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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 "BRIEF OF APPELLANT ELLA NORA DENNY" FILED BY THOMAS ANDERSON

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ORIGINAL

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I. INTRODUCTION

The ward, Ella Nora Denny, has a nephew named Thomas Anderson (Anderson). Anderson says that he speaks for Mrs. Denny,[1] whose cognitive deficits from dementia make her susceptible to undue influence and unable to understand whether the influence of others is contrary to her best interests. CP 986-7. Anderson has never been recognized by the superior court as a person interested in Mrs. Denny's welfare, and the superior court found that he was unfit to serve as her "next friend" due to his detrimental conduct. In Anderson's self-appointed role as Mrs. Denny's "next friend," he has violated court rules and disobeyed court orders. On the record before this Court, Anderson is unqualified to serve as an officer of the court representing Mrs. Denny's interests, and his standing as Mrs. Denny's purported "next friend" should not be recognized on appeal. Respondent Ohana Fiduciary Corporation (Ohana) respectfully requests that this Court affirm the decisions of the trial court and award the guardianship estate its reasonable attorneys' fees and costs on appeal pursuant to RCW 11.96A.150.[2]

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[1] Anderson filed a brief entitled "Brief of Appellant Ella Nora Denny." Mrs. Denny is not the appellant and Anderson's brief is not Mrs. Denny's brief. Therefore, it will be referred to herein as *"Anderson Brf."*

[2] This brief incorporates by reference all briefs filed by Respondent Guardian Ohana Fiduciary Corporation in Court of Appeals Nos. 69117-1-I and 70312-9-I.

II. RESTATEMENT OF ISSUES

Anderson's assignments of error misrepresent the superior court's orders. The issues are properly stated as follows:

1. Did the superior court abuse its discretion when it ruled on January 25, 2013 that Anderson could not participate in the guardianship as Mrs. Denny's "next friend," after finding that Anderson had violated the superior court's orders and caused financial harm to the guardianship estate? CP 1845-57. (Assignment of Error 1.)
2. On March 23, 2012, the superior court ordered an updated psychological evaluation of Mrs. Denny, which occurred April 3, 2012. CP 612. On April 19, 2012, Anderson filed an "emergency motion to enjoin the guardian" from taking Ms. Denny to the court-ordered evaluation that had already occurred. CP 1349-1365, 1368-77. Did the superior court abuse its discretion when it denied Anderson's "emergency motion" because he had not noted it for hearing? CP 637. (Assignment of Error 2.)
3. On May 16, 2012, the superior court commissioner denied the petition to appoint attorney Mark J. Wilson to represent Mrs. Denny finding that there was no credible evidence that Mrs. Denny wanted Mr. Wilson to represent her, that Mrs. Denny's cognitive functioning had worsened since the guardianship was established, and that Mrs.

Denny's interests were adequately protected. CP 985-988. On September 7, 2012, the superior court denied a motion to revise the May 16, 2012 Order and awarded the guardianship estate its costs and reasonable attorneys' fees under RCW 11.96A.150. CP 1414-1416. Did the superior court abuse its discretion? (Assignment of Error 3.)

4. On March 29, 2012, the superior court approved Ohana's Second Annual Report covering the period January 1, 2011 through December 31, 2011. CP 616-620. On April 9, 2012, Anderson filed a motion for reconsideration, not having previously appeared in the guardianship or raised objections to the Second Annual Report. CP 621-628. Did the superior court abuse its discretion in denying Anderson's motion for reconsideration? CP 1459-1461. (Assignment of Error 4.)

5. On June 19, 2012, the superior court commissioner denied Anderson's motion to remove Ohana as Mrs. Denny's guardian and ordered Anderson to reimburse the guardianship estate for its costs and reasonable attorneys' fees under RCW 11.96A.150. CP 1557-1562. On September 7, 2012, the superior court denied a motion to revise the June 19, 2012 Order, and awarded the guardianship estate its costs and reasonable attorneys' fees on revision. CP 1414-1416. Did the superior court abuse its discretion? (Assignment of Error 5.)

III. RESTATEMENT OF THE CASE

Anderson's statement of the case misrepresents the record.

A. When The Guardianship Was Established In 2009, Anderson Was Not Identified As Someone Who Had An Interest In Mrs. Denny's Welfare.

Anyone interested in the welfare of incapacitated persons must be identified in the petition to establish the guardianship, the guardian ad litem report, and the order establishing the guardianship.[3] Thomas Anderson was not mentioned as a person closely related to Mrs. Denny or as a person interested in her welfare in the petition for guardianship filed by Richard Denny in 2009, CP 2, in the guardian ad litem report filed in 2009, CP 1232, or in the order that established Mrs. Denny's guardianship in 2009. CP 30. Anderson's father was specifically identified as someone who Mrs. Denny did not want to receive information about her guardianship. *Id.*

B. When The Full Guardianship Of The Estate Was Established In 2009, The Superior Court Limited Mrs. Denny's Right To Engage Counsel.

Finding "EllaNora Denny is an Incapacitated Person within the

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[3] *See* RCW 11.88.030(1)(f) (petition must identify persons most closely related by blood, marriage, or state registered domestic partnership); RCW 11.88.090(5)(f)(viii) (GAL report shall identify persons with a significant interest in the welfare of the alleged incapacitated person who should be advised of their right to request special notice of proceedings); RCW 11.88.095(j) (orders shall identify persons "whom the court believes should receive copies of further pleadings filed by the guardian with respect to the guardianship").

meaning of RCW Chapter 11.88," CP 21, the King County Superior Court in 2009 appointed Ohana limited guardian of Mrs. Denny's person and full guardian of her estate. *Id.* Among the limitations imposed on Mrs. Denny under the guardianship is the limitation that Mrs. Denny may enter into contracts only in relation to estate planning and only under the advice of independent counsel. CP 22. Otherwise, Mrs. Denny does not have the right to enter into contracts, and she does not have the right to sue or be sued except through her guardian. *Id.*

C. When The Limited Guardianship Of The Person Was Established In 2009, The Superior Court Limited Mrs. Denny's Retained Rights.

The following table compares Ohana's authority and Mrs. Denny's retained rights under the 2009 Order that established the guardianship.

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." 1 CP 21.	● 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). 1 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." 1 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,

SUBJECT	MRS. DENNY'S RETAINED RIGHTS	GUARDIAN'S AUTHORITY
		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." 1 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." 1 CP 23
Code Status	"Mrs. Denny shall retain the right to consent to or refuse medical treatment, subject to the conditions set forth herein." 1 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." 1 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." 1 CP 21.	●"To arrange for medical, dental and other therapeutic appointments." 1 CP 21. ●"After consultation with Ms. Denny, to select or discharge any health care or medical provider." 1 CP 23. ●"To provide for or contract for case care or management services on behalf of the incapacitated person." 1 CP 23. ●"To provide for such other personal assistance as the

SUBJECT	MRS. DENNY'S RETAINED RIGHTS	GUARDIAN'S AUTHORITY
		incapacitated person requires." 1 CP 23.
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." 1 CP 22.
Monitoring Needs	None specified	"To "monitor the conditions and needs of the incapacitated person." 1 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." 1 CP 21.	"In consultation with Ms. Denny, to select an appropriate living situation." 1 CP 21.

D. In March 2012, The Superior Court Approved The Guardian's Second Annual Report, Which Covered The Period January 1, 2011 Through December 31, 2011.

The superior court approved Ohana's Second Annual Report on March 29, 2012, before Anderson appeared in this case, with notice to Richard Denny, Mrs. Denny and Mrs. Denny's daughter Marianne Zak. CP 616-620, 1484-5. Anderson filed a motion to reconsider the Order Approving the Second Annual Report on April 9, 2012. CP 621-628. Anderson's motion for reconsideration of the order approving the Second

Annual Report was denied October 23, 2012. CP 1459-62. The Second Annual Report is discussed in more detail below.

E. When Attorney Mark J. Wilson Petitioned To Be Appointed Independent Counsel For Mrs. Denny in March 2012, The Superior Court Conducted Fact-Finding To Determine Whether Mrs. Denny's Right To Engage Counsel Should Be Restored.

In March 2012, during the pendency of Ohana's petition to approve its Second Annual Report, attorney Mark J. Wilson petitioned under RCW 11.88.045(2) to be appointed independent counsel for Mrs. Denny. CP 1493-1499. Before Anderson appeared in this case, Mr. Wilson filed materials purportedly signed by Mrs. Denny on March 23, 2012, stating she wanted Mr. Wilson and his firm to represent her in the guardianship proceedings. CP 1500-1512, 1519-1521. After Anderson appeared in this case in April 2012, he filed a notarized statement purportedly signed by Mrs. Denny on March 20, 2012, stating she did not want Mr. Wilson to represent her. CP 815.

On March 23, 2013, the superior court ordered an updated psychological evaluation of Mrs. Denny by the clinical psychologist who had evaluated her in 2009 to determine whether Mrs. Denny's cognition had improved. CP 612. The psychological evaluation occurred April 3, 2012. CP 1368-77. The psychologist reported in pertinent part that Mrs. Denny "was agreeable to the evaluation," CP 1371, that "Ms. Denny's

cognitive functioning has deteriorated over the last two and a half years," CP 1375, and that Mrs. Denny wanted "to eliminate the guardian so that she can give money away[.]" CP 1377. According to the updated report, Mrs. Denny's motivation for wanting the guardian removed "centers around the belief that she is unable to afford her current lifestyle and that she must relocate to a less expensive living arrangement so that she will be able to afford basic necessities (such as clothing) and so that she can save up money which she intends to give to her son." CP 1377.

On May 16, 2012, the superior court denied Mr. Wilson's petition to be appointed counsel for Mrs. Denny. In unchallenged findings of fact, the superior court determined that Mrs. Denny's dementia-based cognitive impairments had worsened since the guardianship order was entered, and that she remained highly susceptible to undue influence and exploitation by others. CP 986-7. The superior court also found that Mrs. Denny lacked the mental capacity to understand whether the influence of others is contrary to her best interests or to understand and remember written documents she had signed. *Id.* Finding no credible admissible evidence that Mrs. Denny wished to retain Mr. Wilson, CP 986, or that she needed independent counsel other than for estate planning purposes, CP 987, and further finding that appointment of additional counsel would require the expenditure of estate assets with no discernible benefit, *Id.*, the superior

court denied Mr. Wilson's petition. CP 988.

Richard Denny filed a motion for revision, which was denied by Judge Sharon Armstrong on September 7, 2012. CP 1414-1416. On appeal, neither Anderson nor co-appellant Richard Denny challenged the superior court's findings of fact or Judge Armstrong's order on revision.

F. In April 2012, Anderson Appeared In The Guardianship And Asserted The Right To Speak For Mrs. Denny. Anderson's Motions Were Denied And He Was Ordered To Post A Litigation Bond And Pay Attorney Fees.

Anderson first appeared in the guardianship in April 2012. Since his appearance, he has filed numerous petitions with the trial court and multiple notices of appeal, corrected notices of appeal, and amended notices of appeal – all in the name of Ella Nora Denny. On April 9, 2012, CP 1103, Anderson simultaneously filed a motion to reconsider the order approving the second annual report and a motion to revise the order approving the second annual report. CP 621-628, 1522-1523. Anderson filed these motions even though he had not appeared in opposition to the guardian's petition to approve the second annual report. On April 10, 2012, CP 1103, Anderson filed a 45-page motion entitled "Motions to Replace Guardian and Modify Guardianship." CP 702-746. On April 19, 2012, Anderson filed an "Emergency Motion To Enjoin Guardian," which was denied for procedural irregularities the same day it was filed. CP 637, 1103, 1349-1365.

Anderson's motion to replace the guardian was denied June 19, 2012, and is discussed in more detail later in this brief. In denying Anderson's motion, the superior court commissioner ordered him to pay the guardianship estate's reasonable attorneys' fees of $4,411.50, which he has not paid. CP 1430, 1432-3. Richard Denny filed a motion for revision of the June 19, 2012 Order, which was denied September 7, 2012 by Judge Sharon Armstrong, who made an additional fee award against Richard Denny. CP 1414-1416.

In addition to the fee award, Anderson was ordered to post a nonresident plaintiff security bond of $35,000, and prohibited from filing any "motions, petitions, declarations or objections" until posting the bond. CP 980-2, 1161, 2009. The superior court also prohibited Anderson and co-appellant Richard Denny from procuring Mrs. Denny's signatures on documents or court pleadings relating to the guardianship. CP 1167.

G. In 2013, After Mrs. Denny Tested Positive For Cocaine, The Superior Court Conducted Fact-Finding To Determine Whether Ohana's Response Was Appropriate, Confirmed Ohana's Authority To Hire Caregivers, And Found That Anderson Could Not Participate As Mrs. Denny's Next Friend.

Mrs. Denny was hospitalized in December 2012, and without notification to the guardian, was administered a drug test that revealed cocaine in her system. CP 1920-1928. In response, Ohana filed a petition for instructions with the superior court to apprise it of the incident and the

guardian's response. CP 1860-73. Ohana's petition also addressed Anderson's "Notice of Intent to Move for Sanctions," which Ohana's attorneys received in late November 2012. *Id;* CP 1913-4. Anderson asserted that based on the unpaid judgment for attorneys' fees entered against him, he was entitled to receive copies of all documents filed in the guardianship. *Id.* Ohana requested instruction on "whether Mr. Anderson should receive copies of all pleadings filed in the guardianship, including but not limited to documents relating to Mrs. Denny's financial gifts to her children and her ongoing health issues." CP 1860-1.

In response to Ohana's petition for instructions, Mrs. Denny's son Richard filed pleadings that accused his sister Marianne Zak of drugging Mrs. Denny. CP 1940-1971. Anderson filed a document entitled "Objection by Ward" as well as a declaration that consisted primarily of attacks against Marianne Zak. CP 1803-9, 1843-44. Marianne Zak denied the accusations against her and objected to Anderson's participation in Mrs. Denny's guardianship. CP 1932, 1933, 1937-8, 1973-1986. Richard Denny then filed a reply, which included a request that independent counsel be appointed for Mrs. Denny. CP 1825.

On January 24, 2013, the superior court conducted a hearing to consider the guardian's petition for instructions. 11 RP 1-38. The superior court issued a written ruling on January 25, 2013, which included

31 findings of fact, after considering extensive documentary evidence, CP 1845-6, and the competing arguments of the attorneys appearing for Richard Denny, Ohana, and Marianne Zak. CP 1845-1857, 11 RP 1-38. At the conclusion of the hearing, the superior court granted the guardian's petition, essentially approving its actions in response to Mrs. Denny's hospitalization and drug test and reiterating Ohana's authority regarding Mrs. Denny's healthcare and home care, subject to its duty under the 2009 guardianship order and RCW 7.70.065, to consult with Mrs. Denny on these matters. CP 1854.

The January 25, 2013 order also addressed Anderson's standing in the guardianship. *See* Findings of Fact 22 – 31, Conclusions of Law 8 – 12; 1 CP 1851-2, 1854-5. Unchallenged Finding of Fact 29 states: "Mr. Anderson's injection of himself in the guardianship of EllaNora Denny has not benefitted Mrs. Denny" and that "his involvement has significantly increased the Guardian's attorney fees, which are paid from Mrs. Denny's funds." CP 1852. This finding supported the following conclusions of law ("COL") and order:

> [COL] 11. Mrs. Denny's interests and retained rights are adequately represented by the Guardian, Mrs. Denny's children, and the superior court overseeing Mrs. Denny's guardianship. Even if Washington courts recognized 'next friend' standing in guardianship matters, this Court would not find Thomas Anderson to be an appropriate person for appointment as Mrs. Denny's 'next friend.' CP 1855.

> [COL] 12. Thomas Anderson had no authority to file an objection to these proceedings on behalf of Ella Nora Denny; therefore, that pleading should be stricken. CP 1855.....
>
> [Order] 9. Thomas Anderson is not entitled to copies of pleadings filed in this guardianship or to notice of matters pending in this guardianship as Mrs. Denny's 'next friend.' 1 CP 1856.

The superior court's January 25, 2013 order also addressed whether Mrs. Denny was entitled to engage counsel or have counsel appointed to represent her. The superior court reiterated that under the guardianship order Mrs. Denny retained the right to engage counsel only for estate planning purposes, reiterated its prior findings that she did not have the capacity to reinstate her right to engage counsel, and found that good cause was not established to appoint counsel for Mrs. Denny since her retained rights and welfare were adequately protected. CP 1851, 1853 (Finding of Fact 21; Conclusion of Law 3).

IV. ARGUMENT

A. The Standard Of Review.

The parties disagree on the standard of review. Appellants assume this Court will review the superior court's decisions under the *de novo* standard, including the many findings of fact that the superior court made in support of its rulings, because the record consists entirely of documentary evidence. Ohana agrees that questions of law, such as Anderson's standing to appeal, are determined *de novo.* However,

challenged findings of fact should be reviewed for substantial evidence, unchallenged findings of fact treated as verities on appeal and not reviewed, and the management of a guardianship reviewed for abuse of discretion, whether the record includes live testimony or not. In re Guardianship of Knutson, 160 Wn. App. 854, 863, 250 P.3d 1072 (2011) reviewed a guardianship case on a record comprised solely of documentary evidence as follows:

> We review challenged findings of fact for substantial evidence and the conclusions of law de novo. *Dodd*, 120 Wn. App. at 643. Unchallenged findings of fact are verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); see RAP 10.3(g). The management of the guardianship by the superior court is reviewed for abuse of discretion. RCW 11.92.010; *In re Guardianship of Johnson*, 112 Wn. App. 384, 387-88, 48 P.3d 1029 (2002).

There is no basis for diverging from the standard of review applied in In re Guardianship of Knutson.

Washington's Supreme Court has indicated that even with a purely written record, the substantial evidence standard is more appropriate in cases where the trial court reviewed large amounts of documentary evidence, weighed that evidence, resolved evidentiary conflicts and discrepancies, and issued written findings. In re Estates of Foster, 165 Wn. App. 33, 54, 268 P.3d 945 (2011) (citing Dolan v. King County, 172 Wn.2d 299, 310-311, 258 P.3d 20 (2011)). Dolan v. King County, 172 Wn.2d at 310, applied the substantial evidence standard to review the trial

court's findings of fact that were based solely on documentary evidence because the trial court had to weigh all the competing evidence, resolve evidentiary conflicts and discrepancies, and issue written findings of fact. In re Estates of Foster, 165 Wn. App. at 54, held that the substantial evidence standard was appropriate when reviewing decisions entered under Title 11 based solely on documentary evidence.

In re Guardianship of Cornelius, 181 Wn. App. 513, 326 P.3d 718 (2014) reiterated that the superior court's management of a guardianship is reviewed for abuse of discretion and an appellate court "heavily relies on the trial court's determination of what is in the best interest of the ward." *Id.* at 528, 536 (citing In re Guardianship of Pawling, 101 Wn.2d 392, 401, 679 P.2d 916 (1984)). Appellate courts defer to "the superior court's exercise of fact-finding discretion on appeal" even on documentary records, because the trial courts have a more extended opportunity to consider documentary evidence, hear arguments of and question counsel, and clarify conflicts in the record. In re Marriage of Dodd, 120 Wn. App. 638, 645, 86 P.3d 801 (2004) (upholding findings of fact in a child support modification case based on documentary record).

B. Response to Assignment of Error 1: Anderson Lacks Standing To Appeal As Mrs. Denny's "Next Friend" Because The Superior Court Found Him Unfit For This Role.

Anderson's Assignment of Error 1 contends: "The Superior Court

erroneously held that Washington does not recognize standing of a next friend." *Anderson Brf. at 3.* Anderson cites the oral comments made by Superior Court Commissioner Velategui during the January 24, 2013 court hearing, while disregarding the court's detailed written findings of fact, conclusions of law, and order. *Id; see also Anderson Brf. at 5.* Although in the absence of written findings, appellate courts may look to the trial court's oral decision to determine its reasoning, a trial court's oral ruling should not be used to impeach written findings and conclusions. City of Lakewood v. Pierce County, 144 Wn.2d 118, 127, 30 P.3d 446 (2001) (if findings of fact are incomplete, the appellate court may look to the trial court's oral decision to eliminate speculation concerning the legal theory upon which the trial court based its decision).

Anderson's citation to the oral ruling was improper in this case, where the superior court made 10 findings of fact and five conclusions of law regarding Anderson. The superior court left no doubt that its rejection of Anderson was based on Anderson's conduct in the case. CP 1852, CP 1855. Therefore, Anderson misrepresents the superior court's decision by asserting it held that Washington does not recognize next friend standing. There is no written conclusion of law saying this.

Anderson wrongly assumes that he has an absolute right to speak for Mrs. Denny notwithstanding the superior court's findings that his

conduct has been detrimental to Mrs. Denny. The United States Supreme Court clearly articulated in Whitmore v. Arkansas that "next friend" standing cannot be presumed, and that the party seeking this status has the burden of establishing their qualifications:

> Most important for present purposes, "next friend" standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another. ... First, a "next friend" must provide an adequate explanation -- such as inaccessibility, mental incompetence, or other disability -- why the real party in interest cannot appear on his own behalf to prosecute the action. ... Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest. **The burden is on the "next friend" clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.**

Whitmore v. Arkansas, 495 U.S. 149, 163-164, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990) (internal citations omitted; emphasis added). *See also* In re Guardianship of Cobb, 172 Wn. App. 393, 403, 292 P.3d 772 (2012) (the burden of proof is on the litigant seeking to vindicate the rights of another to establish the requirements for standing).

Anderson's unfitness could not be clearer on the record before this Court. He was not identified as a person interested in Mrs. Denny's welfare by the order that established the guardianship. He never filed a request for special notice in the guardianship. He never applied to be appointed to speak for Mrs. Denny as her "next friend." Unchallenged findings of fact establish that he engaged in litigation tactics that have

been detrimental to the guardianship estate. His participation in the guardianship was opposed by Mrs. Denny's daughter. CP 1486-90. Anderson violated procedural rules for filing motions (CP 637); failed to post bond; failed to pay the attorneys' fees judgment awarded to the guardianship estate; filed pleadings in violation of the superior court's prohibition; and misrepresented facts in his motion to remove the guardian (CP 1560). The superior court did not err in refusing to recognize Anderson's status as "next friend" in this context.

Recognition that the grandparents of a minor ward could serve as her "next friend" in a fee dispute does not redeem Anderson's standing. In re Guardianship of Ivarsson, 60 Wn.2d 733, 736, 375 P.2d 509 (1962) held that a minor ward's grandparents could serve as her "next friend," but there was never any claim that the grandparents were unfit or acting contrary to the best interests of the minor ward. When the superior court prohibited Anderson from filing any additional pleadings in the guardianship, it was based on specific findings that he was unfit to serve as "next friend" due to his conduct in the litigation. This was not error.

C. Response to Assignment of Error 2: The Superior Court Did Not Abuse Its Discretion When It Denied Anderson's Emergency Motion Based On Multiple Procedural Violations.

Anderson's Assignment of Error 2 contends: "The Superior Court erroneously denied Ward's motion for examination exclusively by the

health care professional whom she selected." *Anderson Brf. at 3.* Anderson cites to a Minute Order of the superior court entered on April 19, 2012. *Id.* (citing CP 637); *see also Anderson Brf. at 12-14.* The Minute Order that Anderson assigned error to denied the Emergency Motion to Enjoin Guardian on the following grounds:

> The presenting attorney has not signed the order. Date, room number or time were not completed in the order directing an opposing party to appear. Other: No notice was provided to additional parties to the case. CP 637.

The superior court did not err in denying Anderson's motion for failing to follow basic procedures. A pro se litigant must comply with all procedural rules and satisfy the same standards as an attorney. Batten v. Abrams, 28 Wn. App. 737, 739, 626 P.2d 984 (1981). *See also* State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987) (pro se defendants must conform to substantive and procedural rules and courts are under no duty to inform a pro se defendant of the relevant rules of law). Anderson presented the Emergency Motion to Enjoin Guardian "ex parte via the clerk." CP 1349. He did not schedule a hearing or file a hearing notice. CP 639. The guardian objected to the lack of notice on April 19, 2012. CP 638-639. But the procedural deficiencies were so obvious that the superior court *sua sponte* rejected Anderson's motion. CP 637. After the superior court rejected Anderson's Emergency Motion, he never refiled it,

and the superior court never ruled upon the objections to Dr. Eisenhauer. Rejecting a procedurally defective pleading is not a denial of due process.

Anderson's appeal of this issue is untimely under RAP 5.2(a). The Minute Order he complains about was entered April 19, 2012. Anderson filed his first notice of appeal July 18, 2012. CP 1530. Anderson also never appealed the order that required the updated evaluation by Dr. Eisenhauer, which was entered March 23, 2012. CP 612, 1530 – 1562.

The merits of Anderson's argument are frivolous. Anderson's "emergency motion to enjoin the guardian" from taking Mrs. Denny to the court-ordered evaluation by Dr. Eisenhauer was filed after the evaluation had already occurred. Mrs. Denny, Richard Denny, and the attorney seeking authority to represent Mrs. Denny were all present when the superior court ordered the updated evaluation by Dr. Eisenhauer on March 23, 2012. 2 RP 2, 23-7; CP 612. Nobody objected, or asked for a different evaluator. *Id.* Therefore, the evaluation occurred April 3, 2012, more than two weeks before Anderson's emergency motion to enjoin the evaluation. CP 1368-1377. Contrary to the declaration that Mrs. Denny purportedly signed on April 17, 2012 that objected to the evaluation by Dr. Eisenhauer, CP 1363, Dr. Eisenhauer's report reflects that Mrs. Denny was "agreeable to the evaluation." CP 1370, 1371.

Anderson erroneously asserts that the superior court violated RCW

11.88.045(4) by disregarding Mrs. Denny's preference in selecting Dr. Eisenhauer to conduct the reevaluation. *Anderson Brf. at 12 – 14.* RCW 11.88.045(4) provides in pertinent part:

> In all proceedings for **appointment** of a guardian or limited guardian, the court must be presented with a written report from a physician licensed to practice under chapter 18.71 or 18.57 RCW, psychologist licensed under chapter 18.83 RCW, or advanced registered nurse practitioner licensed under chapter 18.79 RCW, selected by the guardian ad litem. If the **alleged incapacitated person** opposes the health care professional selected by the guardian ad litem to prepare the medical report, then the guardian ad litem shall use the health care professional selected by the **alleged incapacitated person. The guardian ad litem may also obtain a supplemental examination.**

RCW 11.88.045(4) did not apply to the reevaluation of Mrs. Denny in 2012, because Mrs. Denny was adjudicated to be incapacitated in 2009. Persons subject to a limited or a full guardianship have been adjudicated to be incapacitated within the meaning of RCW Chapter 11.88, even in cases where they agreed to the appointment. In re Guardianship of Decker, 188 Wn. App. 429, 440, 353 P.3d 669, *rev. denied* 184 Wn.2d 1015 (2015). In 2009, the superior court ruled: "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. Because Mrs. Denny was not an *alleged* incapacitated person, the superior court was not required to comply with the selection procedures of RCW 11.88.045(4).

Anderson's due process analysis misses the mark. Ordering an evaluation of Mrs. Denny to determine whether to restore her right to engage counsel did not involve the deprivation of any rights. Here, the purpose of Dr. Eisenhauer's updated evaluation was to determine whether to reinstate Mrs. Denny's contractual right to engage counsel, which had been terminated when the guardianship was established in 2009. Moreover, under the order establishing the guardianship and RCW 7.70.065, Ohana had the authority to consent to the evaluation on behalf of Mrs. Denny, provided it considered her wishes. As discussed *supra,* Mrs. Denny did not state any objections to the evaluation when it was ordered during the court hearing she attended, and Mrs. Denny was "agreeable" to the evaluation when she met with Dr. Eisenhauer. The written objection Anderson procured (CP 1363) was not credible evidence that Mrs. Denny objected to the evaluation, because Mrs. Denny purportedly signed the statement in opposition after the evaluation had already occurred, not recalling the evaluation or that she had agreed to it. The superior court did not violate RCW 11.88.045(4) or due process by ordering Dr. Eisenhauer to conduct an updated evaluation of Mrs. Denny.

D. <u>Response To Assignment Of Error 3</u>: The Superior Court Did Not Abuse Its Discretion When It Declined To Reinstate Mrs. Denny's Right To Engage Counsel And Denied The Petition To Appoint Counsel For Her.

Anderson's Assignment of Error 3 contends: "The Superior Court

erroneously denied Mrs. Denny's motion for an attorney independent from the Guardian." *Anderson Brf. at 3.* Anderson assigns error to the superior court commissioner's decision dated May 16, 2012; however, the May 16, 2012 order was the subject of a motion for revision. Judge Sharon Armstrong denied Richard Denny's motion to revise the May 16, 2012 Order on September 7, 2012. CP 1414-1416. 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). 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). Anderson incorrectly assigned error to the court commissioner's ruling.

1. **The superior court correctly declined to reinstate Mrs. Denny's contractual right to engage counsel.**

The superior court made a number of unchallenged findings of fact, which establish that Mrs. Denny's cognitive functioning had worsened, that she remained highly susceptible to undue influence, that she was unable to recall written documents that she signed, and that she could not discern whether the influence of others is contrary to her own best interests. CP 986-7. These findings of fact should be treated as

verities on appeal, but if reviewed, are supported by substantial evidence including but not limited to Dr. Eisenhauer's evaluation. CP 1368-1377.

The evidence supporting the superior court's decision dates back to the inception of the guardianship. Richard Denny petitioned for guardianship because Mrs. Denny had Alzheimer's disease that made her unable to recall signing conflicting legal documents and placed her at risk of undue influence. CP 6-7. 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). The conflicting statements that Mrs. Denny made regarding Mark Wilson are a prime example of both concerns. 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. .... CP 815

Due to Mrs. Denny's inability to recall documents that she signed, her susceptibility to undue influence, her inability to discern whether influence by others is in her best interests, and the worsening of her cognition, the superior court correctly declined to reinstate any of Mrs. Denny's contractual rights, including the right to engage independent counsel.

2. The superior court correctly found that Mrs. Denny did not have the right to appointed counsel when it ruled on Mr. Wilson's petition.

Whether Mrs. Denny should have had counsel appointed to represent her interests is separate from the question of whether she should have been restored the right to engage counsel. Cutting through Anderson's discussion of retained rights, which begins with the Magna Carta, *Anderson Brf. at 15,* and focusing on more recent events relating to Mr. Wilson's petition,[4] Anderson ignores the fact that Mrs. Denny signed a declaration stating that she did not want Mr. Wilson to represent her. CP

[4] Anderson's discussion of guardianship law is radically flawed, and largely irrelevant to whether Mrs. Denny had the right to appointed counsel. For example, Anderson erroneously contends that "a court cannot proceed to impartially adjudicate a guardianship controversy[,]" *Anderson Brf. at 10*, and that making decisions in the best interests of incapacitated persons is a "prima facie breach of its [the superior court's] fiduciary duty as superior guardian," *Id.* at 12. The superior court's management of guardianships has been recognized for over a century. *See* In re Sall, 59 Wash. 539, 542, 110 P. 32 (1910). The substituted judgment standard codified at RCW 7.70.065 authorizes the guardian to consider the ward's best interests in making medical decisions if the guardian cannot in good faith discern what the ward would have wanted if competent. Raven v. Dept. of Social & Health Services, 177 Wn.2d 804, 818-9, 306 P.3d 920 (2013) (citing RCW 7.70.065). Anderson's misstatements of the law are too numerous, too confusing and too irrelevant to rebut individually, and Ohana's silence should not be construed as agreement with his misstatements.

815. This evidence supports unchallenged Finding of Fact 1.8 that there was no credible admissible evidence that Mrs. Denny wanted to have Mr. Wilson appointed to represent her. CP 986. Thus, the superior court did not err in denying Mark Wilson's petition to represent Mrs. Denny on May 16, 2012, or in affirming this decision on revision on September 7, 2012. Whether Mrs. Denny should have had other counsel appointed to represent her is discussed below.

Under Washington statutes and due process, the right to appointed counsel is not guaranteed to every incapacitated person who is subject to a guardianship. The right to an attorney is guaranteed to any *alleged* incapacitated person who wishes to have one appointed. Ms. Denny is not alleged to be incapacitated. She was adjudicated incapacitated in 2009, when she had independent appointed counsel of her choice. *See* In re Guardianship of Decker, 188 Wn. App. at 440. For persons who are adjudicated to be incapacitated already, Washington's guardianship statute provides that one shall be appointed where "**in the opinion of the court**, the rights and interests of an alleged or adjudicated incapacitated person cannot otherwise be adequately protected and represented." RCW 11.88.045(1)(a). Under certain circumstances involving convulsive therapy, psychosurgery, and psychiatric procedures that restrict physical movement, appointment of counsel is mandated by statute. RCW

11.92.043(5). 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).[5]

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 530 (citing Attorney Gen.'s Office, Pub. Counsel Section v. Utilities & 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

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[5] *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).

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.

When the superior court denied Mrs. Denny's petition to appoint counsel on May 16, 2012, it applied the correct law, and its legal conclusions were supported by unchallenged findings of fact that are supported by substantial evidence. In addition to determining that the evidence did not support reinstating the right to engage counsel, the

superior court considered whether there was a need for appointed counsel. 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. After considering not only Mrs. Denny's capacity to engage counsel, but her need for appointed counsel, the superior court found as follows:

> [FOF] 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.
>
> [FOF] 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.

These unchallenged findings of fact are supported by substantial evidence. At the time the superior court considered whether to appoint counsel for Mrs. Denny on May 16, 2012, no matters were currently pending before it other than the appellants' motions to reconsider the order approving the Second Annual Report and Anderson's motion to remove Ohana. As discussed below in response to Assignments of Error 4 and 5, these motions did not implicate any fundamental interests requiring the appointment of counsel either under RCW 11.88.045(1) or due process.

E. Response to Assignment of Error 4: The Superior Court Did Not Abuse Its Discretion By Denying Anderson's Motion to Reconsider The Order Approving Ohana's Second Annual Report.

Anderson's Assignment of Error 4 contends: "The Superior Court erroneously granted an order approving Guardian's annual report for 2011, and denied motions for reconsideration." *Anderson Brf. at 3.* Anderson fails to demonstrate that the superior court abused its discretion in denying his motion to reconsider the order approving the second annual report.

1. The trial court was not required to consider Anderson's arguments on reconsideration.

The guardian's second annual report (the "Report") was approved without opposition on March 29, 2012, after the superior court gave Richard Denny an extension of time to file a response. 2 RP 25-6, CP 612, 616-20. At the time that the superior court reviewed and approved the guardian's second annual report on March 29, 2012, Anderson had not yet appeared in this case. The superior court commissioner denied the motion to reconsider the order approving the annual report on October 22, 2012. CP 1459-1462.

Having failed to offer timely objections to the Report when it was first considered by the superior court, Anderson's motion for reconsideration was properly denied. The trial court's decision on a motion for reconsideration is discretionary. Fishburn v. Pierce County Planning and Land Services Dept. , 161 Wn. App. 452, 250 P.3d 146

(2011). Courts may decline to consider new arguments or new evidence on reconsideration where those arguments or evidence were available earlier. *See, e.g.,* River House Development Inc. v. Integrus Architecture, P.S., 167 Wn. App. 221, 272 P.3d 289 (2012); Eugster v. City of Spokane, 121 Wn. App. 799, 91 P.3d 117 (2004). The superior court did not abuse its discretion by denying Anderson's motion to reconsider the order approving the Report.

2. The Second Annual Report did not curtail any of Mrs. Denny's retained rights.

The guardian's 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. Anderson's contention that the Report in some way curtailed Mrs. Denny's retained rights is not supported by the record.

3. The Second Annual Report did not infringe upon Mrs. Denny's right to interstate travel.

Anderson asserts that the Report infringed upon Mrs. Denny's fundamental right to interstate travel. This argument is legally and factually erroneous. 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.*

To facilitate Mrs. Denny's future travel, the Guardian raised the issue in Paragraph 23 of its Second Annual Report dated March 6, 2012:

> The guardian **requests authority to allow Mrs. Denny to travel wherever she chooses**, and to pay Mrs. Denny's transportation and lodging costs from the guardianship estate, as long as the following criteria are met: 1) she is accompanied by someone whose minimal qualifications include a Certified Nursing Assistant and verifiable experience with dementia patients; 2) the guardian's authority is recognized by the destination state; 3) a sufficiently detailed itinerary has been provided to allow the guardian to know where she will be and how to contact her at all times during the trip; and 4) the guardian has been provided at least one week of notice prior to in-state travel, and at least two months of notice prior to out-of-state travel. CP 441 (emphasis added).

On March 29, 2012, the superior court approved the Guardian's plan:

> 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. 1 CP 618.

The criteria for authorizing travel did not violate Mrs. Denny's retained rights. Mrs. Denny's retained rights are set forth in just nine lines of the 15-page order appointing Ohana guardian, and do not mention travel. CP 21. Meanwhile, the guardian's authority is defined as

including "all powers and responsibilities of a Guardian of the person," CP 22, except as "limited by the language of this Order." CP 22. Furthermore, Ohana as full guardian of the estate had the authority to pay for travel-related expenses. Having lost the right to enter into any contractual relations under the 2009 Order, Mrs. Denny did not have the legal capacity to make travel or lodging arrangements. The travel criteria were appropriate to ensure Mrs. Denny's safety, did not prohibit Mrs. Denny from traveling, and were not an abuse of the superior court's discretion.

4. Mrs. Denny did not have the right to appointed counsel relating to the Second Annual Report.

Mrs. Denny did not have the right to appointed counsel to represent her regarding the petition to approve the annual reports. There is no statutory right to counsel to review the annual reports that guardians must file in every case. *See* RCW 11.92.040(2) .043(2). The Report did not concern 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.*

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.

Finally, by statute, "in all cases where the right to counsel attaches," "legal representation must be provided for indigent persons and persons who are indigent and able to contribute, consistent with the constitutional requirements of fairness, equal protection, and due process[.]" RCW 10.101.005. Thus, if Mrs. Denny had the right to appointed counsel to represent her in response to Ohana's Second Annual Report, which presented nothing out of the ordinary, that right would exist for every incapacitated person, regardless of ability to pay.

F. <u>Response to Assignment of Error 5</u>: The Superior Court Did Not Abuse Its Discretion By Denying Anderson's Motion To Remove Ohana.

Anderson's Assignment of Error 5 contends: "The Superior Court erroneously denied Ward's motion to replace Guardian and modify guardianship." *Anderson Brf. at 3.* Anderson assigns error to the

superior court commissioner's decision dated June 19, 2012; however, the June 19, 2012 order was the subject of a motion for revision. Judge Sharon Armstrong denied the motion for revision on September 7, 2012. CP 1414-1416. Anderson incorrectly assigned error to the court commissioner's ruling. *See* State v. Ramer, 151 Wn.2d at 113; Guardianship of Decker, 188 Wn. App. at 438.

1. **The superior court had broad authority to deny Anderson's motion to remove Ohana and no right to counsel attached.**

RCW 11.88.120 codifies the superior court's broad authority to respond to complaints levied against guardians and rule on motions to remove guardians. Amended in 2015, the current and prior version of the statute recognized the authority of superior courts to dismiss meritless petitions that are brought to harass guardians. Under the current procedures, the superior court may "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[.]" RCW 11.88.120(2)(c)(iii).

Anderson's reliance on In re Disciplinary Proceeding Against Petersen, 180 Wn.2d 768, 329 P.3d 853 (2014) is misplaced. *Anderson*

Brf. at 25. Petersen was as its title indicates a disciplinary proceeding brought against a guardian. The present case is not a disciplinary action taken against the guardian, but an appeal of the superior court's management decisions in overseeing the guardian's conduct, which are reviewed for abuse of discretion. *See* In re Guardianship of Cornelius, 181 Wn. App. at 528; In re Guardianship of Lamb, 173 Wn.2d 173, 183, 265 P.3d 876 (2011). The superior court did not make findings of deficiency against Ohana, but repeatedly affirmed that Ohana was performing its fiduciary duties properly. Petersen also is dissimilar because it involved allegations of inattention and inactivity by the guardian, *id.* at 775-776, whereas here, the appellants are complaining that Ohana has been overzealous in its role. Furthermore, unlike the guardian in Petersen, *id.* at 779, Ohana has consulted Mrs. Denny regarding her healthcare preferences, according to the findings of fact made by the superior court. CP 2005 (FOF 10). The only relevant similarity that can be drawn between Petersen and the present case is that the appellant like Anderson failed to properly assign error to the findings of fact. *Id.* at 780.

The superior court did not err in denying Anderson's motion to remove Ohana without appointing counsel to represent Mrs. Denny. As discussed *supra* and in other briefs filed by Ohana, the guardianship statute required counsel only if Mrs. Denny's "rights and interests" could

not otherwise be adequately protected and represented. RCW 11.88.045(1)(a). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). The "particular situation" presented here was a motion that was found to be based on false representations (CP 1560), assertions that were not well grounded in fact or law (CP 1561), and contrary to Mrs. Denny's best interests (CP 1560). The superior court did not violate RCW 11.88.045(1)(a) or due process by denying Mr. Anderson's motion to remove Ohana without appointing counsel for Mrs. Denny.

2. Anderson fails to demonstrate any abuse of discretion by the trial court.

The superior court considered Anderson's motion on the merits after Ohana filed a response, CP 997 – 1015, and properly denied the motion without conducting an evidentiary hearing. CP 1163-8. In its unchallenged findings and conclusions, the superior court noted that Anderson had misrepresented facts to the superior court in support of his motion, CP 1164, and cited this misrepresentation as a basis for requiring Anderson to reimburse the guardianship estate for its attorneys' fees incurred responding to his motion. CP 1166. The superior court also held that "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.

The superior court's unchallenged findings are supported by substantial evidence. The record includes declarations from Marianne Zak and Timothy Austin, which support the finding that Anderson had misrepresented their statements to him. CP 1016-1023. Mr. Austin stated in pertinent part: "I did not make the statements that Mr. Anderson attributes to me at page 19 of the Motions. Specifically, I did not tell Mr. Anderson that the Guardian has not implemented the estate plan that I crafted for Ms. Denny. ... Mr. Anderson misrepresents both the estate plan that I crafted for Ms. Denny and the tax consequences of the plan." CP 1016-7. Ms. Zak stated in pertinent part: "I do not agree that a replacement guardian is necessary or appropriate for my mother. ... I simply do not see how his Motion and efforts to find a replacement guardian can improve my mother's quality of life. Thus, it was false and misleading for him to tell the Court on April 9, 2012, that the 'family' has unanimously agreed to a replacement guardian." CP 1022-3.

Anderson emphasizes the incorrect letters of guardianship that were in effect for 10 months from June 17, 2011 through April 9, 2012, and asserts that this "fraudulent misrepresentation" required that the superior court remove Ohana. *Anderson Brf. at 26.* 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 error was corrected in the Letters of Limited Guardianship of the Person issued April 9, 2012. CP 1768. 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 to Mrs. Denny's medical providers that Anderson complains about 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. The superior court did not abuse its discretion in declining to remove Ohana based on the incorrect letters of guardianship.

Anderson continues to manipulate the statements of Ohana's attorney Mr. Keller, in an effort to find evidentiary support for the contention that Ohana has attempted to curtail Mrs. Denny's retained rights. In one of the medical records that Anderson failed to seal, Mr. Keller accurately stated that "Pt. [patient] can ask her children to be involved in healthcare. Children can make appt. [appointment] + [and]

attend appt. if pt. so desires. Children cannot make decisions about healthcare – or meds [medications] she takes, operations she has, etc. Only guardian can do that." CP 1329. The only portion of the record quoted by Anderson was "Only guardian can do that." Taken out of context, Anderson incorrectly cites this passage as evidence that Ohana attempted to restrict Ms. Denny's rights regarding her healthcare. *Anderson Brf. at 27.*

Anderson relies on evidence the superior court found to be unreliable, specifically typed documents bearing Mrs. Denny's signature. *Anderson Brf. at 27.* 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],[6] 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.

These findings are supported by substantial evidence, in particular the

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

psychological report from Dr. Eisenhauer, CP 1368-77, as well as Mrs. Denny's history of signing conflicting legal documents prepared by others that she could not recall. CP 6-7. In summary, Anderson fails to demonstrate that the superior court abused its discretion when it denied his motion to remove Ohana.

G. Anderson Should Be Ordered To Reimburse Mrs. Denny's Guardianship Estate For Its Attorney Fees And Costs.

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). Anderson's brief raised frivolous arguments that disregarded established law and misrepresented the trial court's rulings. He should be ordered to reimburse the guardianship estate for the attorney fees incurred responding to his brief.

V. CONCLUSION

The appellant Thomas Anderson's standing to appeal as Ella Nora Denny's "next friend" should not be recognized by this Court. The trial court's rulings should be affirmed in all respects. The equities also support ordering the appellant Thomas Anderson to reimburse Ella Nora Denny's guardianship estate for the reasonable attorney fees and costs incurred responding to his brief.

Respectfully submitted this 12th day of February 2016.

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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 February 12, 2016, I caused a copy of Brief of Respondent Guardian Ohana Fiduciary Corporation in Response to "Brief of Appellant Ella Nora Denny" Filed by Thomas Anderson; and this Declaration of Service, to be served on counsel of record for Richard Denny and *pro se* party Thomas Anderson, via electronic mail and regular U.S. mail, postage prepaid, and *pro se* party Marianne Zak, via electronic mail.

/////

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Signed at Seattle, Washington on February 12, 2016.

THOMPSON & HOWLE

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