

**NO. 70312-9-I**

(consol. with No. 70610-1-I; linked with No. 69117-1-I)

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

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

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**BRIEF OF APPELLANT ELLA NORA DENNY**

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**SUPERIOR COURT RECORD**

Appeal-1: CP1 1-2021.

Appeal-2: CP2 1-491.

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

RP2: Hearing March 23, 2012.

RP3: Hearing March 29, 2012.

RP4: Hearing April 24, 2012.

RP5: Hearing April 27, 2012.

RP6: Hearing May 10, 2012.

RP7: Hearing May 16, 2012.

RP8: Hearing May 31, 2012.

RP9: Hearing August 24, 2012.

RP10: Hearing September 14, 2012.

RP11: Hearing January 24-25, 2013.

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

3. Whether the Superior Court erroneously charged Ward's estate for OFC's non-guardianship costs and fees of defending Mrs. Denny's claims.

4. Whether the Superior Court erroneously allowed Guardian budget items to be charged against Ward's estate without limit.

#### **IV. STATEMENT OF THE CASE**

Adopted by reference is the statement of the case set forth in the Appeal-1 brief of Richard Denny, at pp. 6-26; and the Appeal-2 brief of Richard Denny at pp. 4-8. To minimize repetition and increase clarity, argument on each question begins with relevant statements of the case.

#### **V. DISCUSSION**

##### **A. Standards of Review**

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

##### **B. Process Due Mrs. Denney**

Adopted by reference is Appeal-1 brief of Richard Denny, pp. 31-39 ¶¶3-5, and 42-44 ¶8; and Appeal-1 brief of Ella Nora Denny, pp. 5-12 ¶C.

**C. The Superior Court erroneously modified the guardianship and effected additional loss of Mrs. Denney's retained rights to control health care, by authorizing OFC to become full guardian of the person for health care.<sup>1</sup>**

The establishing guardianship order explicitly allows Mrs. Denney to exercise her adjudicated capacity of the person, to contract with health care providers. [CP1 21 ¶2.2b]. The erroneous advisory order granted on 25 Jan. 2013 [CP1 1845-1857] effected additional loss of Ms. Denny's retained rights, in violation of RCW 11.88.010(2). It exceeding the lost rights specifically set forth in the order establishing limited guardianship of the person. For additional loss of a legal right, an additional limited guardianship proceeding must be commenced in adherence with the process mandated under RCW 11.88.030, RCW 11.88.040, RCW 11.88.045, et. seq. Adopted by reference is Appeal-1 brief of Ella Nora Denny, *Presumptions*, pp. 6-8.

The Superior Court continued the long standing pattern of entering orders in violation of the procedural process due Mrs. Denny, which effect additional loss of her retained rights. Mrs. Denny was erroneously denied a full hearing on alleged further incapacity, and an independent attorney to protect her retained rights against continued

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1. Adopted by reference is Appeal-1 brief of Richard Denny, pp. 26-30 ¶1, pp. 31-37 ¶¶3-4, pp. 41-44 ¶¶7-10, p. 46 ¶12.

infringement. Adopted by reference is Appeal-1 brief of Ella Nora Denny, pp. 12-14 ¶G.; pp. 18-23 ¶F.

Acting as superior guardian [CP1 1854 ¶7], the Superior Court breached its fiduciary duty and neglected the applicable legal standard for decision making. Disregarding the applicable standard of substituted judgment, OFC stated, “it is appropriate for us to be here to ask what the Court thinks would be in Ms. Denny’s best interest.” [RP11 26:16-17]. The Superior Court erroneously applied the “best interest” standard, instead of the correct “substituted judgment standard” in reaching its decision. [CP1 1850 ¶¶19-20, 1855 ¶¶1-2, 1865 ¶7]. Adopted by reference is Appeal-1 brief of Ella Nora Denny, *Superior Guardian*, pp. 10-11; *Decision Making*, pp. 11-12; and Appeal-1 brief of Richard Denny, pp. 42-44 ¶8.

The Superior Court erroneously exercised plenary authority under TEDRA at RCW 11.96A.020, to 100% abrogate Ms. Denny’s retained right to control her health care, and establish OFC as full guardian of the person for health care. [CP1 1854 ¶7; RP11 33:20 - 34:15]. “[N]o one other than the guardian has any right with regard to making any requests regarding health care treatment for Ms. Denny.” *Id.*

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

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

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

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

The Superior Court was without legal authority to exercise plenary authority over Mrs. Denny’s retained rights of the person, under any provision of TEDRA, RCW 11.96A.

Also as superior guardian without plenary power over Mrs. Denny, the Superior Court should adhere to the CPG Regs. For the above reasons, the court’s advisory order was also contrary to the following:

CPG Reg. 403.1, “The civil rights and liberties of the incapacitated person shall be protected. The independence and self-reliance of the incapacitated person shall be maximized”;

CPG Reg. 403.3, “placing the least restrictions on the incapacitated person’s freedom, rights, and ability to control his or her environment.”;

CPG Reg. 405.1, “The primary standard for decision-making is the Substituted Judgment Standard based upon the guardian’s determination of the incapacitated person’s competent preferences.”

The Superior Court’s order culminated a protracted campaign of self serving OFC infringement upon Mrs. Denny’s retained rights of the person — creating more guardianship work, and ultimately generating more fees.

**D. The Superior Court erroneously modified the guardianship and effected additional loss of Mrs. Denney’s retained rights to travel.**

The Superior Court erroneously ordered the additional loss of Mrs. Denney’s rights, by imposing even more travel restrictions than in the prior year. [CP2 320 ¶3.8]. Compare with [CP1 618 ll. 13-17; 440-441; 623 l. 19 - 624 l. 16]. Loss of any right to travel was not “specifically set forth in the court order establishing [the] limited guardianship” of the person. [CP1 21-31]. A new proceeding was not commenced to effect any loss of Mrs. Denny’s right to travel. See, Appeal-1 brief of Ella Nora Denny, Process Due, pp. 5-11 ¶C.

**E. The Superior Court erroneously charged Ward’s estate**

**for OFC's non-guardianship costs and fees of defending Mrs. Denny's claims.**

Without any explicit finding or conclusion, the Superior Court effectively awarded OFC costs and fees of attorney Carol Vaughn, for defending OFC against Mrs. Denny's claims of independent OFC conduct outside the scope and authority of the guardianship. [CP2 321 ¶¶3.11, ¶¶3.14-15]. The order allowed OFC to withdraw costs and fees from Ward's estate, with no due process whatsoever. As in all other matters, Mrs. Denny was denied any hearing through an attorney independent from OFC. The court did not identify the legal standard which it applied. Thus, it may be yet another erroneous application of plenary power under RCW 11.96A. Adopted by reference is Appeal-1 brief of Anderson, pp. 12-20 ¶¶E-H.

Application of RCW 11.92.180 was explained, *In re Guardianship of Adamec*, 100 Wn.2d 166, 179, 667 P.2d 1085 (1983):

The statute authorizes an award of fees only for "services as guardian." The litigation in this case, although occurring in the context of guardianship proceedings, was not a part of [guardian] Watkins' services on behalf of [ward] Mrs. Adamec. The litigation was generated by a transaction entered into by Watkins in his personal capacity, and not as guardian of [ward] Mrs. Adamec. In defending the action, [guardian] Watkins was defending his own interests rather than those of [ward] Mrs. Adamec. The fees and costs were therefore not incurred in respect of his services as guardian.

“First, guardians must work for the individualized best interests of each ward.” *In re Guardianship of Lamb*, 173 Wn.2d 173, 191, 265 P.3d 876 (2011). “Second, courts allow guardianship fees only when the guardian’s work provides a benefit to the guardianship.” *Id.* “Third, a court may allow guardianship fees only where there is evidence in the record to justify compensation from the ward’s estate.” *Id.*, at 192. “[A] guardian may be compensated only for expenditures actually made on behalf of the ward.” *Id.*, at 192. “It is the duty of the trial court in such a case to include in its findings the specific amounts it finds to have been so expended so that they can be challenged on appeal.” *Id.*

Also explained, *In re Guardianship of McKean*, 136 Wn. App. 906, 918, 151 P.3d 223 (2007); citing, *In re Guardianship of Hallauer*, 44 Wn. App. 795, 800, 723 P.2d 1161 (1986):

[T]he court may not award fees simply on the basis of work performed. Rather, the court must determine the need for the work done and whether it benefited the guardianship.

The concept is confirmed by, 1 Restatement (Second) Trusts, 618, § 245 cmt. a (1959) (Expenses Not Properly Incurred):

a. No benefit conferred. If the trustee exceeds his powers in incurring an expense and no benefit is conferred thereby upon the trust estate, he is not entitled to indemnity.

“Where a guardian has been unfaithful in his trust, whether by willful act or indifference, it has been well established in this state that he is

not entitled to compensation.” *In re Guardianship of Carlson*, 162 Wash. 20, 29, 297 P. 764 (1931).

The Superior Court erroneously awarded costs and fees to OFC, without considering, let alone satisfying, any of the applicable standards. As a matter of law, OFC is not entitled to charge Ward’s estate for defence of its conduct independent from the guardianship; to protect its individual interests; or for conduct not directly benefitting Ward. Remaining in place as guardian is in the interest of Ohana, not Mrs. Denny.

**F. The Superior Court erroneously allowed Guardian budget items to be charged against Ward’s estate without limit.**

The Superior Court order supports a conclusion that OFC’s long term pattern of conduct has been a self serving effort to increase fee revenue, by infringing Mrs. Denny’s retained rights in order to create more work [CP2 319 ¶3.3]:

The guardian’s proposed budget set forth at Paragraph 15 of the guardian’s report is hereby approved, with the continuing clarification that the budget items marked “as needed,” “as incurred” and “as authorized” are not subject to the \$15,000 per month limit on application of income to expenses.

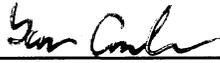
The Superior Court, as superior guardian, has not disciplined and deterred OFC from infringing upon Mrs. Denny’s retained rights. Instead, it has rewarded OFC by unlocking the coffers of Ward’s estate, to charge without limit.

**VI. CERTIFICATION OF SERVICE**

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

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

Dated: 30 Nov. 2015  
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Signed:   
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