

No. 70312-9-I (linked w/ 69117-1-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Richard Denny and Thomas Anderson, Appellants,

v.

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

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

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I. INTRODUCTION

The superior courts have authority and responsibility to oversee guardianships. Wash. Const. art. IV §6; RCW 11.96A.040(1); RCW 2.08.010; O’Connell v. Conte, 76 Wn.2d 280, 286, 456 P.2d 317 (1969). The superior court’s authority in the guardianship of Ella Nora Denny (Mrs. Denny) did not end in July 2012 when the appellants Richard Denny (Richard) and Thomas Anderson (Anderson) began appealing every order entered by the trial court.¹ Court Commissioner Mary Neel ruled on March 13, 2013: “The guardianship of Ms. Denny is ongoing, and the trial court will continue to enter orders.” 1 CP 371.² The respondent guardian Ohana Fiduciary Corporation (Ohana) respectfully requests that this Court affirm the orders entered by the superior court on April 1, 2013, May 23, 2013 and June 26, 2013, and award the guardianship estate its reasonable attorneys’ fees and costs on appeal.

II. RESTATEMENT OF THE ISSUES

The issues are properly stated as follows:

- A. Should this Court review the record *de novo*, reweigh the evidence, and ignore the superior court’s findings of fact?

¹ See Court of Appeals No. 69117-1-I (*Denny I*).

² “1 CP” refers to the Clerk’s Papers for the linked appeal No. 69117-1-I. “2 CP” refers to the Clerk’s Papers for appeal No. 70610-1-I.

- B. Did Richard divest the superior court of jurisdiction to rule on issues arising in this ongoing guardianship by appealing prior rulings?
- C. Did the superior court abuse its discretion by finding that the Denny Resources LLC is not an asset of the guardianship estate and by maintaining the \$100,000 bond?
- D. Did the superior court abuse its discretion by approving Ohana's annual report relating to Mrs. Denny's welfare?
- E. Did the superior court abuse its discretion by finding there was not good cause to let Richard conduct discovery after cautioning his attorney about filing pleadings critical of Mrs. Denny's daughter without reasonable foundation?
- F. Did the superior court lack authority to manage its docket and protect the guardianship estate by prohibiting Richard from filing new pleadings until he pays outstanding attorney fee judgments?
- G. Did the superior court's rulings implicate any constitutional or statutory interests justifying appointment of counsel?

III. RESTATEMENT OF THE CASE

A. The Numerous Issues Appealed In 2012 Are Still On Review.

Between July 18, 2012 and February 15, 2013, Anderson and Richard appealed 16 orders of the superior court, which are still on review.

1 CP 1530-1562, 1566-1567, 1570-1584, 1585-1628, 1629-1674, 1675-

1685, 2000-2014. The numerous notices of appeal and amended notices of appeal were consolidated and remain pending under appellate cause number 69117-1-I (*Denny I*). See *Appendix 1*.

B. The Superior Court Approved The Guardian's Third Annual Report After A Contested Hearing On April 1, 2013.

On April 1, 2013, the superior court held a hearing to consider Ohana's Third Annual Report, which was filed pursuant to RCW 11.92.040(2)³ and .043(2),⁴ covering the period January 1, 2012 through December 31, 2012. 2 CP 1 – 263; 1 RP⁵ 1 – 47. The contested hearing lasted 55 minutes and was attended by Richard, his attorney, the attorney for Mrs. Denny's daughter Marianne Zak, Ohana's Vice President, and Ohana's attorney. 1 RP 2-3.⁶ The superior court considered over 300

³ RCW 11.92.040(2) requires guardians of the estate to "file annually ... a written verified account of the administration for court approval," which shall include an accounting of the property, income and expenditures of the guardianship estate.

⁴ RCW 11.92.043(2) requires guardians of the person to "file annually ... a report on the status of the incapacitated person," which shall include a report of the incapacitated person's residential changes, services or programs received, medical status, mental status, changes in functional abilities, activities of the guardian, recommended changes, and identification of professionals who have assisted the incapacitated person.

⁵ "1 RP" refers to the Verbatim Report of Proceedings for the hearing conducted April 1, 2013. "2 RP" refers to the Verbatim Report of Proceedings for the hearing conducted June 26, 2013.

⁶ See Respondent's Supplemental Designation of Clerk's Papers, Sub No. 348. An errata sheet with citations to the clerk's papers will be filed upon receipt of the index from the superior court.

pages of documentary evidence, 2 CP 3 – 311, and competing arguments from three attorneys about the evidence presented. 1 RP 1 – 47.

The documentary evidence considered by the superior court at the April 1, 2013 hearing consisted of: Ohana’s report and supporting petition (2 CP 3 – 29), Ohana’s itemization of receipts and disbursements, and balance sheet (2 CP 30 – 40), Ohana’s declaration of activities and billing records (2 CP 42 – 186), Ohana’s attorneys’ billing records and fee declarations (2 CP 187 – 261), Richard’s Objections to Guardian’s Petition for Approval of Third Annual Report (2 CP 264 – 271), Ohana’s Reply to Richard’s Objections (2 CP 272 – 280), Objections filed by Ms. Zak to Richard’s Objection (2 CP 281 – 286), Richard’s “Memo of Law Regarding 20-Day Notice Requirement of RCW 11.96A.110(1) (2 CP 287 – 291), the Affidavit of Mrs. Denny’s estate planning attorney Timothy L. Austin (2 CP 292 – 304), and Ohana’s “Memo of Law Regarding Notice Requirements in Guardianships” (2 CP 307 – 311).

The issues addressed at the April 1, 2013 hearing included:

1. Jurisdiction. Richard orally objected to the superior court’s ruling on the Third Annual Report when issues relating to the Second Annual Report were on appeal. 1 RP 12-15. The superior court overruled Richard’s objection finding that it had ongoing jurisdiction over Mrs. Denny’s guardianship and that approval of the Third Annual report did

not affect the issues on appeal. 1 RP 16, 44.

2. Caregiver Budget. Richard objected to paying a live-in companion caregiver for Mrs. Denny. 1 RP 16-28, 2 CP 265-266. The superior court overruled Richard's objection to paying for Mrs. Denny's caregiver based on Mrs. Denny's documented needs. 1 RP 22, 25-26.
3. \$100,000 Bond. Richard requested that the superior court consider whether Ohana's \$100,000 bond was adequate in light of the fact it managed the checking account for the Denny Resources LLC ("DR LLC") and made aggregate distributions from the LLC to Mrs. Denny totaling approximately \$333,000 in 2012, as reflected in the guardian's annual report. 2 CP 31, 266; 1 RP 28-29. As will be discussed in more detail *infra*, Mrs. Denny owns 64.29% of the units of DR LLC (1 CP 136, 2 CP 274), which is a holding company for three limited liability companies formed prior to the guardianship that each own an apartment building. 1 CP 62, 136, 145. The superior court approved Ohana's management of DR LLC and distribution of LLC income in 2012. 1 CP 438, 616, 618. In its Third Annual Report, Ohana reported DR LLC distributions to the guardianship estate, 2 CP 19, 31, 44, and the balance of the DR LLC checking account (\$51,000), of which 64.29% or \$32,788.71 was Mrs. Denny's share. 2 CP 38-39. The superior court found that the \$100,000 bond was adequate,

considering the unblocked guardianship funds of \$73,686.85 (2 CP 5, 19, 37), plus Mrs. Denny's 64.29% share of the DR LLC checking account (\$32,788.71). 1 RP 30; 2 CP 315, 318.

4. Estate Planning Attorney Fees. Richard objected to the fees requested by Mrs. Denny's estate planning attorney Timothy Austin. 1 RP 32-33; 2 CP 266-7. The superior court approved the fees. 1 RP 33; 2 CP 321.
5. Accusations Against Mrs. Denny's Daughter. Richard objected to Ohana's decision not to pursue a protection order against Marianne Zak after Mrs. Denny tested positive for cocaine in December 2012. 2CP 267-269. The superior court found Ohana's response was appropriate because the police investigation was inconclusive, the evidence indicated that Richard may have been responsible for the ingestion, and the guardian properly addressed the risk to Mrs. Denny by hiring a 24-hour live-in caregiver. 1 RP 20, 43.
6. Ms. Zak's Request to Sanction Richard. Ms. Zak requested that the superior court sanction Richard for accusing her of wrongdoing without an evidentiary basis. 1 RP 34-41, 2 CP 281-285. The superior court denied sanctions, but warned Richard's attorney not to file pleadings without conducting a reasonable investigation. 1 RP 45.
7. Request for Discovery. Richard's attorney asked permission to conduct discovery. 2 CP 265, 1 RP 37, 45. The superior court denied

the request for discovery, finding “[t]here is nothing here that warrants a trial.” 1 RP 38.

8. Conflict of Interest. Richard requested that the superior court remove Ohana’s attorney Thomas Keller because of an alleged conflict of interest.⁷ 2 CP 269; 1 RP 31. The superior court denied this request finding there was no conflict of interest. 1 RP 32.
9. Counsel for Mrs. Denny. Richard objected to the superior court ruling on the Third Annual Report without appointing counsel for Mrs. Denny. 2 CP 269. The superior court overruled this objection, and noted this was one of the issues on appeal. 1 RP 44.
10. Incorporation of Oral Ruling. The superior court incorporated its oral ruling into the written order entered April 1, 2013. 1 RP 45; 2 CP 322.

After considering the documentary evidence and competing arguments described above at the April 1, 2013 hearing, the superior court entered the written Findings of Fact, Conclusions of Law, and Order Approving Third Annual Report of Limited Guardian of the Person and Full Guardian of the Estate and Authorizing Payment of Fees, Costs and Other Expenses (the “April 1, 2013 Order”). 2 CP 312-323. Specific findings are discussed in the argument section of this brief.

⁷ Richard had previously made the same allegation only to withdraw it. On June 6, 2012, Richard represented to the superior court through his attorney: “Richard withdraws the objection that Mr. Keller or OFC [Ohana] have a conflict of interest[.]” 1 CP 1086.

C. The Superior Court Denied Richard’s Request To Reconsider The Results Of The April 1, 2013 Hearing And Awarded Attorneys’ Fees To The Guardianship Estate.

Richard moved for reconsideration of the April 1, 2013 Order, asserting that the superior court lacked authority under RAP 7.2 to rule on Ohana’s Third Annual Report due to the pendency of *Denny I*. 2 CP 328-338. Ohana filed a response at the request of the superior court. 2 CP 355 – 386. Marianne Zak responded separately that Richard’s “delays and multiple appeals are not in the best interest of Ella Nora Denny” and expressed “grave concerns about the extent to which he may be manipulating and influencing their mother.” 2 CP 389-90.

The superior court denied the motion for reconsideration and ordered Richard to reimburse the guardianship estate for the attorney fees incurred responding to his motion. 2 CP 404-408. The superior court made 17 additional unchallenged findings of fact in support of its ruling:

There was a lack of candor to the Court in the failure to disclose the Court of Appeals Notation Ruling.⁸ There was a lack of diligence in arguing that the April 1, 2013 Order changed the March 29, 2012 Order. The Motion to Reconsider review of the Guardian’s Third Annual Report was not in Mrs. Denny’s best interests, as the role of the Superior Court is to oversee the Guardian’s conduct. 2 CP 407-408.

⁸ The Notation Ruling referred to in the superior court order was Commissioner Neel’s Notation Ruling of March 6, 2013, which stated in pertinent part: “The guardianship of Ms. Denny is ongoing, and the trial court will continue to enter orders.” 1 CP 371.

D. The Superior Court Ordered Richard To Stop Filing New Pleadings Until He Paid The Attorney Fee Judgments He Owed The Guardianship Estate.

On June 26, 2013, the superior court conducted a hearing to consider Ohana's petition to approve the amount of its fees under the lodestar formula and to prohibit Richard from filing additional pleadings in the guardianship until he paid the outstanding attorney fee judgments he owed the guardianship estate. 2 CP 409-428; 2 RP 1 - 21. The contested hearing lasted 25 minutes, and was attended by Ohana's Vice President, Ohana's attorney, Marianne Zak's attorney and Richard's attorney.⁹

Evidence considered by the superior court at the June 26, 2013 hearing consisted of: Ohana's Petition for Order Approving Attorney Fees and Costs And For Order Prohibiting New Pleadings Until Judgments Are Paid (2 CP 411 – 416), Declaration in Support of Ohana's Attorney's Fees (2 CP 417 – 428), Marianne Zak's Response in Support of Ohana's Petition (2 CP 431 – 433), Richard's Response to Guardian's Petition for Order Approving Attorney Fees and Costs and for Order Prohibiting New Pleadings Until Judgments Are Paid (2 CP 434 – 437), and Ohana's Objection to Richard Denny's Untimely Response (2 CP 458 – 459).

After considering the evidence and competing arguments, the

⁹ See Respondent's Supplemental Designation of Clerk's Papers, Sub No. 382. An errata sheet with citations to the clerk's papers will be filed upon receipt of the index from the superior court.

superior court awarded the guardianship estate a judgment of \$10,355.98 against Richard, and prohibited Richard from filing any more pleadings until the new judgment of \$10,355.98 and prior judgment of \$9338.44 were paid. 2 CP 464-469. The superior court made 16 new unchallenged findings of fact, which are discussed in the argument section of this brief addressing Assignment of Error 6.

IV. ARGUMENT

A. The Standard Of Review For Management Of A Guardianship Is Not *De Novo*, Even When The Record Consists Of Documentary Evidence.

The superior court's orders should be reviewed for abuse of discretion, challenged findings of fact should be reviewed for substantial evidence, and unchallenged findings should be treated as verities on appeal. 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 applying a different standard of review in this case.

Richard's brief does not mention any standard of review and with only one

exception ignores the superior court's findings of fact.

The superior court orders on review dated April 1, 2013, May 23, 2013, and June 26, 2013 include more than 35 findings of fact, which should be given deference on appeal. 2 CP 312-323, 404-408, 464-469. In matters governed by the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, the trial court may enter findings of fact based on affidavits instead of live testimony, which are reviewed for substantial evidence. In re Estate of Hayes, 185 Wn. App. 567, 596-597, 342 P.3d 1161 (2015) (citing In re Estates of Foster, 165 Wn. App. 33, 55, 268 P.3d 945 (2011)). *See also* RCW 11.96A.100(7). TEDRA's procedural rules "apply to disputes arising in connection with estates of incapacitated persons unless otherwise covered by chapters 11.88 and 11.92 RCW." RCW 11.96A.080(2). 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 an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued written findings." In re Estates of Foster, 165 Wn. App. at 54 (citing Dolan v. King County, 172 Wn.2d 299, 310-311, 258 P.3d 20 (2011)).

The superior court's unchallenged findings of fact should be treated as verities on appeal. Darkenwald v. Emp't Sec. Dep't, 183 Wn.2d

237, 244, 350 P.3d 647 (2015). Richard does not argue that any of the findings of fact were erroneous, except for the finding that the DR LLC was not an asset of the guardianship estate. *See Appeal Brief. Of Richard Denny (“R. Denny Brf.”) at 2, Assignment of Error 3.* But even then, he fails to comply with the appellate rules for assigning error to this finding. RAP 10.3(g) states: “A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.” RAP 10.3(g). None of Richard’s assignments of error comply with this rule. *See R. Denny Brf. at 2-3.* Moreover, Richard fails to provide any argument challenging the superior court’s many findings of fact except for the finding about the DR LLC. Because Richard has elected to ignore the trial court’s findings of fact entered in support of the orders dated April 1, 2013, May 23, 2013 and June 26, 2013, they should be treated as verities on appeal.

In Dolan v. King County, 172 Wn.2d at 310, the trial court held employees of public defender agencies were county employees eligible for retirement benefits based solely on documentary evidence. Washington’s Supreme Court applied the substantial evidence standard to review the trial court’s findings of fact because the trial court had to weigh all the competing evidence, resolve evidentiary conflicts and discrepancies, and issue written findings of fact. The rationale for deferring to the trial court

was articulated in In re Marriage of Rideout, 150 Wn.2d 337, 350, 77 P.3d 1174 (2003): “trial courts are better equipped than multijudge appellate courts to resolve conflicts and draw inferences from the evidence.” *See also* Anderson v. City of Bessemer City, 470 U.S. 564, 574-75, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (deference rationale not limited to credibility determinations but also grounded in fact-finding expertise and conservation of judicial resources).

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 Estates of Foster, the superior court had entered several orders and judgments concerning the administration of the estate and trust assets, removed the trustee, found a breach of fiduciary duties, and awarded fees, based solely on documentary evidence. *Id.* Reviewing the superior court findings for substantial evidence, Estates of Foster affirmed the superior court, holding: “It is not necessary that the court hear oral testimony in order to make findings.” *Id.* at 55. *See also* In re Marriage of Rideout, 150 Wn.2d at 351 (recognizing that “where competing documentary evidence [has] to be weighed and conflicts resolved,” trial courts make credibility determinations based on documents).

The deferential standard of review applied in Dolan, Estates of

Foster, and Guardianship of Knutson, should apply to the present case. The superior court considered, weighed, and assessed the credibility of an extensive documentary record, aided by the oral arguments made by attorneys representing the guardian, Richard, and Ms. Zak. The court commissioner who decided the three orders on appeal had conducted 11 prior hearings regarding Mrs. Denny's guardianship since 2009,¹⁰ and had considered thousands of pages of documentary evidence prior to entering the orders on appeal here.¹¹ This case illustrates the rationale for deference to "the superior court's exercise of fact-finding discretion on appeal" when the record consists entirely of documentary evidence. 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 2: The Superior Court Did Not Lose Jurisdiction Over The Ongoing Guardianship Because Richard Appealed Its Prior Rulings.

Richard asserts in Assignment of Error 2 that the April 1, 2013 order violated RAP 7.2(a) because his notices of appeal divested the superior court of jurisdiction. *R. Denny Brf. at 2, 11-15*. Richard misinterprets the Rules of Appellate Procedure and misrepresents the record.

¹⁰ See Reports of Proceedings (Appeal No. 69117-1-I) Volumes 1 - 11.

¹¹ See Clerk's Papers (Appeal No. 69117-1-I) 1 - 2032.

1. The superior court did not find that RAP 7.2 does not apply to guardianships.

Richard erroneously contends the superior court commissioner ruled RAP 7.2 does not apply to guardianships. *R. Denny Brf. at 11*. In fact, the superior court ruled:

The Court doesn't see that this order has any effect on those issues presently before the court of appeals and so the Court is not precluded from signing the order. If this order were such that it would affect the issues on appeal, the Court would not sign it.

1 RP 44. When Richard moved for reconsideration of the April 1, 2013 Order, the superior court entered unchallenged Finding of Fact 10 that the April 1, 2013 order “did not change any of the orders that have been appealed to the Court of Appeals. 2 CP 405.

2. The superior court had authority under RAP 7.2 to rule upon issues that arose in the guardianship during the pendency of *Denny I* as long as its orders did not change the decisions on appeal.

The Findings, Conclusions and Order dated April 1, 2013 comply with RAP 7.2. RAP 7.2(a) provides in pertinent part that after review is accepted, “the trial court has authority to act in a case only to the extent provided in this rule[.]” RAP 7.2(a). Richard ignores subsections (c) through (l) of RAP 7.2, which identify circumstances when a trial court may enter rulings after review is accepted.

First, under RAP 7.2(c), the superior court had “authority to enforce any decision of the trial court[.]” RAP 7.2(c). This Court need

not look all the way to the Indiana Court of Appeals for guidance as Richard urges. *R. Denny Brf. at 11*. In re Irrevocable Trust of McKean, 144 Wn. App. 333, 339-340, 183 P.3d 317 (2008), applied RAP 7.2(c) to confirm the superior court's authority to appoint a trustee during the pendency of an appeal, overruling the appellant's objection that the appeal divested the trial court of jurisdiction. McKean also applied RAP 7.2(c) to authorize the trustee to petition the trial court for instructions related to its appointment during the pendency of the appeal. *Id.*

Here, the April 1, 2013 order was permissible under RAP 7.2(c) because it enforced prior decisions of the superior court that:

- required Ohana to comply with the reporting requirements of RCW 11.92.040 and .043; 1 CP 28-29;
- required Ohana to file its Third Annual Report for the period January 1, 2012 through December 31, 2012 no later than March 17, 2013; 1 CP 619;
- maintained the guardianship bond at \$100,000; 1 CP 617;
- declined to appoint counsel for Mrs. Denny; 1 CP 985-8, 1853;
- ruled Thomas Keller did not have a conflict of interest in representing Ohana in this guardianship; 1 CP 1165;
- authorized Ohana to pay for out of state travel for Mrs. Denny; 1 CP 618; and
- approved Ohana's actions in responding to the incident where Mrs. Denny ingested cocaine. 1 CP 1855, 1856.

Second, under RAP 7.2(e), the superior court has authority to hear

and determine “postjudgment motions authorized by the civil rules, the criminal rules, or statutes[.]” RAP 7.2(e). The petition to approve Ohana’s Third Annual Report that was heard on April 1, 2013 fell within RAP 7.2(e) (as well as RAP 7.2(c) discussed *supra*) because it was a postjudgment motion required (not simply “authorized”) by statute -- specifically the mandatory annual review process set forth in RCW 11.92.040(2) for guardianships of the estate and .043(2) for guardianships of the person.

RAP 7.2(e) did not require permission from the appellate court to rule on the petition to approve the Third Annual Report. Permission from the appellate court is required only if “the trial court determination will change a decision then being reviewed by the appellate court[.]” RAP 7.2(e). For example, Leen v. Demopolis, 62 Wn. App. 473, 815 P.2d 269 (1991), held that the trial court did not err in awarding post-judgment attorney fees during the pendency of an appeal without permission of the appellate court as a sanction for filing frivolous pleadings, because the superior court’s ruling was in addition to the attorney fees awarded by the original judgment. *See also* Brossman v. Brossman, 32 Wn. App. 851, 650 P.2d 246 (1982) (holding that it was not error for the superior court to enter additional findings of fact in response to a motion for reconsideration during the pendency of an appeal). Richard does not

argue that the April 1, 2013 Order changed any of the orders that were on appeal at the time it was entered. *See R. Denny Brf. at 11-15.*

Third, under RAP 7.2(i), “[t]he trial court has authority to act on claims for attorney fees, costs and litigation expenses.” RAP 7.2(i). In re Settlement/Guardianship of A.G.M., 154 Wn. App. 58, 81, 223 P.3d 1276 (2010), interpreted RAP 7.2(i) to authorize the superior court to decide whether to appoint counsel for a settlement guardian ad litem after an appeal had been filed. The Findings, Conclusions and Order dated April 1, 2013 fell within RAP 7.2(i) by approving Ohana’s attorneys’ fees, costs and litigation expenses. 2 CP 320-321.

Fourth, under RAP 7.2(l), “the trial court retains full authority to act in the portion of the case that is not being reviewed by the appellate court.” RAP 7.2(l). The April 1, 2013 order was permissible under RAP 7.2(l) because it concerned the latest annual reports required by RCW 11.92.040(2) and .043(2), not the prior annual reports that were subject to appeal. By analogy, Ruston v. Wingard, 70 Wn.2d 388, 390, 423 P.2d 543 (1967), held that appealing from an order finding the defendant in contempt for violation of a permanent injunction did not divest the trial court of jurisdiction to enter a later order to show cause based upon a subsequent and separate act of contempt.

Court Commissioner Neel was correct when she ruled: “The

guardianship of Ms. Denny is ongoing, and the trial court will continue to enter orders.” 2 CP 371. “[A] superior court which has once properly acquired jurisdiction over the administration of an incompetent's estate cannot divest itself of that jurisdiction until such time as the conditions requiring the guardianship have ceased.” In re Guardianship of Gaddis, 12 Wn.2d 114, 123, 120 P.2d 849 (1942). By statute, guardians are “at all times under the general direction and control of the court making the appointment.” RCW 11.92.010. The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, chapter 11.90 RCW, provides that “a court that has appointed a guardian or issued a protective order consistent with this chapter has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.” RCW 11.90.240.

Due to the continuing oversight responsibilities of the superior courts in guardianship matters, the family law context is not analogous as Richard argues. *See R. Denny Brf. at 11-12*. Superior courts do not have a constitutional or statutory duty to supervise each and every parenting plan. Once a final parenting plan is entered under RCW 26.09.184, the superior court does not continue to oversee or supervise the parties’ parenting, except in limited situations where a parent affirmatively petitions for modification of the parenting plan (RCW 26.09.260), for

relocation (RCW 26.09.405-560), or for protection (RCW 26.50).

Continuing involvement by the family law court after entry of final orders is the exception, not the rule, as it is in a guardianship matter, where by statute guardians remain “under the general direction and control of the court making the appointment.” RCW 11.92.010.

3. The superior court did not modify the orders on appeal.

Richard argues that the April 1, 2013 Order is “void” under RAP 7.2(a) based on a string of citations, which hold that trial courts may not enter orders that modify decisions on appeal. *R. Denny Brf. at 13-15.*

Richard does not argue in his opening brief that the appealed orders modified any decisions on appeal; however, Richard did argue below that the April 1, 2013 Order changed the travel criteria set forth in the trial court’s prior order on appeal. 2 CP 331. On reconsideration, the trial court entered unchallenged Finding of Fact 11 that there was “no material difference” between the two orders. 2 CP 406. If this finding is not treated as a verity on appeal, the following side-by-side comparison of the orders provides substantial evidence to support it:

March 29, 2012 Order (1 CP 440-1, 618)	April 1, 2013 Order (2 CP 320)
[S]he [Ms. Denny] is accompanied by someone whose minimum qualifications include a Certified Nursing Assistant and verifiable experience with dementia patients;	Ms. Denny is accompanied by someone whose minimum qualifications include a Certified Nursing Assistant and verifiable experience with dementia patients;

March 29, 2012 Order (1 CP 440-1, 618)	April 1, 2013 Order (2 CP 320)
[T]he guardian's authority is recognized by the destination state;	The guardian's authority is recognized by the destination state;
[A] sufficiently detailed itinerary has been provided to allow the guardian to know where she [Mrs. Denny] will be and how to contact her at all times during the trip;	A sufficiently detailed itinerary has been provided to allow the guardian to know where Ms. Denny will be and how to contact her or her companion at all times during the trip;
[T]he 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.	The guardian has been provided at least one week of advance notice prior to in-state, overnight travel, and at least two months of advance notice prior to out-of-state travel;
	If the guardian's authority is already recognized by the destination state, the notice time required for travel to such state be equal to the notice time required for in-state, overnight travel.

The April 1, 2013 order did not change the 2012 order in any way that limited Richard's ability to present his arguments on appeal. The only differences are (1) the April 1, 2013 Order explicitly states that the notice requirements only apply for "overnight travel," which was already clear from the 2012 order; and (2) the Guardian may receive less advance notice for out-of-state travel if the destination state already recognizes the guardianship. Richard has not demonstrated that his appeal of the prior orders was in any way prejudiced by entry of the April 1, 2013 Order. The trial court did not violate RAP 7.2(e) or RAP 7.2(a).

4. Divesting the superior courts of jurisdiction over ongoing guardianships whenever there is an appeal would violate public policy.

Acting as the “superior guardian” of the ward, the superior courts are responsible for protecting the person and estate of incapacitated persons. In re the Guardianship of Lamb, 173 Wn.2d 173, 185, 190, 265 P.3d 876 (2011); In re Guardianship of Decker, 188 Wn. App. 429, 451, 353 P.3d 669, *rev. denied* 184 Wn.2d 1015 (2015). According to Richard, the superior court should be divested of its constitutionally based role as the “superior guardian” for however many years it takes *Denny I* to conclude, leaving it up to the appellate courts to oversee the guardianship and to address any “urgent need” that may arise. *R. Denny Brf. at 12*.

Richard’s system of oversight by the appellate courts would contravene public policy, as well as the constitutional role of the superior courts. The Court of Appeals’ constitutional role is to review the decisions made by the lower courts, not to replace them as fact-finders. *See* Wash. Const. art. IV §30(3); RCW 2.06.030; RAP 1.1(a). The appellate branch is not equipped to resolve disputed issues of fact, conduct fact-finding, or weigh evidence. *See State v. Bencivenga*, 137 Wn.2d 703, 708-709, 974 P.2d 832 (1999) (citing *State v. Snider*, 70 Wn.2d 326, 327, 422 P.2d 816 (1967)). There are no rules or procedures for bringing guardianship issues before the appellate courts outside the Rules of Appellate Procedure.

In re Guardianship of Way, 79 Wn. App. 184, 192, 901 P.2d 349 (1995), does not imbue the appellate courts with fact-finding capabilities in guardianship matters as Richard argues. Guardianship of Way reviewed the trial court's decision that appointed a guardian for an incapacitated person, taking into consider uncontested new evidence regarding the status of the ward. In this context, Guardianship of Way held that appellate courts may consider supplemental information in guardianship cases, however, "if any supplemental information is contested by the parties a referral to the trial court will normally be required." *Id.* at 192. Thus, Guardianship of Way recognized the inherent limitation that appellate courts would have in undertaking the ongoing supervision of guardianship matters on appeal, which is that the appellate courts are not equipped to resolve factual disputes.

C. Response to Assignment of Error 3: The Superior Court Did Not Err By Finding Denny Resources LLC Is Not An Asset Of The Guardianship Estate Or By Not Increasing The Guardian's Bond.

Richard asserts in Assignment of Error 3: "The superior court erred by ruling that Denny Resources LLC is not a guardianship asset." *R. Denny Brf. at 2*. Richard also argues that the trial court should have considered that Ohana manages the DR LLC checking account in reviewing the adequacy of the \$100,000 bond, but does not specifically

assign error to the bond amount. *See R. Denny Brf. at 16.* Richard's arguments ignore the facts, the law, and the appellate rules.

1. Assignment of Error 3 violates RAP 10.3(g).

This Court should decline to consider Assignment of Error 3 because Richard did not comply with RAP 10.3(g) in assigning error to the superior court's findings of fact. Finding of Fact 2.2 provided: "Denny Resources LLC is not an asset of the guardianship estate." 2 CP 315. Richard failed to reference Finding of Fact 2.2 by number in Assignment of Error 3 as required by RAP 10.3(g). *See R. Denny Brf. at 2.* Furthermore, Richard did not assign error to the superior court's oral finding (incorporated by reference; 2 CP 322) that the bond amount of \$100,000 was adequate because liquid assets in excess of \$100,000 were held in blocked accounts. 1 RP 30.

2. Assignment of Error 3 raises new issues for the first time on appeal.

Richard argues that the superior court should have considered "total distributions in 2012" from the DR LLC, which he calculates to be \$550,800. *See R. Denny Brf. at 15-16.* Richard's figure of \$550,800 is comprised of \$333,330.96 that the DR LLC distributed to the guardianship estate (reported to the superior court by the guardian, 2 CP 31), as well as distributions made by the DR LLC to the Family Trust that Richard administers (discussed *infra*). The argument that the superior court should

have considered funds distributed to the Family Trust in setting the bond was not raised with the trial court and should not be considered for the first time on appeal. *See RAP 2.5(a); Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). Richard never requested that the superior court consider the amount distributed to the Family Trust in reviewing Ohana's bond. As discussed *infra*, assets held by the Family Trust were expressly excluded from the guardianship estate by the 2009 Order that appointed Ohana guardian. 1 CP 28.

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

Guardianship Bond and Unblocked Accounts. Ohana's bond has been \$100,000 since the guardianship started. 1 CP 28, 2 CP 5. Ohana maintains several unblocked accounts. 2 CP 5, 37. In August 2012, Ohana petitioned to transfer the balance of two blocked accounts into an unblocked account for the payment of taxes, attorney fees, and other expenses, 1 CP 1384-5, 1407, and the superior court approved this request without opposition after notice to Richard. 1 CP 1426-1430. As of December 31, 2012, Ohana held \$73,686.85 in unblocked accounts for Mrs. Denny. 2 CP 5, 19, 37.

DR LLC. Prior to the guardianship, Mrs. Denny owned three apartment buildings that she transferred into three separate limited liability companies, one LLC for each property (LLC A, LLC B and LLC C). 1CP

136. These three LLCs are owned by a fourth LLC, created by Mrs. Denny prior to the guardianship, Denny Resources LLC (“DR LLC”). 1 CP 136, 145. DR LLC is a holding company for LLC A, LLC B, and LLC C, which each own one apartment building. 1 CP 62, 2 CP 38-39.

Guardian’s Initial Report on DR LLC. Ohana presented the superior court with information about DR LLC and its holdings when it was first appointed guardian. 1 CP 136. This information included an audit of DR LLC books and the books of the property management company that managed the three apartment buildings owned by the three LLCs that are held by DR LLC. 1 CP 171, 186, 404-409.

Mrs. Denny’s Ownership of LLC Units. DR LLC has 14 million membership units, composed of 140,000 “A” units that have voting rights, and 13,860,000 “B” units that have no voting rights. 1 CP 136. Prior to the guardianship, Mrs. Denny owned all 14 million units. *Id.* Prior to the guardianship, Mrs. Denny gave 500,000 “B” units to the Ella Nora Denny Family Trust dated 7/18/2008 (the “Trust”). 1 CP 136. Also prior to the guardianship, Mrs. Denny sold another 4,500,000 “B” units to the Trust in exchange for a \$4,500,000 promissory note. *Id.* The Trust is an irrevocable trust, and Mrs. Denny’s children Richard and Marianne Zak are the co-trustees. 1 CP 136, 146, 2 CP 39. The Order that appointed Ohana guardian in 2009 expressly stated that assets of the trusts are not

part of the guardianship estate. 1 CP 28.

Mrs. Denny Owns 64.29% of the DR LLC Units. On January 4, 2012, Mrs. Denny executed, with the assistance of her estate planning attorney Timothy Austin, an assignment whereby the DR LLC promissory note was gifted back to the Trust. 1 CP 438. Mrs. Denny's ownership share of the DR LLC units was and remains 64.29%. 1 CP 136, 2 CP 274. The Trust owns the other 35.71% of the DR LLC units outside the scope of Mrs. Denny's guardianship. 1 CP 28, 2 CP 39.

DR LLC Income Reported to the Superior Court. From the date of Ohana's appointment through 2011, Ohana collected all of the income from DR LLC and reported that income to the superior court in its Inventory (1 CP 49 (identified as "rental property distributions")), Interim Report (1 CP 134, 136), First Annual Report (1 CP 184, 192), and Second Annual Report (1 CP 435, 438, 447) which were approved by the superior court with notice to Mrs. Denny's children, including Richard. 1 CP 118-120, 165-8, 410-413, 616-20. With full disclosure to and express approval by the superior court, all of the LLC income was paid to the guardianship estate, even though Mrs. Denny owned only 64.29% of the units, in lieu of interest payments on the promissory note. 1 CP 136-7, 165-8, 188, 411. Beginning in January 2012, when the promissory note was gifted back to the Trust, the Trust's share of the DR LLC income was distributed to the

trustees of the Trust (Richard and Ms. Zak), rather than to Mrs. Denny's guardianship estate. 1 CP 437-8, 618.

Notice of Ohana's Management of the DR LLC. As owner of 64.29% of the outstanding units of DR LLC, Ohana as full guardian of Mrs. Denny's estate, appointed Ohana to manage DR LLC. 2 CP 44. Contrary to Richard's assertion that his "written objections and his counsel's arguments ... alerted the superior court that OFC had appointed itself manager of Denny Resources LLC," *R. Denny Brf. at 15*, Ohana reported this election to the superior court, along with the functions performed by Ohana as LLC manager in 2012 and again in the Third Annual Report filed in 2013. 1 CP 438, 2 CP 44.

Superior Court Approved Ohana's LLC Management. Ohana's management of the DR LLC and distribution of the DR LLC income were expressly approved by the superior court in the Order Approving Second Annual Report that is on appeal in *Denny I.* 1 CP 616, 618. Bachtel Property Management continues to manage the apartment buildings that are owned by the LLCs held by DR LLC. 1 CP 186. Ohana sends copies of Bachtel's reports to Richard, Ms. Zak, and Mrs. Denny's CPA, Russ Smith, every month. 2 CP 44.

Ohana's Role as DR LLC Manager. As manager of the DR LLC, Ohana maintains an LLC bank account, receives the rent distributions

from Bachtel Property Management, pays LLC administrative fees, and makes distributions from the LLC bank account to the Trust and to Mrs. Denny's guardianship account. 1 CP 438. Ohana sends Richard, Ms. Zak, and Mrs. Denny's accountant Russ Smith an accounting for the cash flow in the DR LLC account each month, along with details about how much cash will be distributed each month. 2 CP 44.

Mrs. Denny's Share of the DR LLC Distributions. Because Mrs. Denny continues to own 64.29% of DR LLC, Ohana transfers that percentage of the cash out of the DR LLC account to the guardianship operating account each month. 1 CP 437-8. Because the Trust (managed by Richard and Ms. Zak outside the guardianship) owns the other 35.71% of DR LLC, Ohana takes the Trust's 35.71% share of the DR LLC cash and divides it evenly between Richard and Ms. Zak, payable to them as the co-trustees. 1 CP 437-8. The total funds distributed from the DR LLC to the guardianship estate between January 1, 2012 and December 31, 2012, was \$333,330.96. 2 CP 31. This total was reported to the superior court in the Third Annual Report, as well as anticipated distributions for 2013. 2 CP 19, 31. As discussed *infra*, distributions from the DR LLC were used along with Mrs. Denny's other monthly income to pay her substantial expenses.

Mrs. Denny's share of undistributed DR LLC funds. At the end of

2012, there was approximately \$51,000 in undistributed income in the DR LLC account, of which 64.29% or approximately \$32,788 was Mrs. Denny's share. 2 CP 38-39; 1 RP 29-30. The other 35.71% of the undistributed income totaling approximately \$18,212 belonged to the Trust (2 CP 38-9), was not subject to the superior court's oversight or the guardianship bond (1 CP 28), and was subject to the control and protection of the co-Trustees Richard and Marianne.

DR LLC account combined with unblocked guardianship accounts totaled approximately \$106,475.85. The total of the unblocked guardianship accounts totaled \$73,686.85 as of December 31, 2012. 2 CP 5, 19, 37. The unblocked guardianship accounts combined with Mrs. Denny's 64.29% share of the DR LLC account (approximately \$32,788; 2 CP 38-9) totaled approximately \$106,475.85. The superior court found that the guardian's \$100,000 bond was adequate to protect against the guardian's defalcation with regard to these funds. 1 RP 30; 2 CP 319, 322.

4. The superior court correctly found that the DR LLC is not an asset of the guardianship estate.

The trial court's finding that the Denny Resources LLC was not an asset of the guardianship estate is correct. "A limited liability company is a statutory business structure that is like a corporation in that members of the company are generally not personally liable for the debts or obligations of the company and like a partnership in that it can be

classified as a partnership for tax purposes and therefore avoid double taxation.” Chadwick Farms Owners Association v. FHC, LLC, 166 Wn.2d 178, 186-7, 207 P.3d 1251 (2009) (internal quotations omitted). Limited liability companies are “entirely creatures of statute”. *Id.* at 187. The Washington Limited Liability Company Act defines members’ ownership interests as follows:

The only interest of a member that is transferable is the member's transferable interest. A transferable interest is personal property. **A member has no interest in specific limited liability company property.**

RCW 25.15.246(1) (emphasis added). The Act defines “transferable interest” as “a member's or transferee's right to receive distributions of the limited liability company's assets.” RCW 25.15.006(18). Mrs. Denny’s ownership of 64.29% of the LLC units gives her a transferable interest, i.e., a right to receive, 64.29% of DR LLC distributions. Mrs. Denny’s ownership of units and right to receive distributions based on those units did not convert DR LLC into a guardianship asset any more than her ownership of Microsoft stock and right to receive Microsoft stock dividends converted the Microsoft Corporation into a guardianship asset. The trial court correctly ruled that the DR LLC is not a guardianship asset.

5. The \$100,000 bond was adequate to protect Mrs. Denny’s interests and complied with RCW 11.88.100.

Richard argues that the superior court erred by failing to consider

the funds Ohana distributed as manager of the DR LLC, including the funds that were distributed to the Trust that Richard and Ms. Zak administer. *R. Denny Brf. at 16*. This argument is not supported by fact or law. As shown *supra at 25-30*, the superior court did consider all material facts relating to the DR LLC when it established the \$100,000 bond in 2009 and reviewed the bond in subsequent years.

The guardianship bond operates as collateral security for the proper discharge of the duties imposed on the guardian by statute.

Dickman v. Strobach, 26 Wash. 558, 67 P. 224 (1901). RCW 11.88.100 provides in relevant part:

Before letters of guardianship are issued, each guardian or limited guardian shall take and subscribe an oath and, unless dispensed with by order of the court as provided in RCW 11.88.105, file a bond, with sureties to be approved by the court, . . . taking into account **the character of the assets on hand or anticipated and the income to be received and disbursements to be made[.]**

(Emphasis added.) The guardianship bond may be dispensed with, or reduced, to the extent that liquid assets and securities are in blocked accounts, or if the assets of the guardianship estate are valued at less than \$3,000. *Id.*; In re Estate of Treadwell v. Wright, 115 Wn. App. 238, 249, 61 P.3d 1214 (2003). RCW 11.88.105 states:

In cases where all or a portion of the estate consisting of cash or securities has been placed in possession of savings and loan associations or banks, trust companies, escrow corporations, or other corporations approved by the court and if a verified receipt signed by the custodian of the funds is filed by the guardian or

limited guardian in court stating that such corporations hold the cash or securities subject to order of court, the court may in its discretion dispense with the bond or reduce the amount of the bond by the amount of such deposits.

RCW 11.88.105.

Ohana's guardianship bond was originally set at \$100,000, and has not been reduced despite the fact that income distributions to Mrs. Denny have declined with the court-approved gift of the LLC promissory note to her children's Trust. *See supra at 29*. In support of prior annual reports, Ohana presented substantial information about DR LLC and Ohana's role as manager, which never resulted in any change to the original \$100,000 bond. *See supra at 25-30*. In 2013, at the request of Richard, the superior court again reviewed the adequacy of the \$100,000 bond. Richard's request to revisit the \$100,000 bond did not result from any change in circumstances, or from Richard being newly apprised of information; Richard received information monthly about the DR LLC income as Trustee from the inception of the guardianship, and was notified that Ohana assumed the role of manager of the LLC in March 2012 when the superior court approved this undertaking. *See supra at 29-30*. After hearing Richard's concerns about Ohana serving as LLC manager (a role that was expressly approved by the superior court in 2012 after notice to Richard, 1 CP 616, 618), the superior court found the \$100,000 bond remained adequate to protect Mrs. Denny's interests. 1 RP 30; 2 CP 319,

322. Richard did not assign error to this finding, which is supported by the substantial evidence reviewed above.

The superior court did not err in finding the \$100,000 bond adequate, “taking into account the character of the assets on hand or anticipated and the income to be received and disbursements to be made[.]” RCW 11.88.100. Looking at “the character of the assets on hand,” Mrs. Denny’s interest in the company is a personal property interest, not an ownership interest in the real property assets of the LLC. RCW 25.15.246(1). Richard conflates the two when he argues that “Ms. Denny’s 64% has a market value of nearly \$6.5 million.” *R. Denny Brf. at 15*. The LLC Act makes clear that the nature of Mrs. Denny’s interest in the DR LLC is the right to receive 64.29% of the DR LLC distributions. *See* RCW 25.15.246(1); 25.15.006(18). As of December 31, 2012, the unblocked “assets on hand” totaled \$73,686.85, 2 CP 37, or \$106,475.85, if Mrs. Denny’s share of the undistributed DR LLC account is added to the unblocked guardianship accounts. *See supra* at 29-30.

The \$100,000 bond was adequate to protect the \$106,475.85 “assets on hand,” particularly considering anticipated disbursements from the guardianship estate, which is an express consideration under RCW 11.88.100. It could be anticipated that Mrs. Denny’s disbursements would once again exceed her income during the next reporting period, as they

had during 2012 (*see supra* at 25), since the taxes, attorney's fees and care costs that required the unblocking of funds in August 2012 were continuing in nature. 1 CP 1384-5, 1407, 1426-30.

6. Richard relies on inflated figures.

Richard claims the superior court erred by failing to consider the "total distributions in 2012" from the DR LLC, which he erroneously calculates to be \$550,800. *See R. Denny Brf. at 15-16.* \$550,800 is an inflated figure, because it includes the Trust's 35.71%, which was expressly excluded from the guardianship estate by the 2009 order appointing Ohana. 1 CP 28. The actual distributions made by the DR LLC to the guardianship estate in 2012 totaled \$333,330.96, and were reported to the superior court by Ohana in the Third Annual Report. 2 CP 31. Furthermore, distributions anticipated from the DR LLC to the guardianship estate in 2013 (projected to be \$300,000) were also reported to the superior court by Ohana in the Third Annual Report. 2 CP 17. "Assets on hand," which determines the bond amount, RCW 11.88.100, never totaled anywhere close to \$333,330.96, because of Mrs. Denny's substantial ongoing expenditures for care, which the superior court was required to consider in setting the bond. RCW 11.88.100.

Richard's argument that total distributions from the DR LLC should be considered, and nothing else, in setting the bond violates RCW

11.88.100, which requires the superior court to take into account income and disbursements in setting the bond. *Id.* In Mrs. Denny's case, the payments to the Aljoya assisted living facility were \$65,588.26 in 2012. 2 CP 31. Due to the numerous petitions and appeals filed by Richard and Anderson, Mrs. Denny paid \$71,190.17 in court-approved litigation-related attorney fees. 2 CP 31. Mrs. Denny made a court-approved gift to Richard of \$432,000 in 2012, and paid federal taxes of \$237,617.35. 2 CP 32. The superior court was fully apprised of and considered the necessary information relating to the bond, and did not violate RCW 11.88.100 in maintaining the bond at \$100,000.

7. Richard relies on false accusations.

Richard points to no evidence indicating a change in Mrs. Denny's income or assets that would justify increasing the bond. In fact, as noted *supra*, Mrs. Denny's income from the DR LLC decreased with her gift of the promissory note to the Trust, because she was no longer receiving 100% of DR LLC distributions. 1 CP 437-8. The common thread running through Richard's arguments is the false accusation that Ohana withheld material information from the trial court. For example:

- Richard asserts that his "written objections and his counsel's arguments at the April 1, 2013 hearing alerted the superior court that OFC [Ohana] has appointed itself manager of Denny Resources

LLC[.]” *R. Denny Brf. at 15*. In fact, Ohana reported this election to the superior court, along with the functions performed by Ohana as LLC manager in 2012, and again in the Third Annual Report filed in 2013. 1 CP 438, 2 CP 19, 38, 44. With notice to Richard, the superior court expressly approved Ohana’s management role in its order dated March 29, 2012. 1 CP 616, 618.

- Richard claims that Ohana failed “to report the unblocked LLC’s bank account’s year-end balance of \$51,000[.]” *R. Denny Brf. at 17*. In fact, this account was properly characterized pursuant to RCW 25.15.246(1) as “other personal property” and reported to the superior court in Ohana’s Third Annual Report. 2 CP 38-39.
- Richard claims Ohana failed to report “that over \$550,000 had been managed and disbursed by OFC from that account [the DR LLC account] during the year.” *R. Denny Brf. at 17*. In fact, Ohana represented the following to the superior court:

As reported in the guardian’s second annual report, Mrs. Denny assigned her rights in the promissory note made with the Denny Family Trust back to the trust in January 2012. Since that time, the guardian, as manager of Denny Resources LLC on Mrs. Denny’s behalf, has made monthly distributions from the LLC to Mrs. Denny and to Mrs. Denny’s two children as the co-trustees of the family trust.

2 CP 19. Ohana further reported that the Denny Resources LLC distributions to Mrs. Denny totaled \$333,330.96 in 2012. 2 CP 31. Under

the terms of the 2009 order appointing guardian that “[a]ssets that are held in trust shall be deemed outside the scope of this guardianship,” 1 CP 28, Ohana did not report to the guardianship court the total distributions made from the DR LLC account directly to Richard and Marianne Zak, but the fact those payments were made was reported to the superior court, 2 CP 19, 44, and monthly reports of the payments were provided directly to the recipient co-trustees, Richard and Ms. Zak. *Id.*

D. Response to Assignment of Error 4: The Superior Court Did Not Err In Approving Ohana’s Annual Report Relating to Mrs. Denny’s Welfare.

Assignment of Error 4 asserts the “superior court erred in approving OFC’s failure to report to the court material events concerning Ms. Denny’s welfare.” *R. Denny Brf. at 2.* The “material events” Richard alludes to concern Richard’s efforts to discount the results of Mrs. Denny’s positive drug test and allegations that his sister engaged in misconduct. *See R. Denny Brf. at 18-19.*

The complaints that comprise Assignment of Error 4 are not properly before this Court, because Richard fails to assign error to any of the superior court’s findings of fact (RAP 10.3(g)), fails to provide a “separate concise statement” of each claimed error by the trial court (RAP 10.3(a)(4)), and fails to provide this Court with any legal authority to support his arguments. “Where no authorities are cited in support of a

proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

The superior court did not err in approving Ohana's Third Annual Report relating to Mrs. Denny's limited guardianship of the person. RCW 11.92.043(2) requires guardians of the person to "file annually ... a report on the status of the incapacitated person," which shall include a report of the incapacitated person's residential changes, services or programs received, medical status, mental status, changes in functional abilities, activities of the guardian, recommended changes, and identification of professionals who have assisted the incapacitated person. *Id.* Ohana's Third Annual Report satisfied these statutory requirements, and the superior court did not abuse its discretion in approving the report. Richard has not demonstrated any violation of RCW 11.92.043(2).

E. Response to Assignment of Error 5: The Superior Court Did Not Err In Finding That Richard Failed To Establish Good Cause To Conduct Discovery Or In Cautioning His Attorney About Making Allegations Without Reasonable Investigation.

Assignment of Error 5 asserts: "The superior court erred in admonishing and threatening Richard's counsel with sanctions for inquiring about alleged incidents that relate to Ms. Denny's welfare." *R. Denny Brf. at 3.*

1. Facts and procedure relating to issues raised by Assignment of Error 5.

Richard's counsel asked for authority to conduct discovery in his written objections to Ohana's report, 2 CP 265, and at the April 1, 2013 hearing after the court cautioned him about filing materials without conducting reasonable investigation in response to Ms. Zak's motion that he be sanctioned. 1 RP 37, 45; 2 CP 281-285. The superior court denied the request for discovery finding that "there is nothing here that warrants a trial." 1 RP 38. When Richard's attorney repeated the oral request, the superior court found:

This guardianship is proceeding a pace as it should, with the exception of the intermeddling of Mr. Denny. And the Court sees absolutely no problem with the progress of the guardianship.

1 RP 45. Richard did not assign error to these findings, which were incorporated into the superior court's written order. 2 CP 322.

2. The superior court properly denied the request for discovery.

Richard fails to demonstrate the superior court erred either by cautioning his attorney or by denying the oral request to conduct discovery. A trial judge has the authority and the responsibility of controlling litigants who threaten to impede the orderly conduct of legal proceedings. *See* CR 11; Yurtis v. Phipps, 143 Wn. App. 680, 693, 181 P.3d 849 (2008); RCW 2.28.010(3). The superior court did not sanction

Richard's attorney, but exercised restraint in cautioning him after Ms. Zak requested sanctions. This was not the first time Richard's attorney had filed materials against Ms. Zak without evidentiary support. In response to Ohana's petition regarding the drug overdose, Richard filed pleadings accusing his sister of drugging their mother, abusing drugs, cheating on her husband, and wanting their mother to die, which provoked Ms. Zak to request sanctions against Richard that the superior court denied. 1 CP 1936-8, 1964-1971, 1973-1986.

The superior court also did not err in finding Richard had not established good cause to conduct discovery. Discovery in guardianship cases is governed by RCW 11.96A.115, which provides as follows:

In all matters governed by this title, discovery shall be permitted only in the following matters:

- (1) A judicial proceeding that places one or more specific issues in controversy that has been commenced under RCW 11.96A.100, in which case discovery shall be conducted in accordance with the superior court civil rules and applicable local rules; or
- (2) A matter in which the court orders that discovery be permitted on a showing of good cause, in which case discovery shall be conducted in accordance with the superior court civil rules and applicable local rules unless otherwise limited by the order of the court.

RCW 11.96A.115. There is no right to discovery in matters governed by TEDRA unless a judicial proceeding has been filed placing one or more specific issues in controversy. Otherwise, parties must establish good

cause to engage in discovery. *See In re Estate of Fitzgerald*, 172 Wn. App. 437, 447, 294 P.3d 720 (2012) (deferring to trial court's refusal to grant a continuance to conduct discovery in a TEDRA matter).

Substantial evidence supports the trial court's findings that Richard did not establish good cause to conduct discovery. No evidence in the record supported Richard's request to "investigate Ohana's accounts and Ms. Denny's living and care situation." 2 CP 265. As Trustee, Richard received monthly reports from the property manager Bachtel relating to the DR LLC income and distributions. 2 CP 44. The superior court found no deficiencies with Ohana's annual reports, which were timely filed pursuant to RCW 11.92.040(2) and .043(3). From the record in this case, it is reasonable to infer that if Richard were authorized to conduct discovery, the cost to Mrs. Denny would be substantial; the superior court and appellate courts would be mired in discovery disputes; and there would be no discernible benefit to Mrs. Denny or her estate. The superior court ruled correctly when it denied Richard's request to engage in discovery.

F. Response to Assignment of Error 6: The Superior Did Not Err By Prohibiting Richard From Filing Additional Pleadings Until He Pays Attorney Fee Judgments Owed To The Guardianship Estate.

Assignment of Error 6 asserts: "The superior court erred by ordering Richard to file no further pleadings with the court until he pays

judgments that he has appealed.” *R. Denny Brf. at 3*. 1. Richard does not assign error to the superior court’s findings of fact, which support the restriction imposed by the superior court. *See Findings of Fact 10, 11, 15, and 16; 2 CP 466-7*.

The unchallenged findings of fact establish that Judge Armstrong had ordered Richard to reimburse the guardianship estate \$9338.44 for attorneys’ fees incurred responding to his motion for revision, and that Richard had not paid this judgment at the time the superior court considered the guardian’s petition to limit Richard’s new court filings. 2 CP 466. The unchallenged findings of fact also establish that Richard’s failure to pay the attorney fee judgment harmed Mrs. Denny financially, that Richard’s “pleadings have not raised meritorious issues, and have not benefitted the ward Ella Nora Denny,” and that Richard was able to pay the judgment. 2 CP 466-7. In addition to these findings, the superior court had previously found “a lack of candor to the Court” and a “lack of diligence” by Richard when it denied his motion for reconsideration. 2 CP 407-408. The superior court also had received multiple requests by Mrs. Denny’s daughter Marianne Zak to sanction Richard for false pleadings filed without evidentiary support, 2 CP 281-286, 389-90, 431-33; 1 RP 34-41, 45, and had before it a record showing that Mrs. Denny’s guardianship estate had paid more than \$71,000 in 2012 for litigation-related attorney

fees in response to Richard and Anderson's pleadings. 2 CP 31.

On this record, it was not an abuse of discretion for the superior court to order as follows on June 26, 2013:

This Court has a duty to guard against waste of the ward's assets. Under this Court's plenary authority, as well as RCW 11.96A.020, .040, and .060, the Court concludes that Richard Denny should be prohibited from filing new pleadings in this guardianship until he pays all judgments, plus accrued interest, entered against him in this guardianship, *except for* pleadings relating to any motion for revision of or appeal of this Order or any pending appeal.

2 CP 467-68. "The welfare of incompetent persons and the care of their property are objects of particular care and attention on the part of the courts." Shelley v. Elfstrom, 13 Wn. App. 887, 889, 538 P.2d 149 (1975) (quoting In re Mignerey, 11 Wn.2d 42, 49, 118 P.2d 440 (1941); Potter v. Potter, 35 Wn.2d 788, 215 P.2d 704 (1950)). TEDRA codifies the court's broad powers in guardianship matters to make "any kinds of orders ... that might be considered proper or necessary in the exercise of the jurisdiction or powers given or intended to be given by this title." RCW 11.96A.060.

Courts in Washington also have the "inherent power to control the conduct of litigants who impede the orderly conduct of proceedings." Yurtis v. Phipps, 143 Wn. App. 680, 693, 181 P.3d 849 (2008); *see also* RCW 2.28.010(3). A court therefore has discretion to place reasonable restrictions on any party who abuses the judicial process. In re Marriage of Giordano, 57 Wn. App. 74, 78, 787 P.2d 51 (1990) (approving

moratorium upon party filing any motions pending resolution of trial).

Shutt v. Moore, 26 Wn. App. 450, 456, 613 P.2d 1188 (1980) articulated

the public policy justification of this authority as follows:

Judicial resources are finite. Time taken to consider frivolous claims is time not available to legitimate litigants. Baseless litigation furthermore burdens the judicial support services, . . . Responsible litigants should not be prejudiced by delays so caused, nor should public treasury bear the costs.

Id. (citations omitted).

The limit imposed on Richard's new court filings was reasonable.

The superior court had before it a "specific and detailed showing of a pattern of abusive and frivolous litigation[.]" Whatcom County v. Kane,

31 Wn. App. 250, 253, 640 P.2d 1075 (1981). The superior court did not

deny Richard all access to the courts, but simply conditioned new

pleadings on his payment of previously ordered attorney fees and costs.

This is the same remedy authorized by the Rules of Appellate Procedure

when a party fails to pay court-ordered fees. RAP 18.9(a). The superior

court also expressly exempted motions for revision and appellate

pleadings. The superior court did not abuse its discretion in limiting

Richard's new pleadings until he paid outstanding attorney fee judgments.

G. Response to Assignment of Error 1: The Superior Court Did Not Err By Declining To Appoint Counsel For Mrs. Denny To Represent Her In Reviewing The Guardian's Third Annual Report.

Assignment of Error 1 asserts: "The superior court erred in ruling

concerning the rights retained by Ms. Denny in its 2009 order without allowing her to retain counsel to advocate on her behalf.” *R. Denny Brf. at*

2. Ohana addresses this assignment last because the preceding analysis demonstrates that the issues presented in Ohana’s Third Annual Report did no implicate Mrs. Denny’s right to appointed counsel.

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

In 2009, the superior court adjudicated that Mrs. Denny was “an Incapacitated Person within the meaning of RCW Chapter 11.88[.]” 1 CP 21. Among the restrictions imposed on Mrs. Denny was termination of her right to enter into a contract, 1 CP 22, and “to sue or be sued other than through a guardian.” *Id.* The 2009 order expressly preserved Mrs. Denny’s right to engage in estate planning with her attorney Timothy Austin. *Id.* In 2012, Mrs. Denny’s cognitive functioning was reevaluated, and she was found to be more impaired than when the guardianship was established. 1 CP 1375, 1368-77. The superior court found that Mrs. Denny did not have capacity to engage counsel, except for the previously authorized estate planning. 1 CP 986-7. The superior court denied the request to appoint counsel for Mrs. Denny on two occasions prior to the April 1, 2013 hearing. *Id.*; 1 CP 1853. These decisions are on appeal in *Denny I.*

2. Richard did not ask the superior court to modify its prior rulings on Mrs. Denny's capacity to engage counsel.

Richard argues that the superior court should have modified its prior decisions regarding Mrs. Denny's capacity to retain counsel based on the billing records and invoices from Mrs. Denny's estate planning attorney Timothy Austin. *R. Denny Brf. at 9*. Richard did not properly raise this issue with the trial court, and, therefore, should not be allowed to raise it for the first time on appeal. *See* RAP 2.5(a).

When the guardianship was established, the superior court limited Mrs. Denny's right to engage counsel as described above. To change this provision of the guardianship order, Richard was required to file a petition to modify the guardianship under RCW 11.88.120, which he did not do in response to the Third Annual Report.

In 2012, when the request was made to appoint counsel for Mrs. Denny, the superior court denied the request, in part because it found that Mrs. Denny had not regained the capacity to engage counsel, and this decision is on appeal in *Denny I*. To modify the superior court decisions on appeal, Richard was required to file a motion under RAP 7.2(e), which he did not do. In fact, Richard expressly recognized that the decision regarding Mrs. Denny's capacity to engage counsel was on review. 2 CP 266. Richard should not be allowed to argue on appeal that the superior court erred in not modifying its orders based on the estate planning records

when he failed to file a motion pursuant to RAP 7.2(e).

3. Mrs. Denny did not have a constitutional or statutory right to appointed counsel to represent her to review the Guardian's Third Annual Report.

In the present case, the management of Mrs. Denny's guardianship reviewed by the superior court in the April 1, 2013 Order did not trigger a right to appointed counsel under either state law or constitutional due process. Under Washington's guardianship statutes, RCW 11.88.045(1)(a) guarantees counsel for persons who are alleged to be incapacitated and for persons already subject to a guardianship when "the rights and interests of ... [the] adjudicated incapacitated person cannot otherwise be adequately protected and represented." RCW 11.88.045(1)(a). The right to counsel after an adjudication of incapacity also exists where fundamental liberty interests are at stake such as commitment to an institution, electroshock therapy, psychosurgery, or psychiatric procedures that restrict freedom of movement. *See* RCW 11.92.043(5).¹² For a more detailed analysis of the right to appointed counsel in guardianships, *see Ohana's Brief in Response to Opening Brief*

¹² *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).

of Richard Denny (linked appeal No. 69610-6-I) at 18-20.

The April 1, 2013 Order did not involve any issues that implicated the right to appointed counsel. This was a routine annual report under RCW 11.92.040(2) and .043(2). Neither Washington's guardianship statutes nor due process require the appointment of counsel for the review of routine annual reports under RCW 11.92.040(2) and .043(2). The superior court's approval of the Third Annual Report did not deprive Mrs. Denny of constitutionally-protected liberty or property interests. The April 1, 2013 Order maintained the status quo in the guardianship that had been established in 2009. Ohana did not request or receive any expansion of its authority or any restriction of Mrs. Denny's retained rights. The superior court did not err by approving the Third Annual Report without appointment of counsel for Mrs. Denny.

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

Under RAP 18.1 and RCW 11.96A.150, Ohana's request for reasonable attorney fees and costs on appeal should be granted, and Richard's should be denied. 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). With this appeal,

Richard has cost the guardianship estate thousands of dollars in attorney fees to prepare a response rebutting arguments that distort the record, ignore unchallenged findings of fact, violate the rules of appellate procedure, disregard established law, contravene public policy and disregard the best interests of Mrs. Denny.

V. CONCLUSION

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

Respectfully submitted this 1ST day of February 2016.

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APPENDIX

APPEALS

DOCUMENT TITLE	DATE FILED	APPELLANT	APPEAL NUMBER/ CLERK'S PAPERS CITATION
Notice of Appeal to Court of Appeals Div. II	July 18, 2012	Thomas Anderson	69117-1-I (consolidated w/ 69610-6-I); CP 1530 - 1562.
Correction – Notice of Appeal to Court of Appeals	August 16, 2012	Thomas Anderson	69117-1-I (consolidated w/ 69610-6-I); CP 1566 - 1567.
Amended Notice of Appeal to Court of Appeals Div. I	October 3, 2012	Thomas Anderson	69117-1-I (consolidated w/ 69610-6-I); CP 1570 - 1584.
Notice of Appeal	October 10, 2012	Richard Denny	69117-1-I (consolidated w/ 69610-6-I); CP 1585 - 1628.
Second Notice of Appeal to Court of Appeals Div. 1	November 9, 2012	Thomas Anderson	69117-1-I (consolidated w/ 69610-6-I); CP 1629 - 1674.
Amended Notice of Cross Appeal	November 15, 2012	Richard Denny	69117-1-I (consolidated w/ 69610-6-I); CP 1675 - 1685.
Second Amended Notice of Appeal	February 15, 2013	Richard Denny	69117-1-I (consolidated w/ 69610-6-I); CP 2000 - 2014.
Notice of Appeal to Court of Appeals Div. 1	April 30, 2013	Thomas Anderson	70312-9-I; CP(2) 340 - 354
Notice of Appeal	June 24, 2013	Richard Denny	70312-9-I; CP(2) 439 - 457
Amended Notice of Appeal	July 10, 2013	Richard Denny	70610-1-I; CP (2) 472 - 479
Notice of Appeal to Court of Appeals Div. I	May 6, 2014	Thomas Anderson	

No. 70312-9-I
(Consolidated with No. 70610-1-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Guardianship of
ELLA NORA DENNY.

DECLARATION OF SERVICE

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

On February 1, 2016, I caused a copy of Brief of Respondent Guardian Ohana Fiduciary Corporation in Response to Opening Brief of Appellant Richard Denny, and this Declaration of Service, to be served on counsel of record for Richard Denny and *pro se* party 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 1, 2016.

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