

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 93867-9
Court of Appeals No. 69117-1-I (consol. w/ No. 69610-6-I)

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.

**ANSWER OF OHANA FIDUCIARY CORPORATION
TO PETITION FOR REVIEW**

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TABLE OF CONTENTS

I.	IDENTITY OF RESPONDING PARTY	1
II.	RELIEF REQUESTED.....	1
III.	RESTATEMENT OF ISSUES PRESENTED FOR REVIEW	1
IV.	RESTATEMENT OF THE CASE.....	2
	A. In 2009, Ms. Denny Agreed Through Independent Counsel To A Guardianship That Limited Her Future Right To Retain Counsel	3
	B. The 2009 Order Authorized Ohana To Make Decisions For Ms. Denny After Consulting Her And Giving Weight To Her Preferences.....	4
	C. On March 29, 2012, The Superior Court Approved Ohana's Second Annual Report.....	5
	D. On May 16, 2012, In An Order That Was Not Timely Appealed, The Superior Court Denied A Petition To Reinstate Ms. Denny's Right To Retain Counsel.	6
	E. On June 19, 2012, The Superior Court Denied A Motion To Replace Ohana Filed By Ms. Denny's Nephew, And Sanctioned Him For Misrepresenting Facts In Support Of The Motion.....	8
	F. On January 25, 2013, The Superior Court Confirmed Ohana's Authority Under The 2009 Guardianship Order After Ms. Denny's Positive Drug Test.	9
V.	ARGUMENT AGAINST REVIEW.....	10
	A. Richard Should Not Be Permitted To Petition For Review When He Has Not Paid Attorney Fee Judgments Of \$138,608.71	11

B.	No Significant Issues Of Constitutional Law Are Presented By Richard’s Petition, Which Ignores Civil Right-To-Counsel Jurisprudence And Distorts The Record	12
1.	Richard Ignores Washington Supreme Court Decisions And <i>Mathews v. Eldridge</i>	12
2.	Richard’s Petition Is Based On False Assumptions	16
C.	Richard Cannot Raise An Issue Of Substantial Public Interest By Presenting The Court With Random Statistics And Asking It To Legislate A Right To Counsel.....	18
D.	Richard Denny Should Be Ordered To Reimburse The Guardianship Estate For The Guardian’s Attorney Fees.....	20
VI.	CONCLUSION	20

APPENDICES

A.	ABA COMMISSION ON LAW AND AGING, <i>Adult Guardianship Statutory Table of Authorities</i> (2014)
B.	Washington Supreme Court Ruling entered December 12, 2013, Case No. 89467-1
C.	Order Appointing Limited Guardian of the Person and Full Guardian of the Estate entered December 17, 2009 (“2009 Order”) (CP 18 – 32)
D.	Petition for Guardianship of Person and Estate RCW 11.88.030 (CP 1 – 5)
E.	Declaration of Richard Denny In Support of Petition for Appointment of Guardian (CP 6 – 7)
F.	Order Appointing Attorney for Alleged Incapacitated Person, Authorizing Increase in Hourly Rate for Guardian ad Litem, Authorizing Additional Hours, and Granting Continuance (CP 12 – 14)

- G.** Response to Petition for Guardianship of Person and Estate RCW 11.88.030 (CP 15 – 17)
- H.** Notarized Statement signed by Ella Nora Denny March 20, 2012 (CP 815)
- I.** Findings of Fact, Conclusions of Law and Order on Motion entered May 16, 2012 (CP 985-988)
- J.** Order Denying Motion to Replace Guardian and Modify Guardianship entered June 19, 2012 (CP 1163-1168)
- K.** Order Denying Motion for Revision entered September 10, 2012 (CP 1663-1664)
- L.** Judgment, Judgment Summary and Order Awarding Guardian's Attorneys' Fees and Costs entered October 18, 2012 (CP 1624 – 1628)
- M.** Division 1 Court of Appeals Ruling on Emergency Motion for Stay entered January 22, 2013 (CP 1835-1837)
- N.** Division 1 Court of Appeals Order Denying Motions to Modify Commissioner's Ruling entered May 20, 2013
- O.** Order Granting Guardian's Petition for Instructions Regarding Contact with the Incapacitated Person and Notice to Thomas Anderson entered January 25, 2013 (CP 1845 – 1857)
- P.** Judgment, Judgment Summary and Order Awarding Guardian's Attorneys' Fees and Costs and Prohibiting New Pleadings Until Judgments Are Paid entered June 26, 2013 in the linked appeal no. 70312-9-I (CP 464 – 469)
- Q.** Division 1 Court of Appeals Commissioner's Ruling Awarding Attorney Fees and Costs entered November 2, 2016
- R.** Division 1 Court of Appeals Commissioner's Ruling Awarding Attorney Fees and Costs entered November 2, 2016 in the linked appeal no 70312-9-I
- S.** RCW 11.88.120

TABLE OF AUTHORITIES

Cases

<i>Bellevue School District v. E.S.</i> , 171 Wn.2d 695, 257 P.3d 570 (2011).....	12
<i>In re Dependency of MSR</i> , 174 Wn.2d 1, 271 P.3d 234 (2012).....	12-13
<i>In re Det. Of M.W. v. DSHS</i> , 185 Wn.2d 633, 374 P.3d 1123 (2016).....	13
<i>Doe v. Doe</i> , 377 Mass. 272, 385 N.E.2d 995 (1979).....	15
<i>In re Guardianship of Bayer's Estate</i> , 101 Wash. 694, 172 P. 842 (1918).....	19
<i>In re Guardianship of Hemrich</i> , 187 Wash. 21, 59 P.2d 748 (1936).....	15
<i>In re Guardianship of Kelley</i> , 193 Wash. 109, 74 P.2d 904 (1938).....	15
<i>In re Guardianship of Lamb</i> , 173 Wn.2d 173, 265 P.3d 876 (2011).....	19
<i>Lassiter v. Dept. of Social Services</i> , 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).....	12
<i>In re Marriage of King</i> , 162 Wn.2d 378, 174 P.3d 659 (2007).....	12
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	1, 2, 12, 13
<i>Quesnell v. State</i> , 83 Wn.2d 224, 517 P.2d 568 (1973).....	14
<i>Sedlacek v. Hillis</i> , 145 Wn.2d 379, 390, 36 P.3d 1014 (2001).....	19

Statutes

RCW 7.70.065 10

RCW 10.77 14

RCW 11.88 3

RCW 11.88.045 6

RCW 11.88.045(a)(1) 13, 19

RCW 11.88.045(a)(3) 13

RCW 11.88.120 15, 16

RCW 11.88.120(d)..... 16

RCW 11.92.020 10

RCW 11.92.043(5)..... 14, 15, 19

RCW 11.92.190 14

RCW 11.96A.020..... 10

RCW 11.96A.150..... 2, 8, 9, 20

RCW 71.05 14

RCW 71.05.160 14

RCW 72.23 14

RCW 74.34.135 19

Court Rules

RAP 13.4..... 10, 20
RAP 18.1(j)..... 2, 20
RAP 18.9..... 2
RAP 18.9(a) 11

Other Authorities

ABA COMMISSION ON LAW & AGING, *Adult Guardianship Statutory Table of Authorities* (2014) www.americanbar.org/aging 14
Mass. Gen. Law ch. 190B §5-309(g)..... 15
ORS §125.320(3) 15

I. IDENTITY OF RESPONDING PARTY

Respondent is Ohana Fiduciary Corporation (“Ohana” or the “Guardian”). Ohana was the respondent in the Court of Appeals.

II. RELIEF REQUESTED

This case concerns the administration of the guardianship of Ella Nora Denny (Ms. Denny), which was established in 2009.¹ Between July 18, 2012 and May 6, 2014, Richard Denny and Thomas Anderson filed five appeals challenging 22 superior court orders in Ms. Denny’s guardianship.² Division I of the Court of Appeals affirmed the superior court’s oversight of Ms. Denny’s guardianship in an unpublished opinion entered August 1, 2016, and Ms. Denny’s son, Richard Denny (Richard), seeks discretionary review. The Guardian respectfully requests that the Court deny Richard’s Petition and order Richard to pay reasonable attorneys’ fees and costs. Richard asserts this case involves due process rights, “including representation by counsel,” Pet. Rev. at 1, yet he ignores Washington Supreme Court cases that discuss the right to counsel in civil matters and ignores the balancing factors prescribed by *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Richard also improperly requests that this Court engage in legislative reform under

¹ *Appendix C*, CP 18 – 32.

² The first two appeals were consolidated under No. 69117-1-I and are the subject of Richard’s Petition for review.

the guise of promoting the public interest.

III. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

Richard's statement of the issues makes assumptions that are not supported by the record. The issues properly stated are:

1. Should this Court, pursuant to RAP 18.9, refuse to consider a petition for discretionary review from a party who has refused to pay judgments for costs and attorneys' fees awarded against him by the Court of Appeals and Superior Court totaling \$138,608.71?
2. Should this Court deny discretionary review of the unpublished decision of Division I that affirmed the superior court orders entered March 29, 2012, May 16, 2012, June 19, 2012, and December 25, 2013, when the challenging party's argument in favor of a due process right to counsel in guardianship proceedings for persons who have been adjudicated incapacitated ignores recent Washington Supreme Court decisions on the right to counsel in civil matters and the *Mathews v. Eldridge* balancing factors, while relying on factual assumptions that contradict the record?
3. Should this Court decline to decree substantial changes to the system of guardianship laws enacted by Washington's legislature?
4. Should this Court order Richard to pay reasonable attorney fees and costs pursuant to RCW 11.96A.150 and RAP 18.1(j)?

IV. RESTATEMENT OF THE CASE

Richard's Statement of the Case is one-sided and inaccurate.

A. In 2009, Ms. Denny Agreed Through Independent Counsel To A Guardianship That Limited Her Future Right To Retain Counsel.

Ms. Denny, now 93 years of age,³ was adjudicated incapacitated in 2009 pursuant to chapter 11.88 RCW because she exhibited symptoms of Alzheimer's disease, was vulnerable to undue influence, and had executed conflicting powers of attorney she was unable to remember.⁴ Richard filed the guardianship petition, informing the court: "I have learned that over the past few years she has visited several lawyers and has executed at least four Durable Powers of Attorney at that time. ... She does not remember any of them."⁵

On December 17, 2009, the superior court ruled "Ella Nora 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."⁶ Her right to retain counsel was limited as follows:

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

³ *Appendix D*, CP 1.

⁴ *Appendix E*, CP 6 - 7.

⁵ *Id.*

⁶ *Appendix C*, CP 21.

testamentary devise. In all other areas, Mrs. Denny shall not have the right to enter into a contract.⁷

When Ms. Denny agreed to this limitation, she was represented by independent counsel of her choice Timothy Austin.⁸ Ms. Denny did not ask to retain any additional right to counsel beyond estate planning.⁹

The 2009 Order was interpreted by this Court in 2013 when it denied a petition to appoint appellate counsel for Ms. Denny, holding: “The superior court in its original guardianship order limited Ms. Denny’s right to secure independent counsel to estate planning matters.”¹⁰

B. The 2009 Order Authorized Ohana To Make Decisions For Ms. Denny After Consulting Her And Giving Weight To Her Preferences.

The 2009 Order specified four rights retained by Ms. Denny: (1) “to make or revoke a will, trust or other testamentary device under the direction of competent independent counsel[;]” (2) “to consent or refuse medical treatment, subject to the conditions set forth herein[;]” (3) “to decide who shall provide care and assistance, subject to the conditions set forth herein[;]” and (4) “to make decisions regarding the social aspects of her life subject to the conditions set forth herein.”¹¹

⁷ *Id.* at CP 22.

⁸ *Appendix F*, CP 12 - 14.

⁹ *Appendix G*, CP 15-17.

¹⁰ *Appendix B*, at 5.

¹¹ *Appendix C*, CP 21.

The 2009 Order authorized Ohana as limited guardian of the person to “consent to reasonable or necessary medical or dental treatment if Ella Nora Denny is unable to consent to necessary medical or dental treatment, or unreasonably withholds her consent to same;”¹² “arrange for medical, dental and other therapeutic appointments;”¹³ “supervise medications, including ensuring Mediset is properly configured and all other issues relating to medication;”¹⁴ and “provide for or contract for case care or management services on behalf of the incapacitated person[.]”¹⁵

The 2009 Order required that Ohana follow the following decision-making standard in making decisions for Ms. Denny:

[T]he guardian shall make reasonable efforts to ascertain EllaNora Denny’s stated, current and historic 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.¹⁶

C. On March 29, 2012, The Superior Court Approved Ohana’s Second Annual Report.

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

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at CP 22-23.

¹⁶ *Id.* at CP 27.

29, 2012 after notice to Richard and Ms. Denny. CP 616-620, 1484-5. The guardian's second Annual Report correctly identified Ohana as Ms. 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.* The superior court corrected a scrivener's error in the letters of guardianship,¹⁷ and issued correct letters on April 9, 2012 (CP 1768). The superior court had given Richard an extension of time to file a response.¹⁸ He did not file a response or attend the March 29, 2012 hearing. 3 RP at 2, 3.

D. On May 16, 2012, In An Order That Was Not Timely Appealed, The Superior Court Denied A Petition To Reinstate Ms. Denny's Right To Retain Counsel.

In March 2012, attorney Mark Wilson petitioned the superior court pursuant to RCW 11.88.045 to appoint him to represent Ms. Denny, whom he referred to as "the alleged incapacitated person," in responding to the guardian's Petition for Approval of Second Annual Report.¹⁹ Ms. Denny, *pro se*, filed documents in support of Mr. Wilson's petition.²⁰ As requested

¹⁷ 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. This was a scrivener's error that did not result in any conduct beyond the scope of the 2009 Order. *See* CP 516-580. Richard has never identified a single decision made during the 10-month period that exceeded Ohana's authority as limited guardian of the person.

¹⁸ 2 RP at 25-26, CP 612.

¹⁹ CP 1493-9.

²⁰ CP 1500-1515.

in Ms. Denny's Motion to Shorten Time (CP 1510-2), the superior court held a hearing March 23, 2012. Ms. Denny was confused about why she was in court, asked whether her son was in trouble,²¹ and mistook Mr. Wilson for the judge.²² Three days earlier, Ms. Denny had signed a notarized document informing Mr. Wilson "I withdraw my authorization for you to act as my attorney."²³

On May 16, 2012, after obtaining updated medical information, the Superior Court denied the petition to retain Mr. Wilson.²⁴ Ms. Denny, Richard, and Mr. Wilson were given notice of the May 16, 2012 hearing,²⁵ and did not appear or respond.²⁶ The superior court found in pertinent part: "The Court was not presented with credible admissible evidence establishing that Ms. Denny wishes to retain Mr. Wilson."²⁷ The Court of Appeals ruled that Richard's appeal of the May 16, 2012 Order was not timely. Unpub. Op. at 19-20, 24 n. 21.

²¹ Vol. 2 RP at 28- 29.

²² Vol 11 RP at 29-30.

²³ *Appendix H*, CP 815. The record does not reflect receipt by Mr. Wilson.

²⁴ *Appendix I*, CP 985-988.

²⁵ CP 642-643, 653-4, 965, 984.

²⁶ CP 964, Vol. 7 RP at 1-3.

²⁷ *Appendix I*, CP 986.

E. On June 19, 2012, The Superior Court Denied A Motion To Replace Ohana Filed By Ms. Denny's Nephew, And Sanctioned Him For Misrepresenting Facts In Support Of The Motion.

On April 10, 2012, Thomas Anderson appeared in the guardianship for the first time, filing several conflicting documents, including 45-pages entitled "Motions to Replace Guardian and Modify Guardianship."²⁸ Anderson requested that the superior court replace Ohana as guardian and enjoin Mr. Wilson and his firm "from further appearance in these proceedings, purportedly as attorney for Ward."²⁹ Anderson attached an additional 69 pages of exhibits, which included a number of documents Ms. Denny purportedly signed, including the notarized statement directed to attorney Wilson discussed above.³⁰

On June 19, 2012, the superior court denied Anderson's Motion on the pleadings without a hearing, and ordered Anderson to pay attorneys' fees and costs pursuant to RCW 11.96A.150.³¹ The superior court found that "the written letters, statements and declarations purportedly signed by Mrs. Denny are not credible evidence"³² and cited Anderson's false

²⁸ CP 702 – 746.

²⁹ CP 704, 745.

³⁰ CP 747 – 815.

³¹ *Appendix J*, CP 1163-8. This Order states a hearing occurred May 31, 2012. CP 1163. The May 31, 2016 hearing addressed the procedural confusion created by Anderson's conflicting motions, not the merits of Anderson's Motion to Replace Guardian and Modify Guardianship. *See* Vol. 8 VRP.

³² *Appendix J*, CP 1164.

representations as a basis for awarding fees.³³ Richard moved for revision, which was denied.³⁴ He was ordered to pay attorney's fees and costs of \$9,338.44 pursuant to RCW 11.96A.150.³⁵

F. On January 25, 2013, The Superior Court Confirmed Ohana's Authority Under The 2009 Guardianship Order After Ms. Denny's Positive Drug Test.

In December 2012, Ms. Denny was administered a drug test without Ohana's knowledge and tested positive for cocaine. CP 1860-1873. After investigating the incident (which Ms. Denny could not recall) and filing a police report, Ohana filed a petition with the superior court to apprise it of the incident and to review Ohana's response, which was to allow unrestricted contact between Ms. Denny and her children, arrange additional medication monitoring by staff at Ms. Denny's assisted living facility, and hire a companion caregiver. CP 1866-7. Richard requested an emergency stay from the Court of Appeals until counsel was appointed for Ms. Denny. CP 1828-34. Division I denied Richard's motion.³⁶

On January 25, 2013, the superior court approved Ohana's response to the incident, denied Richard's request to appoint counsel for

³³ *Appendix J*, CP 1166-7.

³⁴ *Appendix K*, CP 1663-1664.

³⁵ *Appendix L*, CP 1624 – 1628.

³⁶ *Appendix M*, Ruling on Emergency Motion for Stay entered January 22, 2013; *Appendix N*, Order Denying Motions to Modify Commissioner's Ruling entered May 20, 2013.

Ms. Denny, and confirmed Ohana's authority under the 2009 Order to hire caregivers.³⁷ Findings of fact established the caregiver was necessary for Ms. Denny's safety and well-being, Ohana consulted Ms. Denny about the caregiver, and Ms. Denny consented to the caregiver.³⁸ Conclusion of Law 3 denied Richard's request to appoint counsel because:

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.³⁹

Conclusion of Law 7 confirmed Ohana's authority under the 2009 Order to make health care decisions for Ms. Denny as follows:

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.**⁴⁰

V. ARGUMENT AGAINST REVIEW

Four reasons justify denying Richard's Petition for Review. First,

³⁷ *Appendix O*, CP 1845 – 1857.

³⁸ *Id.*, CP 1848 (Findings of Fact 10, 11, 12, 13, and 14).

³⁹ *Id.* CP 1853.

⁴⁰ *Id.* CP 1854 (emphasis supplied).

he should not be permitted to petition for review when he has not paid the attorney fee judgments totaling \$138,608.71. Second, Richard fails to provide even a rudimentary analysis of the due process standard he asserts entitled Ms. Denny to counsel. Third, his arguments make erroneous assumptions that contradict the record. Fourth, Richard's Petition for Review improperly seeks legislative reforms through judicial decree.

A. Richard Should Not Be Permitted To Petition For Review When He Has Not Paid Attorney Fees Judgments Of \$138,608.71.

Richard should not be given continuing access to the appellate courts at the expense of Ms. Denny unless he first pays the judgments already entered against him, which total \$138,608.71 (excluding interest). Title 18 authorizes this Court to “condition a party’s right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party.” RAP 18.9(a). The following judgments have been entered against Richard in this case for the Guardian’s attorneys’ fees and costs:

\$9,338.44 superior court judgment dated October 18, 2012.⁴¹

\$10,355.98 superior court judgment dated June 26, 2013.⁴²

\$65,294.90 court of appeals judgment entered November 2, 2016.⁴³

\$17,593.60 court of appeals judgment entered November 2, 2016.⁴⁴

\$32,680.19 court of appeals judgment entered November 2, 2016.⁴⁵

⁴¹ *Appendix L*, CP 1624-8.

⁴² *Appendix P*, CP 464-469 (linked Appeal No. 70312-9-I).

⁴³ *Appendix Q*.

⁴⁴ *Id.*

\$3,345.60 court of appeals judgment entered November 2, 2016.⁴⁶

TOTAL: \$138,608.71.⁴⁷

B. No Significant Issues Of Constitutional Law Are Presented By Richard's Petition, Which Ignores Civil Right-To-Counsel Jurisprudence And Distorts The Record.

1. Richard Ignores Washington Supreme Court Decisions And *Mathews v. Eldridge*.

Determining the degree of procedural due process afforded in a particular case requires a balancing of the private interest to be protected, the risk of erroneous deprivation of that interest, and the government's interest in maintaining the procedures.⁴⁸ “There is a presumption that civil litigants do not have a right to appointed counsel unless their physical liberty is at risk.”⁴⁹ This Court has issued three decisions during the last 10 years discussing the right to counsel in civil matters: *In re Marriage of King*, 162 Wn.2d 378 (holding no right to counsel for parents facing the denial of residential time with their children); *Bellevue School District v. E.S.*, 171 Wn.2d 695, 257 P.3d 570 (2011) (holding no right to counsel for juveniles at the initial stage of the truancy process); and *In re Dependency*

⁴⁵ *Appendix R*.

⁴⁶ *Id.*

⁴⁷ This sum excludes interest and judgments entered against Anderson.

⁴⁸ *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *In re Marriage of King*, 162 Wn.2d 378, 395, 174 P.3d 659 (2007).

⁴⁹ *King*, 162 Wn.2d at 395 (citing *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)).

of *MSR*, 174 Wn.2d 1, 271 P.3d 234 (2012) (holding no right to counsel for children in parental termination hearings facing placement into foster care). Richard's Petition for Review does not discuss any of these cases.

Lacking any discussion of procedural due process standards, Richard's Petition cannot raise a significant question of constitutional law justifying acceptance of review. Richard conflates the established due process standard, articulated in the cases discussed above, with the procedural protections warranted under the particular facts of any given case, when he argues that the due process standard should not be any lower in guardianships than it is in civil commitment and criminal proceedings. *See* Pet. Rev. at 11-14. The due process standard does not vary; the degree of due process required does, depending on the competing interests and risk of erroneous deprivation.⁵⁰ Thus, Ms. Denny is entitled to fewer procedural protections at this stage of her guardianship than she was entitled to before the superior court ruled on the petition to establish the guardianship, at which time she had the right to counsel and to trial by jury on the issue of incapacity.⁵¹ She is also entitled to less due process

⁵⁰ *See Mathews v. Eldridge*, 424, U.S. at 395. Notably, not all cases falling under the "civil commitment" label carry the same degree of due process protections. *In re Det. Of M.W. v. DSHS*, 185 Wn.2d 633, 663, 374 P.3d 1123 (2016) distinguished between the jury rights that attach to initial commitment under the ITA and "indefinite civil commitment schemes that require jury trials."

⁵¹ *See* RCW 11.88.045(a)(1) (3).

than persons charged with crimes or civil commitment, who face involuntary detention or incarceration. The central problem with Richard's Petition for Review is that he fails to analyze this case under the established due process standard.

Richard misses a fundamental distinction between guardianships and civil commitment proceedings because he fails to consider the risk of erroneous deprivation, one of the *Mathews* balancing factors. In a civil commitment, the individual can be involuntarily detained for varying lengths of time, entitling the subject to appointment of counsel.⁵² However, RCW 11.92.190 strictly prohibits guardians from consenting to involuntary detention or treatment, providing in pertinent part: "Any court order, other than an order issued in accordance with the involuntary treatment provisions of chapters 10.77, 71.05, and 72.23 RCW, which purports to authorize such involuntary detention or purports to authorize a guardian or limited guardian to consent to such involuntary detention on behalf of an incapacitated person shall be void and of no force or effect."

Also, because guardianship laws vary from state to state,⁵³ cases

⁵² See, e.g., 71.05.160; *Quesnell v. State*, 83 Wn.2d 224, 517 P.2d 568 (1973).

⁵³ In 2014, the ABA Commission on Law & Aging compiled a Statutory Table of Authorities providing the citation to each state's guardianship statutes. See ABA Commission on Law & Aging, *Adult Guardianship Statutory Table of Authorities* (2014). *Appendix A*. The ABA has published a series of charts comparing significant variations between the 50 states' guardianship laws on a range of issues. See www.americanbar.org/aging

interpreting other states' civil commitment and guardianship statutes are not relevant. This Court has recognized the limited value of looking at guardianship statutes from other states because of the differences between state statutes.⁵⁴ For example, unlike Washington, many states do not prohibit guardians from consenting to involuntary detention for treatment. *See* ORS §125.320(3) (Oregon law authorizes guardians to petition the court to place incapacitated persons in nursing homes and other residential treatment facilities if certain procedures are followed); Mass. Gen. Law ch. 190B §5-309(g) (Massachusetts law authorizes a guardian to commit an incapacitated person to nursing facility for up to 60 days subject to procedural protections including right to counsel); *Doe v. Doe*, 377 Mass. 272, 273, 385 N.E.2d 995 (1979) (interpreting Massachusetts guardianship statute to authorize guardian to involuntarily commit a ward for mental health treatment).

Richard's argument that the Court of Appeals erred in declining to consider amendments to RCW 11.88.120 involves interpretation of a state statute, not constitutional law. The amendment took effect July 24, 2015, more than three years after the superior court dismissed Anderson's

⁵⁴ *See In re Guardianship of Kelley*, 193 Wash. 109, 114, 74 P.2d 904 (1938); *In re Guardianship of Hemrich*, 187 Wash. 21, 23, 59 P.2d 748 (1936).

motion to replace Ohana and sanctioned him for misrepresenting facts.⁵⁵ RCW 11.88.120 still authorizes superior courts to dismiss meritless petitions without a hearing and to “levy necessary sanctions” for petitions filed without justification or in bad faith.⁵⁶ Whether the Court of Appeals should have considered the amendment does not implicate any constitutional issues, but is purely a question of state law.

2. Richard’s Petition Is Based On False Assumptions.

Issue 1 asks if adults subject to limited guardianships have the right to retain counsel at hearings to modify fundamental retained rights. Pet. Rev. at 2. Issue 2 asks if adults subject to guardianships are entitled to counsel when they seek to replace their guardians for misconduct. *Id.* at 3. As shown below, these issues are so far removed from the record that to answer them as framed would result in an advisory opinion.

- Whether Ms. Denny had the right to retain counsel was decided by the original guardianship order entered in 2009 when Ms. Denny was represented by counsel, and she did not appeal that decision.⁵⁷ The superior court furthermore found there was no credible evidence Ms.

⁵⁵ *Appendix J*, CP 1163-8. *See supra* at 7-8.

⁵⁶ RCW 11.88.120(d). The full text of RCW 11.88.120 is reprinted in *Appendix S*.

⁵⁷ CP 22; Unpub. Op. at 23-24; *Appendix B*, Washington Supreme Court Ruling 89467-1 (December 12, 2013) at 5. *See supra* at 3-4.

Denny wanted to retain counsel.⁵⁸

- Richard falsely asserts that Ohana petitioned to restrict Ms. Denny's right to travel. Pet. Rev. at 8.⁵⁹ In fact, Ohana petitioned for approval of protocol for paying for travel (CP 441), and the superior court ruled "The guardian is hereby authorized to allow Ms. Denny to travel whenever she chooses, and is hereby further authorized to pay Ms. Denny's transportation and lodging costs associated therewith, provided the criteria set forth in Paragraph 23 of the Guardian's Second Annual Report are met." CP 618. The record reflects Ohana was responsive to and facilitated Ms. Denny's desire to travel.⁶⁰
- Richard falsely asserts that Ms. Denny did not have adequate advance notice of the January 25, 2013 order. Pet. Rev. at 10. The Guardian's petition for instruction expressly stated that the Guardian had retained in-home caregivers for Ms. Denny and sought approval of the

⁵⁸ *Appendix I*, CP 986. This finding appears in the May 16, 2012 Order that Richard did not timely appeal. *See supra* at 7.

⁵⁹ In the Court of Appeals briefing, assignments of error relating to travel issues were raised by Anderson, not Richard. *See* Brief of Respondent Guardian Ohana Fiduciary Corporation In Response to "Brief of Appellant Ella Nora Denny" Filed by Thomas Anderson at 32-34.

⁶⁰ On November 17, 2011, Mrs. Denny signed a declaration stating "I would like to be able to travel to a destination of my choice." CP 812. In January 2012, she signed a typewritten letter stating she wanted to travel to Arizona and "other places." CP 585. The letter requested "a credit card for payment of expenses[.]" *Id.* In response, the Guardian registered the Washington guardianship in Arizona. CP 440, 1763. Richard Denny then announced Mrs. Denny had cancelled her travel plans. *Id.*

Guardian's actions. *See supra* at 9, CP 1865-7.

- It is furthermore a false assertion to state that the January 25, 2013 Order restricted Ms. Denny's retained rights under the 2009 Order, Pet. Rev. at 10, when the Order repeatedly reiterated that decisions must be consistent with the 2009 Order.⁶¹
- Ms. Denny did not petition "to replace the guardian for evidence of misconduct." Pet. Rev. at 3. The petition to replace Ohana was filed by Anderson, not Ms. Denny. It was not based on evidence of misconduct, but was dismissed summarily by the superior court, which sanctioned Anderson for misrepresenting facts.⁶² The superior court furthermore found that documents purportedly signed by Ms. Denny offered in support of Anderson's Motion were not credible evidence.⁶³

Nevertheless, assuming solely for the purpose of this answer that Richard's statement of facts is accurate, he has not shown how this record rebuts the presumption against appointed counsel in civil matters.

C. Richard Cannot Raise An Issue Of Substantial Public Interest By Presenting The Court With Random Statistics And Asking It To Legislate A Right To Counsel.

Failing to articulate a legal error, Richard improperly asks this Court to change the law under the guise of "public interest." But the

⁶¹ *Appendix O*, CP 1853-4. *See supra* at 9-10.

⁶² *Appendix J*, CP 1163-8.

⁶³ *Appendix J*, CP 1164.

Legislature not the Courts declare public policy. *See, e.g., Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001). The public policy reflected in Washington's guardianship statutes requires appointment of counsel for alleged incapacitated persons at any stage of the guardianship proceeding (RCW 11.88.045(1)(a)), for incapacitated persons who face the loss of fundamental liberty interests through convulsive therapy or invasive psychiatric procedures that involve surgery or restrict movement (RCW 11.92.043(5)), and whenever the superior court determines that the incapacitated person's interests and rights cannot otherwise be adequately protected. RCW 11.88.045(1)(a). Expanding the right to counsel as Richard requests would be impermissible legislation from the bench.

The public interest is served by the guardianship system adopted by Washington's legislature, which balances incapacitated persons' rights with the state interest in protection. Courts have long been concerned with protecting incapacitated persons from undue influence and fraud. *In re Guardianship of Lamb*, 173 Wn.2d 173, 184, 265 P.3d 876 (2011) (citing *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). Indeed, Richard petitioned for guardianship because of Ms. Denny's vulnerability to undue influence. *Appendix D*, CP 1-5; *Appendix E*, CP 6-7. Richard fails to

establish how accepting review of this case would benefit Ms. Denny or any similarly situated persons. To the contrary, his advocacy has cost her more than \$138,000 in attorneys' fees.

D. Richard Denny Should Be Ordered To Reimburse The Guardianship Estate For The Guardian's Attorney Fees.


Attorney fees are authorized by RAP 18.1(j) and RCW 11.96A.150(1), which provides "any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, ... to be paid in such amount and in such manner as the court determines to be equitable." Further justification for the award is the fact that Richard impermissibly quoted documents that are not part of the record in disregard of the Court of Appeals decision. *See* Pet. Rev. at 5 n. 1.

VI. CONCLUSION

Richard failed to establish that review is warranted under RAP 13.4. Ohana respectfully requests that his Petition be denied and that attorneys' fees and costs be awarded to the guardianship estate.

Respectfully submitted this 5th day of December, 2016.

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