Order. The superior court commissioner and judge with original jurisdiction over Mrs. Denny’s guardianship had the opportunity to fully consider Ohana’s mistake, and were not persuaded that the incorrect reference justified any action or penalty. The superior court did not abuse its discretion in approving the guardian’s actions and fees.

G. Response to Assignment of Error 4: The Superior Court Did Not Abuse Its Discretion By Confirming The Guardian’s Pre-Existing Authority To Make Health Care Decisions For Mrs. Denny And Restricting Richard’s Involvement In Her Health Care.

Assignment of Error 4 asserts: “The superior court erred entering its order of January 25, 2013.” *App. Op. Brf. at 5*. Richard challenges the provisions that (1) reaffirmed Ohana’s authority to make health care decisions for Mrs. Denny, including the authority to retain a caregiver (Issue 12); and (2) restricted Richard from participating in Mrs. Denny’s health care decision-making or accessing her health care records. The superior court’s January 25, 2013 Order was proper under RCW 11.92.043(5), RCW 7.70.065 and the 2009 Order, and it should be affirmed.

1. Facts and procedures relevant to the issues presented by Assignment of Error 4.

The 2009 Order Gave Broad Authority to the Guardian. Under the

2009 Order, Ohana had authority to make health care decisions for Mrs. Denny after consulting her, to supervise medications, to provide substitute informed consent for medical treatment, to select health care providers after consulting Mrs. Denny, to hire caregivers and case managers, and to provide for personal assistance for Mrs. Denny. CP 22-3; *Appendix* at 13-15. The 2009 Order provides that “When the competent preferences of EllaNora Denny cannot be ascertained, the Guardian is responsible for making decisions which are in EllaNora Denny’s best interest.” CP 27.

Ohana Facilitated Mrs. Denny’s Exercise of her Retained Rights.

At Ohana’s request in 2010, the superior court authorized the guardian to involve Mrs. Denny’s children in her health care as follows:

The guardian is hereby authorized to allow Ms. Denny to manage her own medical and dental care with the assistance of her children, provided that:

- The children inform all medical, dental and other care providers that there is a guardianship in place ...
- The children inform the guardian of each medical, dental or other health care appointment, in advance of the day of the appointment ...
- At the guardian’s discretion if any proposed treatment might be detrimental to Ms. Denny’s health, the guardian shall retain authority to withhold consent for the treatment; and
- If the children fail to follow such court direction, the court will entertain an order restraining them from further involvement in their mother’s health care. CP 1318-9.

Positive Drug Test. In December 2012, Mrs. Denny required emergency medical attention and, without advance notice to Ohana, was

administered a drug test and tested positive for cocaine. CP 1889-1891, 1928. Mrs. Denny had no recollection of the events that led to these results. CP 1922.

Voluntary Suspension of Visits. At the guardian's request, Mrs. Denny's children both agreed to temporarily suspend their in person visits to Mrs. Denny after the positive drug test. CP 1893, 1896.

Richard's Demand for a Protection Order. In response to the cocaine finding, Richard demanded that Ohana seek a restraining order against his sister, who he accused of drugging Mrs. Denny. CP 1886, 1964-1971.

Anderson's Threat of Sanctions. Meanwhile, Anderson notified Ohana he would seek sanctions against it for failing to provide him copies of guardianship reports and other private information relating to Mrs. Denny. CP 1909, 1913.

Petition for Instructions. The guardian filed a petition for instructions to inform the superior court of the cocaine incident and Anderson's threat, and to seek the superior court's review and approval of its intended course of action. CP 1860-73. Ohana's petition proposed that Mrs. Denny's children resume unrestricted contact with her, that Mrs. Denny's assisted living facility begin monitoring Mrs. Denny's medications under the Guardian's oversight, and that the guardian retain a

caregiver for Mrs. Denny. CP 1866-7.

Response to Petition for Instructions. In response to Ohana's petition, Richard filed pleadings accusing his sister of drugging their mother, abusing drugs, cheating on her husband, and wanting their mother to die. CP 1964-1971. Richard's attorney also filed a declaration that attached unauthenticated medical records of Mrs. Denny obtained without the guardian's knowledge. CP 1956-62. Meanwhile, Richard's sister denied the allegations made against her, submitted polygraph test results, and requested sanctions against Richard. CP 1936-8, 1973-1986.

January 24, 2013 Hearing. On January 24, 2013, the superior court conducted a hearing and orally ruled on the guardian's petition for instructions. *See* 11 RP 1-38. The superior court's written order was entered the next day. CP 1845. Mrs. Denny received notice of the hearing, the guardian's petition and the guardian's supporting declaration, as did her estate planning attorney Timothy Austin.¹⁵ Mrs. Denny did not appear at the hearing on January 24, 2013, which was attended by the guardian, the guardian's attorney, the attorney for Mrs. Denny's daughter, Richard and his attorney. 11 RP at 2-3.

Decision Regarding Health Care Decision-Making. The superior

¹⁵ *See* Respondent's Supplemental Designation of Clerk's Papers, Sub Nos. 277, 281, 282, 308. An errata sheet with citations to the clerk's papers will be filed upon receipt of the index from the superior court.

court made extensive detailed findings of fact in support of its decision to confirm Ohana's authority to hire a caregiver for Ms. Denny and in support of its decision to return health care decision-making to the guardian's exclusive control, in consultation with Mrs. Denny. *See* CP 1845 - 1857. Based on these findings of fact, the superior court made the following Conclusion of Law:

Pursuant to RCW 11.96A.020, RCW 11.96A.060, RCW 11.92.020, the Court's plenary authority, the terms of the Order Appointing Guardian entered December 17, 2009, and the Court's authority and responsibilities as the superior guardian for Ella Nora Denny, the Court concludes that the Guardian should have sole decision-making authority over all aspects of Ella Nora Denny's health care, subject to its duty to consult with Ella Nora Denny as required by RCW 7.70.065 and the terms of the Order Appointing Guardian. The Court further concludes that it would be detrimental to Ella Nora Denny at this time for either one of her children to make health care decisions for her, except in an emergency, or to have access to Ella Nora's health care information as defined by RCW 70.02. The provisions of any prior orders that authorized Mrs. Denny's children to assist with health care decision-making for Mrs. Denny should no longer govern. CP 1854.

2. The superior court did not abuse its discretion by affirming Ohana's authority to make health care decisions, including the authority to hire caregivers for Mrs. Denny.

The January 25, 2013 Order did not expand the guardian's authority to make health care decisions for Mrs. Denny beyond the parameters of the 2009 Order. For the purpose of consenting to health care, Mrs. Denny has been deemed "incompetent" since the guardianship was established in 2009. Any person adjudicated to be incapacitated, as to

their person or their estate, is “incompetent” under Washington’s informed consent statute, *RCW 7.70.065*. See *RCW 11.88.010(1)(e)*.¹⁶ For adults who are not competent to consent to health care, *RCW 7.70.065* authorizes “the following classes of persons in the following order of priority [to consent]:

- (i) The appointed guardian of the patient, if any;
- (ii) The individual, if any, to whom the patient has given a durable power of attorney that encompasses the authority to make health care decisions;
- (iii) The patient's spouse or state registered domestic partner;
- (iv) Children of the patient who are at least eighteen years of age;
- (v) Parents of the patient; and
- (vi) Adult brothers and sisters of the patient.”

RCW 7.70.065(1)(a). “[N]o person under this section may provide informed consent to health care: (i) If a person of higher priority under this section has refused to give such authorization; or (ii) If there are two or more individuals in the same class and the decision is not unanimous among all available members of that class.” *RCW 7.70.065(1)(b)*.

Under the guardianship statute, guardians of the person are authorized consistent with *RCW 7.70.065*, “to provide timely, informed

¹⁶ *RCW 11.88.010(1)(e)* provides: “For purposes of giving informed consent for health care pursuant to *RCW 7.70.050* and *7.70.065*, an “incompetent” person is any person who is (i) incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his or her property or caring for himself or herself, or both, **or (ii) incapacitated as defined in (a), (b), or (d) of this subsection.**” (Emphasis supplied). Subsection (a) refers to persons subject to guardianships of the person and subsection (b) refers to persons subject to guardianships of the estate. *RCW 11.88.010(1)(a), (b)* (emphasis supplied).

consent for health care of the incapacitated person, except in the case of a limited guardian where such power is not expressly provided for in the order of appointment[.]” *RCW 11.92.043(5)*.¹⁷ In this case, the 2009 Order gave Ohana authority “[t]o consent to reasonable or necessary medical or dental treatment if EllaNora Denny is unable to consent to necessary medical or dental treatment, or unreasonably withholds her consent to same.” CP 21. Additionally the 2009 Order authorized Ohana:

After consultation with Ms. Denny, to select or discharge any health care or medical provider. ...

To provide for or contract for case care or management services on behalf of the incapacitated person. ... [and]

To provide for such other personal assistance as the incapacitated person requires. CP 23.

Thus, under Washington’s informed consent laws, read in concert with the guardianship statute and the 2009 Order, Ohana has been empowered to make health care decisions for Mrs. Denny since 2009. It is difficult to conceive of a decision that falls more squarely within the discretion of the

¹⁷ In addition, *RCW 11.92.043(5)* provides that no guardian or limited guardian may involuntarily commit for mental health treatment, observation, or evaluation any ward unless the procedures for involuntary commitment set forth in chapter 71.05 or 72.23 RCW are followed. *RCW 11.92.043(5)*. Nor can guardians consent to the following types of treatment without court authority and appointment of counsel for the ward: “(a) Therapy or other procedure which induces convulsion; (b) Surgery solely for the purpose of psychosurgery; (c) Other psychiatric or mental health procedures that restrict physical freedom of movement, or the rights set forth in *RCW 71.05.217*.” *Id.*

guardian and the superior court than the hiring of a caregiver, particularly in the factual context presented by this case.

3. Substantial evidence supports the trial court’s finding that hiring a caregiver was in Mrs. Denny’s best interests.

In exercising its decision-making authority, Ohana had a duty to comply with the informed consent statute, which provides:

Before any person authorized to provide informed consent on behalf of a patient not competent to consent ... exercises that authority, the person must first determine in good faith that that patient, if competent, would consent to the proposed health care. If such a determination cannot be made, the decision to consent to the proposed health care may be made only after determining that the proposed health care is in the patient's best interests.

RCW 7.70.065(1)(c). The trial court made specific findings of fact that Ohana consulted Mrs. Denny about hiring the caregiver, that Mrs. Denny agreed to the caregiver, and that Mrs. Denny gets along well with the caregiver. CP 1848. Moreover, if Mrs. Denny had not agreed to the caregiver, Ohana would have had authority to hire the caregiver under *RCW 7.70.065(1)(c)* and the 2009 Order, CP 27, if it was in Mrs. Denny’s best interests.

Richard argues it was error to authorize the guardian to hire a caregiver for Mrs. Denny without “any credible evidence” of Mrs. Denny’s consent. If this Court considers Richard’s factual arguments notwithstanding his failure to assign error to any of the superior court’s 31 findings of fact, the record amply supports the trial court’s findings that

Mrs. Denny consented to the caregiver and that retaining a caregiver was in Mrs. Denny's best interests. The evidence presented at the January 24, 2013 hearing included a sworn declaration from Richard's sister that set forth her personal observations of Mrs. Denny with the caregiver and her impressions that Mrs. Denny benefitted from the caregiver, CP 1931, 1937, as well as the guardian's declaration sworn under penalty of perjury that set forth its personal observation that Mrs. Denny consented to the caregiver and enjoyed the presence of the caregiver. CP 1923. Richard argues that the superior court erred in giving more weight to the guardian's and his sister's observations of his mother than to his lawyer's assertion that Mrs. Denny did not want a 24-hour caregiver. However, appellate courts will not resolve conflicting evidence or substitute their judgment for that of the trial judge. In re Guardianship of Cornelius, 181 Wn. App. at 536.

Moreover, even without the observations that Mrs. Denny liked and benefitted from the caregiver, overwhelming evidence supported putting this protection in place. The superior court found that it was in Mrs. Denny's best interests to have a caregiver after she ingested cocaine and was unable to explain how the substance got into her system. CP 1922. A "best interest" finding depends on the facts and circumstances of each case and a preponderance of the evidence must support it. *See In re*

Welfare of Aschauer, 93 Wn.2d 689,695,611 P.2d 1245 (1980). The record amply supports the superior court’s findings that Mrs. Denny benefitted from the caregivers and that their continued employment was in her best interests.

4. The superior court did not abuse its discretion in prohibiting Richard from participating in health care decision-making or accessing Mrs. Denny’s medical records.

Richard articulates no right to make health care decisions for his mother. A family member does not have a constitutional or statutory right to make medical decisions for an incapacitated person. Under Washington’s informed consent statute, Richard would only have authority to consent to non-emergency health care for Mrs. Denny if Ohana was not available *and* his sister agreed. *RCW 7.70.065(1)(b)*. Nor did the 2009 Order give Mrs. Denny’s children decision-making authority over health care. The guardian is only required to consult Mrs. Denny’s children in determining Mrs. Denny’s best interests. CP 27.

H. Response to Assignment of Error 5: The Superior Court Did Not Abuse Its Discretion In Prohibiting Richard From Procuring Mrs. Denny’s Signature On Documents Relating to the Guardianship.

Assignment of Error 5 asserts: “The superior court erred by, in its June 19, 2012 order, enjoining Richard and Mr. Anderson from assisting Ms. Denny to express her concerns about OFC’s misconduct.” *App. Op. Brf. at 5*. The June 19, 2012 order was the subject of a motion for

revision, CP 1414-1416, and Richard failed to assign error to the superior court's decision denying revision.¹⁸ Assignment of Error 5 is also meritless under established law and undisputed facts.

1. Facts and procedure relevant to the issues presented by Assignment of Error 5.

History of Signing Contradictory Documents. One of the precipitating events of Mrs. Denny's guardianship was her susceptibility to undue influence, evidenced by her signing conflicting legal documents prepared by others that she could not recall. CP 6-7.

January 7, 2012 Letter Signed by Mrs. Denny. In early 2012, Ohana received a two-page single-spaced letter signed by Mrs. Denny stating various demands and grievances. CP 584-5. The guardian informed the superior court of this letter, as well as the guardian's doubts about its authenticity. CP 442.

Additional Documents Signed by Mrs. Denny. The following documents with Mrs. Denny's signature were filed in support of the motions Anderson filed April 9, 2012:

- Handwritten declaration signed by Mrs. Denny on "November 17, 2011," but notarized "October 17, 2011". CP 813.

¹⁸ Once the superior court makes a decision on revision, "the appeal is from the superior court's decision, not the commissioner's." State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004).

- Typed demands for health care records signed “January 10, 2012,” which appear to have been dated “2010,” and then corrected. CP 769, 771.
- Typed statement dated March 20, 2012 withdrawing Mrs. Denny’s authorization to have Mark Wilson serve as her attorney. Mrs. Denny’s signature appears twice on the same page. CP 815.
- Petition signed March 23, 2012 requesting that Mark Wilson be appointed to represent Mrs. Denny. CP 1501.
- Typed and handwritten statement signed April 17, 2012, asserting “I do not agree to be evaluated by Dr. Eisenhower[,]” which was made after Mrs. Denny had already consented to and participated in the evaluation. CP 1363, 1370, 1371.

Unchallenged Findings of Fact. The superior court made the

following findings of fact in support of its June 19, 2012 order:

Based on the documentary evidence in the record regarding Mrs. Denny’s diminished mental capacity, as well as the confusion exhibited by Mrs. Denny at the court hearing conducted March 29, 2012 [sic],¹⁹ where Mrs. Denny did not appear to understand the purpose for the hearing and questioned whether her son was in trouble, the Court finds that the written letters, statements and declarations purportedly signed by Mrs. Denny are not credible evidence. CP 1164.

In support of Mr. Anderson’s motion, he submitted a number of documents that Mrs. Denny purportedly signed, which as found above, the Court does not find to be credible evidence. It is not in Mrs. Denny’s best interest for third parties to procure her signature on documents that the evidence reflects she lacks capacity to understand or recall. CP 1166.

Richard did not assign error to these findings of fact. *App. Op. Brf. 4-5.*

Conclusions of Law. The superior court made the following

¹⁹ The actual date of the court hearing was March 23, 2012. 2 RP at 29.

conclusion of law in support of the June 19, 2012 order:

Authority exists under RCW 11.88.120(4), RCW 11.96A.020, .040, and .060 to restrain Richard Denny and Thomas Anderson from procuring Ms. Denny's signature on any documents, including but not limited to court pleadings, declarations, affidavits, letters, and any written communication of any kind except as follows: Richard Denny may assist Ms. Denny in signing documents relating to informed consent to medical care, checks written on Ms. Denny's discretionary spending account provided they are not written to Richard Denny, Ms. Denny's right to vote, and social communications such as birthday cards and personal correspondence unrelated to the Guardianship or the Guardian. CP 1166.

Motion for Revision. On September 7, 2012, Judge Armstrong denied Richard's motion for revision, and ordered Richard to reimburse the guardianship estate for the attorney fees incurred opposing his motion. CP 1414-1416.

2. The restrictions on Richard do not implicate constitutionally protected interests.

Richard does not have a constitutionally protected interest in procuring Mrs. Denny's signature on documents related to the guardianship. This issue was disposed of by In re Guardianship of Cornelius, 181 Wn. App. at 530-532, which upheld the constitutionality of limitations more restrictive than Judge Armstrong's order.²⁰ In Cornelius, the superior court limited a parent's contact with her child, the subject of

²⁰ Where the trial court denied the motion to revise without making findings of its own, the appellate court deems that the trial court adopted the findings and conclusions of the commissioner. Guardianship of Decker, 188 Wn. App. at 438 (citations omitted).

the guardianship. The parent argued this restriction violated the “constitutional interest” in maintaining the parent-child relationship and in having “the companionship and society” of their children. *Id.* at 530. Cornelius declined to recognize a constitutionally-protected interest between adult children and their parents. *Id.* 530-32. Richard’s attempt to characterize the restriction as implicating Mrs. Denny’s rights to free expression and to access the courts fails because the unchallenged findings of fact establish that the documents Mrs. Denny signed do not accurately represent her intent or wishes and are not credible evidence. *See supra* at 42-43.

3. The superior court did not abuse its discretion in prohibiting Richard and Anderson from procuring Mrs. Denny’s signature on documents.

The superior court properly found: “It is not in Mrs. Denny’s best interest for third parties to procure her signature on documents that the evidence reflects she lacks capacity to understand or recall.” CP 1166. A “best interest” finding depends on the facts and circumstances of each case and a preponderance of the evidence must support it. *See In re Welfare of Aschauer*, 93 Wn.2d at 695. The record dating back to the inception of this guardianship in 2009 documents that Mrs. Denny is highly susceptible to undue influence, and frequently has signed conflicting documents prepared by others, even under penalty of perjury, that she had no

recollection of signing. *See supra* at 6-7, 13-14. The risk of undue influence was one of the reasons for establishing the guardianship in 2009. CP 1204. The contradictory documents signed by Mrs. Denny related to both her estate (conflicting durable powers of attorney) and her person (conflicting statements concerning Dr. Eisenhower evaluation). The evidence amply supported the finding that restrictions were necessary for Mrs. Denny's best interests.

The relief ordered by the superior court was well within its authority and discretion. When the superior court receives a petition to modify a guardianship or to replace a guardian, it may grant the relief "it deems just and in the best interest of the incapacitated person." *RCW 11.88.120(1)*.²¹ Moreover, in exercising original jurisdiction over guardianship matters, superior courts have "full and ample power" to enter orders deemed "right and proper". *RCW 11.96A.020, .040, .060*. Courts have long been concerned with protecting incapacitated persons from undue influence and fraud. *In re Guardianship of Lamb*, 173 Wn.2d at 184 (2011) (quoting *In re Guardianship of Bayer's Estate*, 101 Wash. 694, 695, 172 P. 842 (1918)); *RCW 74.34.135* (authorizing vulnerable protection orders upon the petition of an incapacitated person's guardian). The superior court's restriction was narrowly tailored to the particular risk,

²¹ This language was not changed by the amendments that took effect July 24, 2015. *See Appendix* at 6-10.

and there is no basis for substituting this Court's judgment for the superior court's determination of what is in Mrs. Denny's best interest.

I. Richard's Request For Attorney Fees Should Be Denied And He Should Be Ordered To Reimburse Mrs. Denny's Guardianship Estate For The Attorney Fees And Costs Ohana Incurred.

Under *RAP 18.1* and *RCW 11.96A.150*, Ohana's request for reasonable attorney fees and costs on appeal should be granted, and Richard's should be denied. *RAP 18.1* permits attorney fees on appeal if applicable law grants the party the right to recover reasonable attorney fees. *RCW 11.96A.150* permits the appellate courts in guardianship, probate and trust matters to award attorney fees from any party to any party "in such amount and in such manner as the court determines to be equitable." *RCW 11.96A.150(1)*. In determining whether to award fees under *RCW 11.96A.150*, this Court "may consider any and all factors ... deem[ed] to be relevant and appropriate, such as whether the litigation benefits the estate." *In re Guardianship of Decker*, 188 Wn. App. at 451 (awarding guardian attorney fees on appeal against ward's former attorney who sought to "vindicate" her due process rights). The equities weigh in favor of Ohana and against Richard. As shown above, Richard's arguments are contrary to established law, the rules of appellate procedure and the best interests of Mrs. Denny.

V. CONCLUSION

The trial court's rulings are easily supported in both fact and law and should be affirmed in all respects. The equities also support ordering the appellant Richard Denny to reimburse Ella Nora Denny's guardianship estate for the reasonable attorney fees and costs incurred in this appeal and denying Richard's request for attorneys' fees.

Respectfully submitted this 9th day of December 2015.

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APPENDIX

APPEALED ORDERS

	DOCUMENT TITLE	DATE FILED IN THE TRIAL COURT	APPEAL CAUSE NO.
1.	Order Approving Interim Report	December 17, 2010	69117-1-I
2.	Order Reaffirming Court's Prior Order of December 17, 2010	March 29, 2012	69117-1-I
3.	Order Approving Second Annual Report of Guardian of the Person and Estate, and Authorizing Payment of Fees, Costs and other Expenses	March 29, 2012	69117-1-I
4.	Minute Order	April 19, 2012	69117-1-I
5.	Order Granting Guardian's Petition for Authority to Retain Counsel to Respond to Litigation and to Authorize Payment of Litigation Attorneys' Fees	April 27, 2012	69117-1-I
6.	Order Granting Guardian's Motion to Require Out of State Petitioner to Post Bond	May 10, 2012	69117-1-I
7.	Findings of Fact, Conclusions of Law and Order on Motion	May 16, 2012	69117-1-I
8.	Order Sealing Documents and Awarding Attorneys' Fees and Costs	May 31, 2012	69117-1-I
9.	Order Denying Motion to Reconsider Findings of Fact, Conclusions of Law and Order On Motion Entered May 16, 2012	June 19, 2012	69117-1-I
10.	Order Denying Motion to Reconsider Order for Bond	June 19, 2012	69117-1-I
11.	Order Denying Motion to Replace Guardian and Modify Guardianship	June 19, 2012	69117-1-I
12.	Order Denying Motion for Revision	September 10, 2012	69117-1-I
13.	Order Approving Guardian's Attorneys' Fees and Costs and Unblocking Accounts for Payment of Fees	September 14, 2012	69117-1-I
14.	Judgment, Judgment Summary Against Thomas Anderson	September 14, 2012	69117-1-I
15.	Judgment, Judgment Summary and Order Awarding Guardian's Attorneys' Fees and Costs	October 18, 2012	69117-1-I
16.	Order Denying Motion to Reconsider Order Approving Second Annual Report	October 23, 2012	69117-1-I

	DOCUMENT TITLE	DATE FILED IN THE TRIAL COURT	APPEAL CAUSE NO.
17.	Order Granting Guardian's Petition for Instructions Regarding Contact With the Incapacitated Person and Notice to Thomas Anderson	January 25, 2013	70312-9-I
18.	Findings of Fact, Conclusions of Law, and Order Approving Third Annual Report of Limited Guardianship of the Person and Full Guardian of the Estate, and Authorizing Payment of Fees, Costs and Other Expenses	April 1, 2013	70312-9-I
19.	Order Denying Motion to Reconsider Order Entered on April 1, 2013	May 23, 2105	70312-9-I
20.	Judgment, Judgment Summary and Order Awarding Guardian's Attorneys' Fees and Costs and Prohibiting New Pleadings Until Judgments are Paid	June 26 ,2013	70312-9-I
21.	Findings of Fact, Conclusions of Law, and Order Approving Fourth Annual Report of Limited Guardian of the Person and Full Guardian of the Estate, and Authorizing Payment of Fees, Costs and Other Expenses	April 7, 2014	70312-9-I
22.	Order Unblocking and Withdrawing From U.S. Bancorp Investment Account	April 7, 2014	70312-9-I

APPELLATE MOTIONS

MOTION	DATE FILED	DISPOSITION/DATE
Emergency Motion to Stay Superior Court Proceedings	January 18, 2013	Notation Ruling Denied Motion, filed January 22, 2013
Motion to Modify and Stay	February 13, 2013	Order Denying Motions to Modify Commissioner's Ruling, filed May 20, 2013
Petition for Order Appointing Counsel to Represent Ella Nora Denny on Appeal	June 4, 2013	Order Denying Petition for Order Appointing Counsel to Represent Ella Nora Denny on Appeal, filed September 30, 2013
Motion for Discretionary Review of Interlocutory Order	October 30, 2013	Ruling Denying Motion for Discretionary Review, filed December 12, 2012
Motion to Modify Commissioner's Ruling Denying Discretionary Review of Interlocutory Order	January 13, 2014	Order Denying Motion to Modify Commissioner's Ruling, filed April 2, 2014

CURRENT

RCW 11.88.120

Modification or termination of guardianship—Procedure.

(1) At any time after establishment of a guardianship or appointment of a guardian, the court may, upon the death of the guardian or limited guardian, or, for other good reason, modify or terminate the guardianship or replace the guardian or limited guardian or modify the authority of a guardian or limited guardian. Such action may be taken based on the court's own motion, based on a motion by an attorney for a person or entity, based on a motion of a person or entity representing themselves, or based on a written complaint, as described in this section. The court may grant relief under this section as it deems just and in the best interest of the incapacitated person. For any hearing to modify or terminate a guardianship, the incapacitated person shall be given reasonable notice of the hearing and of the incapacitated person's right to be represented at the hearing by counsel of his or her own choosing.

(2)(a) An unrepresented person or entity may submit a complaint to the court. Complaints must be addressed to one of the following designees of the court: The clerk of the court having jurisdiction in the guardianship, the court administrator, or the guardianship monitoring program, and must identify the complainant and the incapacitated person who is the subject of the guardianship. The complaint must also provide the complainant's address, the case number (if available), and the address of the incapacitated person (if available). The complaint must state facts to support the claim.

(b) By the next judicial day after receipt of a complaint from an unrepresented person, the court's designee must ensure the original complaint is filed and deliver the complaint to the court.

(c) Within fourteen days of being presented with a complaint, the court must enter an order to do one or more of the following actions:

(i) To show cause, with fourteen days' notice, directing the guardian to appear at a hearing set by the court in order to respond to the complaint;

(ii) To appoint a guardian ad litem to investigate the issues raised by the complaint or to take any emergency action the court deems necessary to protect the incapacitated person until a hearing can be held;

(iii) To dismiss the complaint without scheduling a hearing, if it appears to the court that the complaint: Is without merit on its face; is filed in other than good faith; is filed for an improper purpose; regards issues that have already been adjudicated; or is frivolous. In making a determination, the court may review the matter and consider previous behavior of the complainant that is documented in the guardianship record;

(iv) To direct the guardian to provide, in not less than fourteen days, a written report to the court on the issues raised in the complaint;

(v) To defer consideration of the complaint until the next regularly scheduled hearing in the guardianship, if the date of that hearing is within the next three months, provided that there is no indication that the incapacitated person will suffer physical, emotional, financial, or other harm as a result of the court's deferral of consideration;

(vi) To order other action, in the court's discretion, in addition to doing one or more of the actions set out in this subsection.

(d) If after consideration of the complaint, the court believes that the complaint is made without justification or for reason to harass or delay or with malice or other bad faith, the court has the power to levy necessary sanctions, including but not limited to the imposition of reasonable attorney fees, costs, fees, striking pleadings, or other appropriate relief.

(3) The court may order persons who have been removed as guardians to deliver any property or records belonging to the incapacitated person in accordance with the court's order. Similarly, when guardians have died or been removed and property or records of an incapacitated person are being held by any other person, the court may order that person to deliver it in accordance with the court's order. Disobedience of an order to deliver shall be punishable as contempt of court.

(4) The administrative office of the courts must develop and prepare[,] in consultation with interested persons, a model form for the complaint described in subsection (2)(a) of this section and a model form for the order that must be issued by the court under subsection (2)(c) of this section.

(5) The board may send a grievance it has received regarding an active guardian case to the court's designee with a request that the court review the grievance and take any action the court deems necessary. This type of request from the board must be treated as a complaint under this section and the person who sent the complaint must be treated as the complainant. The court must direct the clerk to transmit a copy of its order to the board. The board must consider the court order when taking any further action and note the court order in any final determination.

(6) In any court action under this section that involves a professional guardian, the court must direct the clerk of the court to send a copy of the order entered under this section to the board.

(7) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Board" means the certified professional guardianship board.

(b) "Complaint" means a written submission by an unrepresented person or entity, who is referred to as the complainant.

[2015 c 293 § 1; 1991 c 289 § 7; 1990 c 122 § 14; 1977 ex.s. c 309 § 9; 1975 1st ex.s. c 95 § 14; 1965 c 145 § 11.88.120. Prior: 1917 c 156 § 209; RRS § 1579; prior: Code 1881 § 1616; 1860 p 227 § 333; 1855 p 17 § 11.]

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE SENATE BILL 5607

Chapter 293, Laws of 2015

64th Legislature
2015 Regular Session

GUARDIANSHIP--MODIFICATION--TERMINATION

EFFECTIVE DATE: 7/24/2015

Passed by the Senate April 23, 2015
Yeas 46 Nays 0

BRAD OWEN

President of the Senate

Passed by the House April 14, 2015
Yeas 87 Nays 11

FRANK CHOPP

Speaker of the House of Representatives

Approved May 18, 2015 2:18 PM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Hunter G. Goodman, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5607** as passed by Senate and the House of Representatives on the dates hereon set forth.

HUNTER G. GOODMAN

Secretary

FILED

May 18, 2015

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE SENATE BILL 5607

AS AMENDED BY THE HOUSE

Passed Legislature - 2015 Regular Session

State of Washington 64th Legislature 2015 Regular Session

By Senate Human Services, Mental Health & Housing (originally sponsored by Senators Conway, Dammeier, Darneille, O'Ban, and Padden)

READ FIRST TIME 02/20/15.

1 AN ACT Relating to complaint procedure for the modification or
2 termination of guardianship; and amending RCW 11.88.120.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 11.88.120 and 1991 c 289 s 7 are each amended to
5 read as follows:

6 (1) At any time after establishment of a guardianship or
7 appointment of a guardian, the court may, upon the death of the
8 guardian or limited guardian, or, for other good reason, modify or
9 terminate the guardianship or replace the guardian or limited
10 guardian((-

11 ~~(2) Any person, including an incapacitated person, may apply to~~
12 ~~the court for an order to modify or terminate a guardianship or to~~
13 ~~replace a guardian or limited guardian. If applicants are represented~~
14 ~~by counsel, counsel shall move for an order to show cause why the~~
15 ~~relief requested should not be granted. If applicants are not~~
16 ~~represented by counsel, they may move for an order to show cause, or~~
17 ~~they may deliver a written request to the clerk of the court.~~

18 ~~(3) By the next judicial day after receipt of an unrepresented~~
19 ~~person's request to modify or terminate a guardianship order, or to~~
20 ~~replace a guardian or limited guardian, the clerk shall deliver the~~
21 ~~request to the court. The court may (a) direct the clerk to schedule~~

1 a hearing, (b) appoint a guardian ad litem to investigate the issues
2 raised by the application or to take any emergency action the court
3 deems necessary to protect the incapacitated person until a hearing
4 can be held, or (c) deny the application without scheduling a
5 hearing, if it appears based on documents in the court file that the
6 application is frivolous. Any denial of an application without a
7 hearing shall be in writing with the reasons for the denial
8 explained. A copy of the order shall be mailed by the clerk to the
9 applicant, to the guardian, and to any other person entitled to
10 receive notice of proceedings in the matter. Unless within thirty
11 days after receiving the request from the clerk the court directs
12 otherwise, the clerk shall schedule a hearing on the request and mail
13 notice to the guardian, the incapacitated person, the applicant, all
14 counsel of record, and any other person entitled to receive notice of
15 proceedings in the matter.

16 (4) In a hearing on an application to modify or terminate a
17 guardianship, or to replace a guardian or limited guardian, the court
18 may grant such relief as it deems just and in the best interest of
19 the incapacitated person.

20 (5)) or modify the authority of a guardian or limited guardian.
21 Such action may be taken based on the court's own motion, based on a
22 motion by an attorney for a person or entity, based on a motion of a
23 person or entity representing themselves, or based on a written
24 complaint, as described in this section. The court may grant relief
25 under this section as it deems just and in the best interest of the
26 incapacitated person. For any hearing to modify or terminate a
27 guardianship, the incapacitated person shall be given reasonable
28 notice of the hearing and of the incapacitated person's right to be
29 represented at the hearing by counsel of his or her own choosing.

30 (2) (a) An unrepresented person or entity may submit a complaint
31 to the court. Complaints must be addressed to one of the following
32 designees of the court: The clerk of the court having jurisdiction in
33 the guardianship, the court administrator, or the guardianship
34 monitoring program, and must identify the complainant and the
35 incapacitated person who is the subject of the guardianship. The
36 complaint must also provide the complainant's address, the case
37 number (if available), and the address of the incapacitated person
38 (if available). The complaint must state facts to support the claim.

1 (b) By the next judicial day after receipt of a complaint from an
2 unrepresented person, the court's designee must ensure the original
3 complaint is filed and deliver the complaint to the court.

4 (c) Within fourteen days of being presented with a complaint, the
5 court must enter an order to do one or more of the following actions:

6 (i) To show cause, with fourteen days' notice, directing the
7 guardian to appear at a hearing set by the court in order to respond
8 to the complaint;

9 (ii) To appoint a guardian ad litem to investigate the issues
10 raised by the complaint or to take any emergency action the court
11 deems necessary to protect the incapacitated person until a hearing
12 can be held;

13 (iii) To dismiss the complaint without scheduling a hearing, if
14 it appears to the court that the complaint: Is without merit on its
15 face; is filed in other than good faith; is filed for an improper
16 purpose; regards issues that have already been adjudicated; or is
17 frivolous. In making a determination, the court may review the matter
18 and consider previous behavior of the complainant that is documented
19 in the guardianship record;

20 (iv) To direct the guardian to provide, in not less than fourteen
21 days, a written report to the court on the issues raised in the
22 complaint;

23 (v) To defer consideration of the complaint until the next
24 regularly scheduled hearing in the guardianship, if the date of that
25 hearing is within the next three months, provided that there is no
26 indication that the incapacitated person will suffer physical,
27 emotional, financial, or other harm as a result of the court's
28 deferral of consideration;

29 (vi) To order other action, in the court's discretion, in
30 addition to doing one or more of the actions set out in this
31 subsection.

32 (d) If after consideration of the complaint, the court believes
33 that the complaint is made without justification or for reason to
34 harass or delay or with malice or other bad faith, the court has the
35 power to levy necessary sanctions, including but not limited to the
36 imposition of reasonable attorney fees, costs, fees, striking
37 pleadings, or other appropriate relief.

38 (3) The court may order persons who have been removed as
39 guardians to deliver any property or records belonging to the
40 incapacitated person in accordance with the court's order. Similarly,

1 when guardians have died or been removed and property or records of
2 an incapacitated person are being held by any other person, the court
3 may order that person to deliver it in accordance with the court's
4 order. Disobedience of an order to deliver shall be punishable as
5 contempt of court.

6 (4) The administrative office of the courts must develop and
7 prepare in consultation with interested persons, a model form for the
8 complaint described in subsection (2)(a) of this section and a model
9 form for the order that must be issued by the court under subsection
10 (2)(c) of this section.

11 (5) The board may send a grievance it has received regarding an
12 active guardian case to the court's designee with a request that the
13 court review the grievance and take any action the court deems
14 necessary. This type of request from the board must be treated as a
15 complaint under this section and the person who sent the complaint
16 must be treated as the complainant. The court must direct the clerk
17 to transmit a copy of its order to the board. The board must consider
18 the court order when taking any further action and note the court
19 order in any final determination.

20 (6) In any court action under this section that involves a
21 professional guardian, the court must direct the clerk of the court
22 to send a copy of the order entered under this section to the board.

23 (7) The definitions in this subsection apply throughout this
24 section unless the context clearly requires otherwise.

25 (a) "Board" means the certified professional guardianship board.

26 (b) "Complaint" means a written submission by an unrepresented
27 person or entity, who is referred to as the complainant.

Passed by the Senate April 23, 2015.

Passed by the House April 14, 2015.

Approved by the Governor May 18, 2015.

Filed in Office of Secretary of State May 18, 2015.

FINAL BILL REPORT

ESSB 5607

C 293 L 15

Synopsis as Enacted

Brief Description: Concerning the complaint procedure for the modification or termination of guardianship.

Sponsors: Senate Committee on Human Services, Mental Health & Housing (originally sponsored by Senators Conway, Dammeier, Darneille, O'Ban and Padden).

Senate Committee on Human Services, Mental Health & Housing
House Committee on Judiciary

Background: Any person or entity may petition the court for the appointment of a guardian or limited guardian for an allegedly incapacitated person. Incapacitated means that the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety. A guardian may be a lay guardian, generally a family member or friend of the alleged incapacitated person, or a professional guardian, who charges a fee to provide guardianship services. Professional guardians are regulated by the Certified Professional Guardianship Board. The court has supervisory power over guardianships, and may modify a guardianship or remove a guardian upon petition and showing of good cause. A guardian ad litem must be appointed to represent an allegedly incapacitated person during the guardianship proceeding.

Summary: The court may modify the authority of a guardian or limited guardian if the guardian has died or for good reason. This action may be taken on the court's own motion, based on a motion by an attorney for a person or entity, based on a motion of a person or entity representing themselves, or based on a written complaint. The court may grant relief as it deems just and in the best interest of the incapacitated person.

An unrepresented person or entity may submit a complaint to the court. Complaints must be addressed to one of the following designees of the court: the clerk of the court having jurisdiction in the guardianship, the court administrator, or the guardianship monitoring program. The complaint must:

- identify the complainant;
- identify the incapacitated person who is the subject of the guardianship;
- provide the complainant's address;
- provide the case number, if available;
- provide the address of the incapacitated person, if available; and
- state facts to support the claim.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

By the next judicial day after receipt of a complaint from an unrepresented person, the court's designee must ensure the original complaint is filed and deliver the complaint to the court. Within 14 days of being presented with a complaint, the court must enter an order to do one or more of the following actions:

1. show cause, with 14 days' notice, directing the guardian to appear at a hearing set by the court in order to respond to the complaint;
2. appoint a guardian ad litem to investigate the issues raised by the complaint or take any emergency action the court deems necessary to protect the incapacitated person until a hearing can be held;
3. dismiss the complaint without scheduling a hearing, if it appears to the court that the complaint:
 - a. is without merit on its face;
 - b. is not filed in good faith;
 - c. is filed for an improper purpose;
 - d. regards issues that have already been adjudicated; or
 - e. is frivolous;
4. direct the guardian to provide, in not less than 14 days, a written report to the court on the issues raised in the complaint;
5. defer consideration of the complaint until the next regularly scheduled hearing in the guardianship, if the date of that hearing is within the next three months, provided that there is no indication that the incapacitated person will suffer physical, emotional, financial, or other harm as a result of the court's deferral of consideration; or
6. order another action, in the court's discretion, in addition to doing one or more of the actions set out in this subsection.

A court may levy necessary sanctions against parties who file complaints without justification or for reason to harass or delay, with malice or other bad faith. Sanctions include but are not limited to imposition of reasonable attorney fees, costs, fees, striking pleadings, or other appropriate relief.

The Certified Professional Guardianship Board may send a grievance it has received regarding an active guardian case to the court's designee with a request that the court review the grievance and take any action the court deems necessary. This type of request from the board must be treated as a complaint under this section and the person who sent the complaint must be treated as the complainant. The court must direct the clerk to transmit a copy of its order to the board. The board must consider the court order when taking any further action and note the court order in any final determination.

Votes on Final Passage:

Senate	49	0	
House	87	11	(House amended)
Senate	46	0	(Senate concurred)

Effective: July 24, 2015

COMPARISON OF RETAINED RIGHTS WITH GUARDIAN'S AUTHORITY

SUBJECT	MRS. DENNY'S RETAINED RIGHTS	GUARDIAN'S AUTHORITY
Medical Consent	"Mrs. Denny shall retain the right to consent to or refuse medical treatment, subject to the conditions set forth herein." CP 21.	<ul style="list-style-type: none"> ● Authority "to provide timely, informed consent for health care" except where such power is not expressly stated in the order of appointment. RCW 11.92.043(5). CP 22 (incorporating by reference Chapter 11.92 RCW). ● "To supervise medications, including ensuring Mediset is properly configured and all other issues related to medication." CP 21. ● "After consultation with Ms. Denny, and subject to the provisions of Paragraph 2.2 and 2.3, to consent to and arrange for, or refuse to consent to, medical, dental, psychological or psychiatric treatment and care, including any and all medications, diagnostic testing, evaluation, examination, placement and/or transfer to an appropriate health care facility such as, but not limited to, an adult family home, hospital, assisted living facility or nursing home." CP 22-23. ● "Subject to the provisions of paragraphs 2.2 and 2.3, to provide substitute informed consent (RCW 7.70.065) to medical or dental treatment, medications for incapacitated person, including surgery, except where contrary to law." CP 23
Code Status	"Mrs. Denny shall retain the right to consent to or refuse medical treatment, subject to the conditions set forth herein." CP 21.	"After consultation with Ms. Denny, to decide code status of the ward, including the use of life sustaining measures, including intravenous therapy, tube feedings, hydration, antibiotics, pain medications and comfort care." CP 23.
Care Providers	"Mrs. Denny shall retain the right to decide who shall provide care and assistance, subject to the conditions as set forth herein." CP 21.	<ul style="list-style-type: none"> ● "To arrange for medical, dental and other therapeutic appointments." CP 21. ● "After consultation with Ms. Denny, to select or discharge any health care or medical provider." CP 23. ● "To provide for or contract for case care or management services on behalf of the incapacitated person." CP 23. ● "To provide for such other personal assistance as the incapacitated person requires." CP 23.

SUBJECT	MRS. DENNY'S RETAINED RIGHTS	GUARDIAN'S AUTHORITY
Medical Records	None specified.	"To review, release, consent to the release of and use as appropriate all medical, dental, mental health, psychological, psychiatric, medication, laboratory and social services work records, charts, evaluations and reports concerning the incapacitated person." CP 22.
Monitoring Needs	None specified	"To "monitor the conditions and needs of the incapacitated person." CP 22.
Social Decisions	"Mrs. Denny shall retain the right to make decisions regarding the social aspects of her life subject to the conditions as set forth herein." CP 21.	"In consultation with Ms. Denny, to select an appropriate living situation." CP 21.
Estate Planning	"Mrs. Denny shall retain the right to make or revoke a will, trust or other testamentary device under the direction of competent independent counsel. This estate planning may include, but not be limited to, gifting and transfer of interests to a family trust." CP 21	None specified
Contracts	"Mrs. Denny shall have the right to enter into contract provided it is solely under the advice and direction of competent independent counsel and in furtherance of her estate planning. Mrs. Denny shall also have the right to appoint someone to act on her behalf pursuant [sic] provided such appointment is solely in a testamentary devise. In all other areas, Mrs. Denny shall not have the right to enter into a contract." CP 22	"To undertake the management of the financial affairs of the incapacitated person, including but not limited to contracting for and incurring obligations on behalf of the incapacitated person, becoming representative payee of any income from Social Security, income from employment of the incapacitated person, and any other sources of revenue or income." CP 24.
Retain Counsel	See above under "estate planning" and "contract"	See above
Access to the Courts	"Mrs. Denny shall not have the right to sue or be sued other than through a guardian."	"When there is a guardian of the estate, all actions between the incapacitated person or the guardian and third persons in which it is sought to charge or benefit the estate of the incapacitated person shall

SUBJECT	MRS. DENNY'S RETAINED RIGHTS	GUARDIAN'S AUTHORITY
	CP 22.	be prosecuted by or against the guardian of the estate as such. The guardian shall represent the interests of the incapacitated person in the action and all process shall be served on him or her. A guardian or limited guardian of the estate shall report to the court any action commenced against the incapacitated person and shall secure court approval prior to initiating any legal action in the name of the incapacitated person." RCW 11.92.060(1). CP 24 (incorporating chapter 11.92 RCW).
Buy/Sell Property	"Mrs. Denny shall not have the right to buy, sell, mortgage or lease property other than through the guardian." CP 22	"To sell, exchange lease or mortgage real property, pursuant o the requirements of RCW 11.92, and to negotiate and determine the value of real property holdings and/or interest in real property." CP 25

No. 69117-1-I
(Consolidated with No. 69610-6-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Guardianship of
ELLA NORA DENNY.

DECLARATION OF SERVICE

CHRISTINE JAMES certifies under penalty of perjury under the laws of the State of Washington that the following statement is true and correct:

On December 9, 2015, I caused a copy of Brief of Respondent Guardian Ohana Fiduciary Corporation in Response to Opening Brief of Appellant Richard Denny, and this Declaration of Service, to be served on counsel of record for Richard Denny and *pro se* party Marianne Zak, via electronic mail; *pro se* party Thomas Anderson, via electronic mail and regular U.S. mail, postage prepaid; and Ella Nora Denny via regular U.S. mail, postage prepaid.

Douglas Schafer
Email: schafer@pobox.com

2015 DEC -9 PM 4:26
COURT OF APPEALS
STATE OF WASHINGTON

Ms. Marianne Zak
Email: mde8611451@mac.com

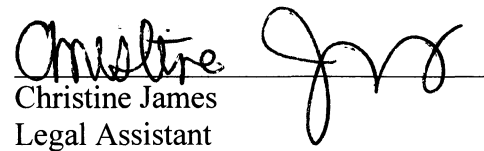
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Aljoya
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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS
OF THE STATE OF WASHINGTON THAT THE FOREGOING IS
TRUE AND CORRECT.

Signed at Seattle, Washington on December 9, 2015.

THOMPSON & HOWLE


Christine James
Legal Assistant