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FILED
COURT OF APPEALS
DIVISION II
2015 NOV -9 PM 3:04
STATE OF WASHINGTON
BY _____
DEPUTY

No. 69117-1-I

(consol. with No. 69610-6-I; linked with No. 70312-9-I)

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

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

APPEAL BRIEF OF RICHARD DENNY

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2015 NOV 12 PM 12:04
STATE OF WASHINGTON
DIVISION II


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INTRODUCTION

This case involves (1) the interpretation of a poorly drafted guardianship order, (2) the due process rights of a person under a limited guardianship when fundamental rights initially reserved to her in an initial proceeding are restricted or revoked in later hearings, and (3) the role of the court when presented with evidence of a guardian's misconduct.

Ella Nora Denny was placed under guardianship in December 2009 by a superior court order that appointed Ohana Fiduciary Corporation (OFC) as limited guardian of her person and full guardian of her substantial estate. That 2009 order (Appendix A2 - A16), reserved to her the right to vote and to make decisions concerning her health care, her personal care, and her social life. It also expressly allowed her to engage in estate planning under the direction of competent independent counsel, including making gifts and transfers to a family trust.

Months later, Ms. Denny and her son, Richard Denny, learned that OFC was claiming sole authority over her health care and had directed providers to bar Richard from participating in her health care. Ms. Denny sought legal counsel to advocate in defense of her retained rights, but OFC argued that she lacked contractual capacity to retain counsel. The superior court in March 2012 refused to allow Ms. Denny's lawyers to represent her and after determining that her moderate dementia had not improved since 2009, ruled that she lacked the capacity to form an attorney-client

relationship (except with her tax attorney in estate planning matters only). Later that March, the court granted OFC's *ex parte* request to impose restrictions on Ms. Denny's right to travel.

In April 2012, Ms. Denny's nephew Tom Anderson, not a lawyer, filed as next friend on her behalf a lengthy motion to replace OFC as her limited guardian that included documentary evidence of it claiming to have sole health care authority over Ms. Denny. Upon Superior Court Commissioner Carlos Velategui's dismissal without a hearing of the motion to remove OFC, Richard, then represented by counsel, sought revision of the Commissioner's order dismissing the motion to remove OFC, that included an injunction against Richard, and the *ex parte* order finding that Ms. Denny lacked the capacity to form an attorney-client relationship.

In August 2012, Judge Sharon Armstrong concluded the revision hearing by remarking that the 2009 order appeared both to give to Ms. Denny and to take away from her the authority over her health care. The Judge denied the revision motion.

In December 2012, while Ms. Denny was briefly hospitalized for an episode of atrial flutter, a lab test reportedly found cocaine in her system, though that test result was soon dismissed as a false positive. OFC sought judicial instructions. In January 2013, Commissioner Velategui at a hearing at which Ms. Denny was not present or represented by counsel

entered an order granting OFC sole authority over her health care and barred Richard and his sister from participating at all in her health care or accessing her medical records. The order authorized OFC to place 24-hour home care workers in Ms. Denny residence, and reaffirmed that under the 2009 order Ms. Denny had no right to retain a lawyer except for her estate planning.

The Case Record. The Clerk's Papers (CP) is 2,021 pages. Reports of Proceedings (RP) are from the following hearings, identified as follows:

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

ASSIGNMENT OF ERROR & ISSUES

Assignment of Error #1: The superior court erred in its interpretations of its 2009 order.

Issue #1: Under the 2009 order, did Ms. Denny retain the right to consent to or refuse medical treatment and retain other fundamental rights?

Issue #2: Did the 2009 order bar Ms. Denny from engaging legal counsel to advocate her retained rights in the guardianship case?

Assignment of Error #2: The superior court erred by denying Ms. Denny's constitutional and statutory rights to due process when restricting or revoking her retained fundamental rights.

Issue #3: Do persons have a constitutional right to due process before a court in a guardianship case may restrict their fundamental rights?

Issue #4: Do persons have a statutory right under Washington law to due process before a court in a guardianship case may restrict their fundamental rights?

Issue #5: Does the 2015 amendment to RCW 11.88.120(1) apply retroactively in this case?

Issue #6: Did the superior court correctly determine in May 2012 that Ms. Denny lacked capacity to form an attorney-client relationship except for complex estate planning advice?

Issue #7: Are the orders void that restricted Ms. Denny's retained

rights without affording her due process, including legal counsel?

Assignment of Error #3: The superior court erred by failing to supervise OFC and address its fiduciary misconduct.

Issue #8: Do courts have a responsibility, as superior guardian, to protect the rights of respondents in guardianship cases?

Issue #9: Was the superior court informed of OFC's misconduct?

Issue #10: Should the superior court have imposed sanctions against OFC for its misconduct?

Assignment of Error #4: The superior court erred entering its order of January 25, 2013.

Issue #11: Should the superior court in January 2013 have barred Richard from participating in Ms. Denny's health care or accessing her records?

Issue #12: Should the superior court have authorized OFC to place live-in care workers in Ms. Denny's residence without credible, objective evidence of her consent?

Assignment of Error #5: The superior court erred by, in its June 19, 2012 order, enjoining Richard and Mr. Anderson from assisting Ms. Denny to express her concerns about OFC's misconduct?

Issue #13: Did the superior court comply with applicable law when it, in its June 19, 2012 order, enjoined Richard and Mr. Anderson from assisting Ms. Denny to express her concerns about OFC's misconduct?

STATEMENT OF THE CASE

Initial Events. In late 2009, Richard initiated a guardianship proceeding for his 86-year-old mother, Ms. Denny. CP 1. The guardian ad litem (GAL) obtained an order October 21, 2009, appointing Ms. Denny's estate planning and tax attorney, Tim Austin, to represent her. CP 8-11, 1224, 1226. The next day, Renee Eisenhauer, Ph.D., made a psychological evaluation of her, from which a report was filed. CP 1205-18. That report stated that "her cognitive compromise is at most mild and in the early stages" (CP 1211), and described her relationships with her children:

"In the process of discussing the petition, she expressed suspicion of the motives of her daughter (she felt that her daughter "only cares about the money"), reported that she fully trusts her son but was repeatedly surprised that he is the petitioner." CP 1208.

"She did report, however, that she does not trust her daughter. She indicated that she had overheard her daughter saying: "The only thing I care about is the money." She also noted that over the years she had given her daughter "at least \$100,000." She expressed worry that she had not done the same for her son." CP 1213-14.

The GAL's report (CP 1219-34), filed December 3, 2009, recommended a limited guardian of the person of Ms. Denny and, because her "mild cognitive deficits" made her vulnerable to undue influence, a full guardian of her estate, that was substantial and complex. CP 1228, 1234. The first page of the GAL's report (Appendix A1, CP 1220) stated:

"I recommend that the limited guardian of the person have the following powers only:

1. The selection of an appropriate living situation.
2. The selection of an appropriate living facility should be made only after consultation with Ellanora Denny.
3. Consent to necessary medical and dental treatment, except where contrary to law, provided that Ellanora Denny is not able to consent, or unreasonably withholds or consents to reasonable or necessary medical or dental treatment. (*sic*)
4. To arrange for doctor visits.
5. To ensure that the Mediset is properly configured with proper medications.
6. To assist with issues involving medication and related matters.”

The afternoon preceding the scheduled hearing, Mr. Austin filed a response for Ms. Denny simply requesting that she retain the right to engage in estate planning assisted by competent independent counsel of her choice. CP 15-17. On December 17, 2009, the parties and counsel appeared before Superior Court Commissioner Carlos Velategui who stated he had read the pleadings, and he signed the presented order without any discussion. RP1 5. In brief, the 2009 order appointed OFC full guardian of Ms. Denny’s estate and limited guardian of her person, but she retained the rights (1) to consent to or refuse medical treatment, (2) to decide who shall provide care and assistance, (3) to make decisions regarding the social aspects of her life, (4) to vote, and (5) to revoke or amend her will and engage in any transactions or gifting in furtherance of her estate planning. (Appendix A2 - A16; CP 18-32).

OFC’s initial care plan filed in March 2010 (CP 43-57), reported that Ms. Denny was “relatively high functioning” with minimal or no cognitive

impairments except moderately impaired short-term memory. CP 53, 56. Within a short time, Ms. Denny became very unhappy with OFC as her guardian and frequently expressed her desire or intention to terminate the guardianship, including hiring an attorney to do so. CP 385, 363, 290, 295. On June 24, 2010, OFC's employee, Ms. Marx, met with Ms. Denny attempting to obtain her agreement to see a specialist to address her carpal tunnel syndrome. CP 294-94. Later in its Annual Report for 2010, OFC wrote that Ms. Denny "remains fiercely independent," "is keenly aware of what she considers the guardian's unwelcome and unnecessary involvement in her affairs," scored 24/30 on a Mini Mental State exam¹ in December, and preferred her son Richard's involvement in her medical care rather than the guardian's. CP 179-81, 183.

OFC Exceeded Its Limited Authority. On September 3, 2010, OFC's Ms. Marx learned from the medical staff at Aljoya, the facility at which Ms. Denny resided, that she had that day received surgery to address her carpal tunnel syndrome. Ms. Marx then mailed that month to the hand surgeon and to five other doctors for Ms. Denny *letters stating that she had been adjudicated incapacitated so she could no longer give consent to medical treatment, and that only representatives of OFC, the*

¹ Any score greater than or equal to 25 points (out of 30) indicates a normal cognition. Below this, scores can indicate severe (≤ 9 points), moderate (10-20 points) or mild (21-24 points) cognitive impairment. Mungas D (July 1991). "In-office mental status testing: a practical guide". *Geriatrics* 46 (7): 54-8, 63, 66. PMID 2060803. Source: http://en.wikipedia.org/wiki/Mini-mental_state_examination

appointed guardian of her person and estate, could give such consent.

CP 242, 246, 1327-8, 1332-5. Ms. Denny and Richard did not learn of these secret September 2010 letters until she requested from her health care providers copies of her medical records in early 2012. CP 1326.

In December 2010, OFC cited the hand surgery and an alleged, but later disproved (CP 1486-90), incident involving Ms. Denny's daughter, Marianne Zak, in support of its request for an order that Ms. Denny's son and daughter may assist in her health care *only* if they inform providers of the guardianship and inform OFC before any appointments so it may communicate with the provider and withhold consent to any treatment that its believes might harm Ms. Denny. CP 123-4, 132-4. That request was within a Petition for Approval of Interim Report (CP 124-64) that was *not* served on Mr. Austin, Ms. Denny's tax attorney, or any other attorney representing her, for none was. CP 1471-73. At the *ex parte* hearing on that petition, OFC's attorney, Thomas Keller, falsely stated, "Her children have both been taking her to various medical appointments, and we just want some ground rules because we're supposed to be the guardian of her person and estate, and we weren't even aware of some of these things until after the fact." RP1 18. Commissioner Velategui entered OFC's requested order. CP 165-68. Consistent with his oral misrepresentations (also at RP1 15), the petition and order prepared by Mr. Keller, and all the pleadings and orders (except those dealing solely with estate matters) that

he prepared in 2010 and through March 2011 consistently referred to OFC as guardian of the person and estate of Ms. Denny—never correctly as *limited* guardian of her person. CP 38, 118, 121, 123, 165, 169, 410. And none of Mr. Keller’s pleadings in 2010 were served on Mr. Austin (CP 1467, 1469-73, 1690, 1692, 1745), whose role was limited to estate planning, though Mr. Keller began sending him some pleadings in March 2011 and listing him on notes to motion docket as “Estate Planning Attorney for Ella Nora Denny.” CP 1761-2, 1482-3.

Mr. Keller’s petition, filed March 9, 2011, for approval of OFC’s first annual report and care plan concluded by requesting an order directing the clerk to reissue “Letters of Guardianship of the Person and Estate” to OFC and the court on March 31, 2011, entered his presented order with his requested language. CP 175, 412. On June 17, 2011, the clerk issued an incorrect letter of guardianship certifying that OFC was guardian of the person and estate of Ms. Denny—not *limited* guardian of her person. CP 414. Four days later, OFC received from Mr. Keller certified copies of the newly issued incorrect letter of guardianship. CP 521.

In mid-July 2011, OFC staff objected to Richard’s efforts to participate in Ms. Denny’s health care at the Overlake Hospital Medical Center Mercer Island Senior Care Clinic (OHMC Clinic), so Ms. Marx delivered the newly issued incorrect letter of guardianship of person and estate to that clinic’s staff and *directed them to not share with Richard*

his mother's private health care information. CP 526-9, 1330.

On September 13, 2011, after another confrontation with Richard at the OHMC Clinic concerning his desire to participate in Ms. Denny's health care, the clinic's social worker sought clarification of OFC. That social worker wrote of her phone conversation with Mr. Keller that Ms. Denny's children could attend he appointments but, "Children cannot make decisions about healthcare, not meds she takes, operations she has, etc. Only guardian can do that." CP 1329, 604. Of her phone conversation with Ms. Marx, the social worker wrote: "She admits that the court doesn't prevent son's involvement in pt's health care. She took him off of pt privacy list because he was so difficult to deal w/ about health issues." CP 1330. The social worker referred the matter to the clinic's manager, Greg Beeks, who reviewed the court documents that Mr. Keller provided by fax and concluded in his message to Ms. Marx that Ms. Denny's "family members should be allowed to remain on the patient privacy form and actively participate in the patient's care." CP 1951 Nothing suggests, however, that Mr. Beeks recognized as false ***Mr. Keller's bald assertion that only the guardian, OFC, could consent to her health care, to the exclusion of Ms. Denny herself.***

That incident caused Ms. Denny and her family members to learn of the incorrect letters of guardianship that supported OFC claims of sole authority over her health care. On September 16, 2011, Ms. Denny mailed

OFC a certified letter (its receipt confirmed three days later) demanding that it cause the immediate correction of the clerk's letter of guardianship and inform third parties including all her health care providers of the mistake and of OFC's limited authority as *limited* guardian of her person. CP 1311-22. A few days later, Nathan Reinsche, an officer of OFC, emailed Mr. Keller "to request that he obtain corrected letters of guardianship reflecting limited guardianship of person." CP 546, 604. Mr. Keller never did so. But after the court approved OFC's Second Annual Report, the clerk on April 9, 2012, issued a correct letter of limited guardianship of the person. CP 1768. OFC's Second Annual Report failed to report to the court the clerk's error or its own excesses concerning its limited authority. CP 416-45. That report indicated that OFC planned to continue claiming sole authority over Ms. Denny's health care. CP 434. ***Nothing in the record indicates or even suggests that OFC ever took any actions to inform third parties, as Ms. Denny's letter had demanded, that the 2011 letters of guardianship and its own claims of sole authority over her health care were incorrect.*** To illustrate, on December 16, 2012, an Overlake Hospital worker informed Richard that it would not do a urinalysis drug screen on Ms. Denny's urine sample (though she was conscious and could consent) unless OFC gave its authorization. CP 1889-90. And on January 17, 2013, an Overlake Hospital official asserted to Richard's counsel that its records, that it had received from OFC, showed

OFC as Ms. Denny's full guardian. CP 1944.

At a hearing before Commissioner Velategui on January 24, 2013, Richard's counsel again asserted that OFC has been holding itself out to medical professional as Ms. Denny's full guardian. In response, OFC's counsel Carol Vaughn, stated: "I believe that what Mr. Schafer is referring to was an error that the guardian made, I believe it's two years ago now, when they made that misrepresentation accidentally to a medical provider. It has been clarified over and over and over again in the reports that have been filed by the guardian since that time." RP11 30-31. ***But there is no record that OFC ever acknowledged its "mistakes" or corrected them to third parties.***

Motion to Remove OFC. Following the court's refusal to allow counsel for Ms. Denny, discussed below, her nonlawyer nephew, Thomas Anderson, on April 9, 2012, applied as her next friend to the court to remove OFC and replace it with a different guardian by delivering to the clerk, pursuant to RCW 11.88.120, a motion (CP1235-79) with many exhibits documenting OFC's misconduct and Ms. Denny's ignored pleas. CP 1280-1348. At a hearing on April 27, 2012, before Commissioner Velategui, Mr. Anderson asserted that his motion to remove OFC was based on its misconduct in claiming to be full guardian of the person of Ms. Denny and claiming sole authority over her health care. RP5 5. The commissioner stated that he had read the motion to remove but had not

gleaned that OFC had exceeded its authority. *Id.* However, most of the documentation showing OFC's misconduct discussed above, such as OFC's letters to doctors and the incorrect letters of guardianship, were exhibits to that motion and discussed within it. CP 1235-8, 1251, 1256-60, 1272, 1311, 1325, 1327-35. At that April 27 hearing, in response to Mr. Anderson's misconduct accusations, Mr. Keller acknowledged, "the order [approving OFC's First Annual Report] inadvertently referred to Ohana as a full guardian of the person instead of a limited guardian of the person." And concerning the incorrect clerk's letter of guardianship he said, "We didn't discover it until nine months into the second year. And when it was discovered the decision was made that we were only three months away from going back to court on the second annual report, we would just fix it at that time, which we did in the second annual report." RP5 6. In fact, the incorrect letter of guardianship was discovered (Sept. 19, 2011, when OFC received Ms. Denny's letter) three months after its issuance (June 17, 2011), and not fixed until nearly seven months after discovery (April 9, 2012).

In a pleading responding to Mr. Anderson's motion to remove OFC, Ms. Vaughn wrote, "There is no merit to the contention that Ohana breached its fiduciary duty by overstepping its authority as limited guardian of the person." CP 1009-11.

Commissioner Velategui on June 19, 2012, without having

appointed a guardian-ad-litem to investigate the contentions in Mr. Anderson's motion or holding a hearing on it—that RCW 11.88.120(3) requires unless such an application is frivolous—denied the motion. The order did not find it to have been frivolous, but expressly barred Richard and Mr. Anderson from “procuring Ms. Denny’s signature” on any documents relating to the guardianship or OFC. CP 1163-8. Richard moved for revision of that order along with the order, discussed below, denying counsel for Ms. Denny. The denial of that motion for revision is discussed below.

Attorney Timothy Austin. Estate planning and tax attorney Tim Austin represented Ms. Denny by preparing and filing on December 16, 2009, her response to guardianship petition (CP 15) and by appearing with her the next morning at the one-minute hearing on that petition. RP1 5-6. But he believed, as apparently did OFC and all the participating lawyers, that his representation of Ms. Denny thereafter was limited to estate planning. On April 24, 2012, Mr. Austin emailed Mr. Anderson to advise that he represented Ms. Denny “only with regard to her estate plan.” CP 701. On January 10, 2013, Mr. Austin filed a Declaration and Notice of Withdrawal stating, “Whereas I represented Ella Nora Denny in her guardianship hearing on December 17, 2009, I have not represented her with regard to her guardianship matter after that date. Rather, my representation of Ms. Denny has been limited to estate planning matters,

as permitted by the Order of December 17, 2009.” CP 1764-65. In a pleading filed with this appellate court, OFC acknowledged, “Mrs. Denny did not retain appointed counsel in the guardianship after the guardianship was established.” and “As of December 17, 2009, Mrs. Denny did not have appointed counsel in the guardianship” Guardian’s Response to Motion to Modify and Stay, filed Feb. 25, 2013, pgs 3, 12.

Ms. Denny Seeks Counsel. The record reflects Ms Denny’s handwritten declaration dated November 17, 2011, stating among other things, “I want to select my own attorney.” CP 1345. By November 2011, Ms. Denny apparently had engaged lawyers Brian Isaacson and Mark Wilson, and their firm, Isaacson & Wilson, P.S. (I&W), to represent her in the guardianship case. Many timesheet entries by OHC and Mr. Keller from November 18 to 22, 2011 indicate that. CP 608, 564-5. On December 16, 2011, Mark Wilson introduced himself to Ms. Marx, then visiting the Aljoya facility, as Ms. Denny’s attorney. CP 564-5.

By March 20, 2012, since I&W still had not appeared in Ms. Denny’s guardianship case notwithstanding an impending hearing on OFC’s Second Annual Report, Ms. Denny signed a letter discharging that firm and its lawyers. CP 1348. The record does not indicate if that letter was delivered, but Ms. Denny apparently reconsidered that discharge. On March 23, 2012, she appeared with Mr. Wilson at a hearing before Commissioner Velategui for the purpose of obtaining the court’s

permission for Mr. Wilson to represent her in opposing OFC's oppressive requests in its petition presenting its Second Annual Report and to continue the impending hearing on that petition. CP 1491-1518. Several of Ms. Denny's pleadings, signed by her *pro se*, expressed her need for counsel to oppose OFC's requests for further restrictions on her retained rights, stating that its petition "is inappropriate, unnecessary and will have undue, unnecessary, adverse impacts on my rights and freedom. For these and other reasons, I need independent legal representation." CP 1501, 1503, 1505, 1508, 1510-11. At that hearing, Mr. Keller argued that Ms. Denny lacked contractual capacity to hire an attorney, directing the commissioner's attention to a sentence in the 2009 order, following sentences that expressly allowed her on advice of counsel to enter into contracts relating to her estate planning, that read, "In all other areas, Mrs. Denny shall not have the right to enter into a contract." RP2 11. Mr. Keller argued that the court could not reverse that ruling unless it found, based upon another medical report, that Ms. Denny's dementia "has gotten better, not worse." *Id.* Mr. Wilson's pleadings and oral argument had cited RCW 11.88.045(1)(a) that directs courts to appoint a lawyer for "an alleged *or adjudicated* incapacitated person" whenever ("at any stage," "at any time") the person's rights and interests "cannot otherwise be adequately protected and represented." But Mr. Keller, a prominent

probate lawyer,² impugned his opponent's competency, saying "[He] practices in securities law. He doesn't understand that the statutes that he's citing don't apply to what he's asking for." because "She's no longer alleged to be incapacitated. She's been found to be incapacitated two and a half years ago." RP2 12. And later interrupting Mr. Wilson to assert, "She's not alleged. She's incapacitated." RP2 15. In response to the commissioner's question, Mr. Wilson reported that I&W was paid by a Denny family friend. RP2 18.

Commissioner Velatigui expressed concern about large guardianship estates being used essentially as "piggy banks for lawyers" (RP 2 21), but he recognized that the test, under the guardianship statutes (RCW 11.88.045(1)(b) and (c)), of whether a respondent can form an attorney-client relationship is whether she can "give direction to the lawyer." RP2 23. Nonetheless, he accepted Mr. Keller's suggestion, declining then to appoint Mr. Wilson or to continue the impending hearing on OFC's petition, and he requested that Dr. Eisenhauer "do an updated evaluation of Ms. Denny's current psychological capacities and whether the Alzheimer's type dementia that they believe is the underlying disability here has gotten worse or better and what her cognitive abilities actually are." RP2 23-4. The court then entered an order to that effect. CP

² A recognized "super lawyer" who chaired the 2003 and 2010 revisions to the King County Probate Manual. <https://www.linkedin.com/in/thomasmkeller> (visited 11/7/2015)

612.

Dr. Eisenhower visited and tested Ms. Denny on April 3, 2012. Her filed psychological report from that visit begins by stating that she was referred by OFC's Ms. Marx "to determine [Ms. Denny's] current cognitive functioning and to assess whether she remains incapacitated and in need of a guardian" (CP 1370) and concludes that "Ms. Denny would be best served with the ongoing services of a professional guardian." CP 1377. The report stated that "she has no significant problems with either receptive or expressive aphasia³," that she "was coherent," and that "She was able to process simple questions at a normal rate." CP 1372.

Mr. Keller filed the Eisenhower report on April 20, 2012, with a motion by OFC asking the court to deny Mr. Wilson's petition for appointment as counsel for Ms. Denny—

"because Ms. Denny lacks contractual capacity to enter into an attorney-client relationship with Mr. Wilson, because Mr. Wilson is relying upon a statute pertaining to alleged incapacitated persons prior to the initiation of a guardianship for authority for his appointment, and because the appointment of Mr. Wilson as independent counsel to Ms. Denny in addition to her current estate planning counsel Tim Austin will only serve to increase the litigation that has already occurred in this guardianship at the expense of the guardianship estate, and to the detriment of Ms. Denny." CP 644-48.

Commissioner Velategui granted OFC's motion in an *ex parte* hearing on May 16, 2012, (RP7) based upon his conclusions that she lacked

³ Aphasia is the ability to speak, write and understand language, both verbal and written.

contractual capacity, needed protection from undue influence, and that—

“Clear, cogent and convincing evidence establishes that EllaNora Denny is not in need of independent counsel, other than continuing representation by her current attorney Tim Austin for estate planning matters only, and then only to the extent that Mr. Austin determines that Ms. Denny retains sufficient mental capacity to understand and engage in estate planning.” CP 985-88.

After counsel later appeared for Richard, he sought reconsideration of that order (CP 1034-71), and upon its denial (CP 1159-60) he filed a motion for revision (CP 1528-29) and supporting memorandum. CP 1171-82. Ms. Denny appealed the May 16, 2012, order and many other orders directly to this court, assisted by Mr. Anderson as her next friend, who also appealed Commissioner Velategui’s orders adverse to him personally. CP 1530-62. Superior Court Judge Susan Armstrong heard Richard’s motion for revision on August 24, 2012, (RP 9) and entered an order denying it on September 10, 2012. CP 1414-15. Richard has appealed that order. CP 1585-1623.

2012 Restrictions on Ms. Denny’s Retained Rights. In OFC’s petition for approval of its Second Annual Report, filed March 9, 2012, it sought (1) greater restrictions on Ms. Denny’s retained right to manage her health care—an enlargement of the 2010 order to allow OFC’s agents to attend or cancel her health care appointments, (2) new restrictions on her right to travel—requiring a detailed itinerary two months in advance and that she be accompanied by a nurse approved by OFC, and (3) an

affirmation that the 2009 order revoking her right to contract barred her from retaining counsel except for estate planning. CP 416-445, specifically 419-20, 439-43. Commissioner Velategui granted OFC's requests by *ex parte* orders entered March 29, 2012. CP 613-20. RP3. On April 9, 2012, Ms. Denny, by Mr. Anderson as her next friend, and Richard moved for reconsideration of the order approving OFC's Second Annual Report. CP 621-8. On May 24, 2012, OFC filed a response (CP 997-1013) to which Richard replied on June 7, 2012. CP 1082-6. After four months, Richard's counsel sent Commissioner Velategui's assistant a letter about the still pending motion. CP 1434. After further responses by both Ms. Denny's daughter, Ms. Zak, (CP 1439) and Mr. Anderson (CP 1446-55), the Commissioner on October 23, 2012, entered the order that OFC had presented five months earlier denying the motion for reconsideration. CP 1459-62. The appellants to this consolidated appeal then amended their notices of appeal to include that order. CP 1629-74, 1675-85.

Alarming Events, Alarming 2013 Order. Prior to an incident in December 2012, Richard normally spent two or more hours each day with his mother, taking her on walks and other outings and administering her medications. CP 1452, 1953. On December 15, 2012, Ms. Denny was observed by an Aljoya nurse to have an elevated heart rate, so the nurse directed Richard to take her to Overlake Hospital where she was given

drugs to stabilize her heart rate and admitted for observation. CP 1889. Shortly before her hospital discharge the next day, Richard had a phone conversation with Ms. Denny's half-brother, James Anderson, and they began to suspect that Ms. Zak, then visiting from Michigan, may have given her an illicit substance. After J. Anderson spoke by phone with the attending physician, and Richard concurred, that doctor agreed to order a urinalysis. CP 1889-90. However, Richard soon was told by a nurse that the hospital would need authorization from OFC before drug-testing her urine sample. *Id.*

The doctor phoned OFC the next day, Monday, December 17, to report that the drug test indicated a positive for cocaine. CP 1861. Two days later Ms. Denny had another episode of heart rate irregularity, and the Aljoya nurse again directed Richard to take her to Overlake Hospital. CP 1899. At that visit, a doctor informed Richard of the positive drug test three days earlier, and Ms. Denny was re-admitted for two days. CP 1890-1. The next day, December 20, Richard agreed to OFC's request that he and his sister abstain from visiting with his mother temporarily. CP 1947. On December 26, Richard met with an investigating detective who informed him that a drug test from December 19 was negative for illicit drugs and that the first drug test report may have been a "false positive." CP 1943. Since it was obviously important to determine if that first test was a false positive, Richard's attorney sent OFC's attorney emails on

January 2 and 4, 2013, strongly urging it to cause professionals to attempt such a determination. CP 1904, 1907. But OFC declined, saying that it would simply await the conclusion of the police investigation. CP 1946. On January 14, 2013, at Richard's request, Dr. Gregory Gorman, the neurologist who had been seeing Ms. Denny regularly since 2008, reviewed the records of her recent hospitalizations and lab tests. CP 1945. He saw that the drug test from her second hospitalization was negative, and he concluded that the cocaine test report from her first hospitalization likely was a false positive from medications that she was treated with at the hospital. *Id.*, CP 1957. He provided Richard his progress notes stating that conclusion and progress notes from Ms. Denny's four appointments with him during 2012. CP 1945, 1956-62. Two months later, Richard's counsel received confirmation from the investigating detective and the assigned APS worker that they closed their respective investigations with no finding of crime or abuse. CP 2015-19.

On January 10, 2010, OFC filed in court a petition for instructions and supporting declarations relating to the drug test incident. CP 1859 - 1928. In those pleadings OFC expressed its objection that the December 16, 2012, drug test had been performed on Ms. Denny's urine sample without its prior authorization. CP 1863. Upon Ms. Denny's return to her Aljoya apartment, OFC had hired a home care agency to place 24-hour live-in care workers with her in her apartment (CP 1865, 1954), and

directed Aljoya's staff to administer her medications. CP 1866-7. In its petition for instructions, OFC recommended that those measures be continued and that Ms. Denny's children be allowed to resume their unsupervised visits with her provided they do not interfere with or discourage her acceptance of the live-in care workers. CP 1869-70, 1873. However, Richard's sister, Ms. Zak, responded requesting that his visits and outings with their mother be supervised. CP 1931, 1937. The pleadings filed by the parties in response to OFC's petition for instructions and particularly Ms. Zak's request that Richard's visits with their mother be supervised were quite adversarial. CP 1803-44, 1929-99. Richard again contended that Ms. Denny should be represented by counsel (CP 1825) and unsuccessfully sought from this appellate court an emergency stay of the impending hearing on OFC's petition until she became represented by counsel. *Id.*, CP 1828-37.

At the hearing on January 24, 2013, of OFC's petition for instructions, at the start of a discussion about the drug test, Commissioner Velategui alarmingly accused Richard of drugging his mother to frame his sister:

“And, frankly, as I was reading the pleadings, I was wondering why it was no one asked your client to immediately submit to a test to see if he was the one who had administered it to his mother so that he could blame it on Ms. Zak. I mean, this case—this attempt to pin the cocaine on Ms. Zak, as I was reading the pleadings I was laughing to myself: Well, Richard did it for goodness

sake.” RP11 12

OFC’s counsel, Ms. Vaughn, reasserted that “the guardian is not asking for any restrictions against [Richard] or Ms. Zak.” RP11 22. Ms. Zak’s counsel reasserted her position that all visits should be supervised. RP11 26. Richard’s counsel asserted that, contrary to OFC’s representations, Ms. Denny was not happy having a stranger, the care worker, residing in her apartment with her. RP11 28. The Commissioner challenged Richard’s counsel for having requested Dr. Gorman to look into the validity of the drug test report, suggesting that neither Richard nor his counsel were permitted to communicate with Ms. Denny’s doctor. RP11 32. Obviously dissatisfied with counsel’s reply that the existing court orders expressly allowed Ms. Denny’s children to participate in her health care, Commissioner Velategui, *sua sponte*, “clarified” prior orders by directing that henceforth *only* OFC may communicate with her health care providers or access her records—that OFC was to be a full guardian of the person of Ms. Denny as to medical matters. RP11 33-34. The order entered from that hearing is consistent with his directive. CP 1845-57. Richard amended his notice of appeal to include this January 25, 2013, order. CP 2000-14.

Richard unsuccessfully moved this appellate court to modify its commissioner’s denial of the emergency motion to stay. Attorney Elena Garella met with Ms. Denny and petitioned for authority to represent her

in her appeals filed by her next friend, Mr. Anderson. This court denied that petition, and its denial was upheld by the state supreme court.

ARGUMENT

1. Under the 2009 order, Ms. Denny retained the right to consent to or refuse medical treatment and retained other fundamental rights.

At the conclusion of the revision hearing, Judge Armstrong stated, “part of the problem I think is at least with respect to her medical decisions, the original guardianship order gives [Ms. Denny] control but takes it away in the same document. So it’s—there is not a lot of authority left in her. It’s subject to the guardian’s oversight.” RP9 30. But the poorly drafted 2009 order should not be interpreted so hyper-technically against Ms. Denny. The order states that OFC is only a limited guardian of her person. The GAL report was plain and clear in describing the very limited authority that should be given to OFC. The 2009 order, at Findings of Fact 1.5, stated that Ms. Denny was only “partially incapacitated” and that “EllaNora Denny has the capacity to exercise the retained rights as set forth in Conclusions of Law.” That sentence would be meaningless if lawyerly conditions buried in boilerplate stripped her of all her rights.

The poorly drafted order should be interpreted in favor Ms. Denny’s retention of liberty and autonomy, consistent with state policy established by the legislature. To encourage courts to establish limited

guardianships, the legislature, in Laws of 1975, 1st Ex. Sess., ch. 95, § 2, amended RCW 11.88.010 by adding subsection (2) reading in relevant part as follows:

(2) The superior court for each county shall have power to appoint limited guardians for the persons and estates, or either thereof, of disabled persons, who by reason of their disability have need for protection and assistance, but who cannot be found to be fully incompetent, upon investigation by the court After considering all evidence presented as a result of such investigation, the court shall impose, by order, only such specific limitations and disabilities on a disabled person to be placed under a limited guardianship as the court finds necessary for such person's protection and assistance. A person shall not be presumed to be incompetent nor shall a person lose any legal rights or suffer any legal disabilities as the result of being placed under a limited guardianship, except as to those rights and disabilities specifically set forth in the court order establishing such a limited guardianship.⁴ [Emphasis added.]

In 1990, our state legislature adopted many guardianship reforms as Laws of 1990, ch. 122. At its section 1, it amended RCW 11.88.005 to its present form:

It is the intent of the legislature to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person. The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian. However, their liberty and autonomy should be restricted through the guardianship

⁴ Laws of 1990, ch. 122, replaced “incompetent” with “incapacitated” throughout RCW Chapters 11.88 and 11.92.

process only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs. [Emphasis added.]

Section 9 of that 1990 legislation added a new section, later codified as RCW 11.88.095, subsection (3), reading as follows:

(3) If the court determines that a limited guardian should be appointed, the order shall specifically set forth the limits by either stating exceptions to the otherwise full authority of the guardian or by stating the specific authority of the guardian. [Emphasis added.]

The language of the 2009 order that specified the retained rights of Ms. Denny and the limited authority of OFC concerning her person were in Conclusions of Law paragraphs 2.2 and 2.3, quoted as follows:

2.2 Rights Retained

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

2.3 Limited Guardian of the Person’s Authority and Duties:

- In consultation with Ms. Denny, to select an appropriate living situation.
- To consent to reasonable or necessary medical or dental treatment if EllaNora Denny is unable to consent to necessary medical or dental treatment, or unreasonably withholds her consent to same.
- To arrange for medical, dental and other therapeutic appointments;
- To supervise medications, including ensuring Mediset is properly configured and all other issues related to medication.

Paragraph 2.4 of the 2009 Order addressed Ms. Denny’s restrictions concerning her estate, reserving to her the right to enter into contracts in furtherance of her estate planning “solely under the advice and direction of competent independent counsel” but otherwise revoking her right to enter into contracts.

Paragraph 2.5 of the Conclusions of Law in the 2009 order appears to be a poorly edited alteration of the drafter’s form language from full guardian-of-the-person orders describing the limited guardian’s authority that flowed from the specific language of Paragraphs 2.2 and 2.3. The initial sentence of Paragraph 2.5 introduces a list, but the first item in the list is also introductory language that limits—“limited by the language in this Order”(plainly referring to Paragraphs 2.2 and 2.3)—the items listed

below it. So these two introductory passages should have been edited and merged into a single introductory sentence as follows:

2.5 Upon the issuance of Letters of Limited Guardianship, the Limited Guardian of the Person shall have all of the powers and responsibilities of a Guardian of the person pursuant to the provisions of Chapter 11.92 RCW, limited by the language in this Order, including but not limited to:

So properly understood, every item listed in Paragraph 2.5 is subject to and limited by the controlling provisions of Paragraphs 2.2 and 2.3. OFC wrongly asserted to Judge Armstrong that language in the items listed in Paragraph 2.5 control the provisions of Paragraph 2.2 that broadly reserved to Ms. Denny her right to manage her health care, personal care, and the social aspects of her life.

2. The 2009 order did not bar Ms. Denny from engaging legal counsel to advocate her retained rights in the guardianship case.

Though the 2009 order revoked Ms. Denny's right to manage her substantial and complex financial estate, barring her from executing contracts, it did not address her right to be represented by legal counsel in defense of her retained rights. As noted above, RCW 11.88.010(2) provides that in limited guardianship cases a partly incapacitated person loses none of their civil rights "unless specifically set forth in the court order."

Ohana’s argument that a person who lacks contractual capacity has no right to an attorney in judicial proceedings affecting them goes much too far. If true, because minors lack contractual capacity, they would have no right to an attorney in judicial proceedings affecting them. However, decades ago it was held that juveniles have a constitutional right to be represented by legal counsel in civil and criminal proceedings affecting their liberty. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). The absurd argument that a person lacking contractual capacity has no right to an attorney’s representation could as well be applied to assert that the person has no right to housing, to health care, or even to nutrition, all of which arise from a contract with the provider.

3. Persons have a constitutional right to due process before a court in a guardianship case may restrict their fundamental rights.

Judicial recognition that constitutional due process protections apply to respondents in guardianship cases began in the late 1960s, as summarized by the Missouri supreme court in *In re Link*, 713 S.W.2d 487, 493-94 (Mo. 1986):

“Historically, the notion that a declaration of incompetence is in the best interest of the affected individual has resulted in the parens patriae power being exercised in an atmosphere of procedural informality. [Citations omitted.] The beneficial motives behind

guardianship obscured the fact that guardianship necessarily entails a deprivation of the fundamental liberty to go unimpeded about one's ordinary affairs....

The procedural "deficiency" in the exercise of the *parens patriae* power began to receive judicial attention following two 1967 decisions by the United States Supreme Court. In *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), the Court ruled that the Fourteenth Amendment's procedural due process protection applied to juvenile delinquency proceedings long considered civil in nature. The Court held that it is not the characterization of the proceedings which determines whether constitutional guarantees normally utilized only in criminal matters apply, but rather, what is at stake for the individual. *Id.* at 26, 87 S.Ct. at 1442. In *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), the Supreme Court held that a mental illness commitment proceeding, "whether denominated civil or criminal," is subject to the constitutional guarantee of due process. [Footnote omitted.] *Id.* at 608, 87 S.Ct. at 1211; *see also Kent v. United States*, 383 U.S. 541, 555, 86 S.Ct. 1045, 1054, 16 L.Ed.2d 84 (1966) ("[T]he admonition to function in a 'parental' relation is not an invitation to procedural arbitrariness.").

Following the Supreme Court's lead, courts began to scrutinize proceedings conducted pursuant to the *parens patriae* power more closely. See, for example, *Heryford v. Parker*, 396 F.2d 393 (10th Cir.1968); *Lessard v. Schmidt*, 349 F.Supp. 1078 (E.D.Wisc.1972); *Quesnell v. State*, 83 Wash.2d 224, 517 P.2d 568 (1974); *State ex rel. Hawks v. Lazaro*, 157 W.Va. 417, 202 S.E.2d 109 (1974); *Lynch v. Baxley*, 386 F.Supp. 378 (N.D.Ala.1974); *Doremus v. Farrell*, 407 F.Supp. 509 (D.Neb.1975); *Suzuki v. Quisenberry*, 411 F.Supp. 1113 (D.Haw.1976).

The uniform conclusion reached by these courts was that "[i]t matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. Where ... the state undertakes to act in *parens patriae*, it has the inescapable duty to vouchsafe due process ... [and] due process requires that the infirm

person ... be fully advised of his rights and accorded each of them unless knowingly and understandingly waived.”

Heryford, supra at 396.”

The Missouri supreme court in that passage cited *Quesnell v. State*, 83 Wn.2d 224, 517 P.2d 568 (1973). In that involuntary commitment case, our state supreme court undertook to “consider and review the subject proceedings in terms of due process of law as guaranteed the appellant by U.S. Const. Amend. 14, and Wash. Const. art. 1, § 3.” *Id* at 227. The Court discussed the 1967 U.S. Supreme Court cases, *In re Gault* and *Specht v. Patterson*, and quoted the above-quoted passage from *Heryford v. Parker*. The court stressed that “constitutional and statutory guarantees in regard to the assistance of counsel” entitled a respondent in a commitment proceeding to “affirmative advocacy” by a lawyer who had fully investigated by consulting “meaningfully” with the client and “exploring all relevant factors in his defense.” *Id* at 237–38. Stating that “the right to trial by jury in Washington mental illness proceedings is guaranteed by the constitution (Wash. Const. art. 1, § 21)” (*Id* at 240), the court vacated the lower court’s order for not having honored the appellant’s jury request.

Our state supreme court recognized in later cases that the due process guarantees of the Fourteenth Amendment to the U.S. Constitution

must accompany civil commitment proceedings. *State ex rel. T.B. v. CPC Fairfax Hosp.*, 129 Wn.2d 439, 452, 918 P.2d 497 (1996); *In re Harris*, 98 Wash.2d 276, 279, 654 P.2d 109 (1982), *overruled on other grounds by Dunner v. McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984)).

Courts and scholars have asserted that procedural due process in guardianship proceedings should be no less than that required in civil commitment and criminal proceedings. *E.g.*, *In re Guardianship of Hedin*, 528 N.W.2d 567, 575 (Iowa 1995); Susan G. Haines and John J. Campbell, *Defects, Due Process and Protective Proceedings: Are Our Probate Codes Unconstitutional?*, 33 Real Prop., Probate and Trust J. 215, 244 (1998) (“There is no cogent reason why the due process standard in protective proceedings should be any lower than those applicable in juvenile, criminal, or civil commitment cases.”); Mark D. Andrews, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 Elder L.J. 75 (1997).

There is no rational basis for holding that constitutional due process applies at an initial guardianship hearing—that might revoke only some of a respondent’s fundamental rights—but fails to apply at subsequent hearings at which the respondent’s remaining fundamental rights are restricted or revoked.

4. **Persons have a statutory right under Washington law to due process before a court in a guardianship case may restrict their fundamental rights.**

In 1975, our state legislature began codifying in our guardianship statutes its recognized constitutional due process concepts, such as the right to counsel and to a jury trial on issues of capacity. Section 7, Laws of 1975, 1st Ex. Sess., ch. 95, enacted a new section later codified as RCW 11.88.045, in relevant part as follows:

An alleged incompetent or disabled person is entitled to independent legal counsel at his own expense to represent him in the procedure: PROVIDED, That if the alleged incompetent or disabled person is unable to pay for such representation or should such payment result in substantial hardship upon such person the county shall be responsible for such costs. The alleged incompetent or disabled person is further entitled upon request to a jury trial on the issues of his alleged incompetency or disability, with the standard of proof to be applied being that of clear, cogent, and convincing evidence.

And two years later, in Laws of 1977, 1st Ex. Sess., ch. 309, § 5, the legislature specified that *the right to counsel also applies to persons already adjudicated* to be incompetent or disabled (contrary to arguments by OFC's counsel), amending RCW 11.88.045 by appending to it the following additional proviso:

PROVIDED FURTHER, That when, in the opinion of the court, the rights and interests of an alleged **or adjudicated** incompetent or disabled person cannot otherwise be adequately protected and represented, the court on its own motion **shall** appoint an attorney at any time to represent

such person. [Emphasis added.]

To further emphasize, it reads, ***“the court shall appoint an attorney at any time to represent such person.”***

The next major reform of our guardianship statutes occurred in 1990, Laws of 1990, ch. 122. Section 3 of that legislation amended RCW 11.88.030 by adding a new subsection (4) that required prompt service on an alleged incapacitated person (AIP) of a statutory notice in double spaced 10-point type of capital letters of their possible loss of rights in the guardianship proceeding and of “the right to counsel of choice and to a jury trial on the issue of incapacity.” Is specifically did not notify AIPs that their rights to counsel and a jury on issues of capacity would apply only at their initial court hearing. Consistently, Section 6 of the 1990 legislation amended RCW 11.88.045(1) to state that the right to counsel applies “at any stage of guardianship proceedings” and to state that the role of an AIP’s counsel is to advocate their client’s expressed preferences.

Continuing this trend of codifying constitutional due process principles, the 1996 legislature in Laws of 1996, ch. 249, sec. 9, amended RCW 11.88.045 by adding to the first sentence of subsection (1)(a) and to the first sentence of subsection (3) the underscored text to read as follows:

(1)(a) Alleged incapacitated individuals shall have the right

to be represented by willing counsel of their choosing at any stage in guardianship proceedings.

(3) The alleged incapacitated person is further entitled to testify and present evidence and, upon request, entitled to a jury trial on the issues of his or her alleged incapacity.

Again, nothing in the statute suggests that these due process rights shall be afforded guardianship case respondents only when their capacities and fundamental civil rights are an issue in an initial guardianship hearing but not when their rights are an issue in subsequent hearings..

The language of RCW 11.88.010(2) since 1975 that empowers courts “to appoint limited guardians for the persons and estates, or either thereof, of incapacitated persons, who by reason of their incapacity have need for protection and assistance, but who are capable of managing some of their personal and financial affairs” indicates that a person might be incapacitated as to her estate but not her person, or the reverse, or with respect to some aspects but not other aspects of her personal or financial affairs. Whenever a court is petitioned to revoke a person’s rights as to a specified aspect of her personal or financial affairs, that person is an “alleged incapacitated person” as to that aspect of her affairs.

5. The 2015 amendment to RCW 11.88.120(1) applies retroactively in this case.

In the 2015 legislative session, the House of Representatives

Committee on the Judiciary unanimously voted “do pass” on HB 1407 that would amend to then RCW 11.88.120(4) the following sentence: “For a hearing on an application to terminate a guardianship or to modify the legal rights of a fully or partly incapacitated person, that person has the same due process and procedural rights that an alleged incapacitated person is afforded in an initial guardianship proceeding.” Though that bill failed to get enacted into law, largely due to opposition by the judges’ association, its key remedial and clarifying concept was enacted in ESSB 5607 and became Chapter 293, Laws of 2015, effective July 24, 2015. (Appendix A17 - A21) The legislation added to RCW 11.88.120(1) a sentence reading, “For any hearing to modify or terminate a guardianship, the incapacitated person shall be given reasonable notice of the hearing and of the incapacitated person’s right to be represented at the hearing by counsel of his or her own choosing.” There can be no doubt that this enactment, championed by Richard’s counsel because of this case, was intended to clarify the statutory provisions discussed above. Accordingly it should be recognized that this provision applies retroactively to Ms. Denny’s case.

OHC’s counsel argued, and the superior court apparently was persuaded, that the statutes affording guardianship case respondents a right to counsel only applied at initial guardianship proceedings because

of some references in the statutes to “alleged incapacitated persons.” To the extent there is statutory ambiguity, the 2015 legislation clarifies and cures it. Legislation is curative and retroactive if it clarifies an ambiguous statute. Also, the 2015 legislation is remedial. Legislation is remedial and applied retroactively when it relates to practice, procedure or remedies, and does not affect a substantive or vested right. Both bases for retroactivity apply. *Houk v. Best Dev. & Const. Co.*, 179 Wn. App. 908, 322 P.3d 29 (2014); *Bayless v. Community College Dist. No. XIX*, 84 Wn. App. 309, 927 P.2d 254, 255 (1996); *Marine Power & Equip. Co. v. Human Rights Comm’n Hearing Tribunal*, 39 Wn. App. 609, 694 P.2d 697 (1985).

6. The superior court did not correctly determine in May 2012 that Ms. Denny lacked capacity to form an attorney-client relationship except for complex estate planning advice.

At the hearing on March 23, 2012, at which Mr. Wilson and Ms. Denny sought his appointment to represent her, Commissioner Velategui correctly recognized that the test, under the guardianship statutes, RCW 11.88.045(1)(b) and (c), of whether a respondent can form an attorney-client relationship for a guardianship case is whether she can “give direction to the lawyer.” RP2 23. The lawyer’s role is to advocate the client’s expressed preferences.

But the Commissioner ignored that test. He ordered an updated psychological evaluation of Ms. Denny to determine whether her disability “has gotten worse or better and what her cognitive abilities actually are.” The report by the psychologist states that she understood the purpose of her updated evaluation of Ms. Denny was “to assess whether she remains incapacitated and in need of a guardian.” CP 1370. The purpose should have been to determine if Ms. Denny simply had the capacity to communicate to an attorney her desires concerning the threatened restrictions on or loss of her retained fundamental personal rights so the attorney then could advocate her expressed preferences on her behalf as RCW 11.88.045(1)(b) and (c) require. The psychologist’s report indicated that Ms. Denny had sufficient cognition and no aphasia deficiency, so she could have communicated her desires to Mr. Wilson, as she reportedly did.

And it must be noted that Ms. Denny had a statutory right under RCW 11.88.045(4) to select the health care professional whose report the court must consider in determining any limitations on her civil rights. Every annual report and care plan filed by OFC listed Dr. Gorman as her neurologist, and he had been seeing her regularly since 2008. Had she been afforded her statutory right, she certainly would have selected him.

It is irrational to conclude that an individual possesses the capacity

to communicate with and consider advice from a tax attorney concerning multi-million dollar tax avoidance estate planning transactions, but lacks the capacity to express her preferences to an attorney about retaining her rights concerning her personal and health care. RP2 8, 14.

7. The orders are void that restricted Ms. Denny's retained rights without affording her due process, including legal counsel.

Washington law is clear that judicial proceedings conducted in disregard of a party's due process rights are void. *Esmieu v. Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203 (1977)(“An order is void as violative of due process where based on a hearing for which there was not adequate notice or an opportunity for a party to be heard.”); *McDaniel v. Washington State Dept. of Soc. & Health Services*, 51 Wn. App. 893, 897, 756 P.2d 143 (1988); *R.R. Gable, Inc. v. Burrows*, 32 Wn. App. 749, 753, 649 P.2d 177 (1982).

The courts have a nondiscretionary duty to vacate a void order or judgment. *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991), *review denied*, 118 Wn.2d 1022, 827 P.2d 1393 (1992); *In re Marriage of Markowski*, 50 Wn. App. 633, 635, 749 P.2d 754 (1988); *Brickum Inv. Co. v. Vernham Corp.*, 46 Wn. App. 517, 520, 731 P.2d 533 (1987).

8. Courts have a responsibility, as superior guardian, to protect the rights of respondents in guardianship cases.

“Although governed by statute, guardianships are equitable creations of the courts and it is the court that retains ultimate responsibility for protecting the ward’s person and estate.” *In re Guardianship of Hallauer*, 44 Wn.App. 795, 797, 723 P.2d 1161 (1986); quoted in *In re Guardianship of Lamb*, 173 Wn.2d 173, 184, 265 P.3d 876 (2011). In a guardianship proceeding, the court “is said to be the superior guardian of the ward,” and the guardian is an agent of the guardianship court. *Id.* at 190; *Seattle–First Nat’l Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977).

Our state supreme court established, by court rule, the Certified Professional Guardian Board that oversees professional guardians, such as OFC. That board has adopted, based upon guardianship law, standards of practice that strictly only apply to certified professional guardians but ought to guide all guardians—including superior guardians (the courts). Of particular relevance here is Standard of Practice Regulation 403.1, that states:

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 to the greatest extent consistent with their protection and safety. The guardian shall protect the personal and economic interests of the incapacitated person and foster

growth, independence, and self-reliance.

(available from http://www.courts.wa.gov/programs_orgs/guardian/)

An appellate court reviewing a guardianship case becomes the superior guardian, as well, of the protected person. The court of appeals recognized that in *In re Guardianship of Way*, 79 Wn. App. 184, 901 P.2d 349 (1995). It held that that rules applicable to adjudicatory proceedings ought not apply to protective proceeding if they impede the ability of the court, as superior guardian, to address the needs of a person being protected. In *Way*, the appellate court ruled, at 192, that to fulfill its own role as superior guardian, “we must have before us the most complete and up-to-date record possible, even if that means considering evidence or circumstances which were not before the trier of fact.”

In *Way*, the trial and appellate courts rejected DSHS’s arguments—similar to those made here by OFC—that once the jury determined Ms. Way to be incapacitated as to her estate, she did not have any further due process rights, such as the right to have a jury determine which of her rights as to her person should be restricted. The jury had found her incapacitated but determined that she should retain certain rights, including the right to give informed consent to her medical treatment, essentially the same as in Ms. Denny’s case. The court held that the jury’s determination that Ms. Way was incapacitated as to her

estate did not deprive her of her due process right to a jury's finding to support any restrictions on her rights as to her person.

9. The superior court was informed of OFC's misconduct.

The superior court was well informed by documentary evidence that was filed and called to the court's attention multiple times that OFC had been, over an extended period, exceeding its limited authority over Ms. Denny's person. And though OFC's counsel, Mr. Keller, once acknowledged his mistakenly drafted order that led to the mistakenly issued letters of full guardianship, it was apparent to the court that OFC had never acknowledged the depth and duration of its misconduct as described above, at pages 8 - 13.

10. The superior court should have imposed sanctions against OFC for its misconduct.

The superior court has a duty to oversee the conduct of its appointed guardians and their attorneys. RCW 11.92.180 specifically directs the court to scrutinize fees charged by them, and provides, "If the court finds that the guardian or limited guardian has failed to discharge his or her duties as such in any respect, it may deny the guardian any compensation whatsoever or may reduce the compensation which would

otherwise be allowed.” It is established law that an appropriate remedy when a court finds that a party under its supervision has breached a fiduciary duty to disapprove fees or order disgorgement of fees previously paid. *In re Guardianship of Decker*, 188 Wn. App. 429, 441, 353 P.3d 669, 675 (2015); *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992). The court should consider these sanctions for the misconduct that is described above, at pages 8 - 13.

11. The superior court in January 2013 should not have barred Richard from participating in his mother’s health care or accessing her records.

Without any evidence that Richard had acted inappropriately in any way concerning the health care of his now 92-year-old mother, Ms. Denny, the January 2013 order bars him from participating in any respect in her health care or having access to her health care information. The limited guardian, OFC, had not requested such a restriction. This unsupported ruling directly conflicts with case law precedent that, at least in the context of end-of-life medical treatment decisions, members of a patient’s immediate family have a voice in the decisions. *Guardianship of Hamlin*, 102 Wn.2d 810, 819 689 P.2d 1372 (1984) (“[T]he approach that best accommodates these most fundamental societal decisions is to allow the surrogate decision maker, the family, to make the decision free of the

cumbersomeness and costs of legal guardianship proceedings.”);

Guardianship of Grant, 109 Wn.2d 545, 566, 747 P.2d 445 (1987)

(“[T]hese decisions are best left, wherever possible, to the incompetent patient’s guardian, immediate family and physicians.”) Absent evidence of misconduct, it was an abusive for Commissioner Velategui to bar Richard from participating in any way in the health care of his mother, Ms. Denny.

12. The superior court should not have authorized OFC to place live-in care workers in Ms. Denny’s residence without credible, objective evidence of her consent.

Under RCW 11.92.190, no guardian may compel their client to reside in a residential care facility against their will without a judicial proceeding in which the client has independent counsel. Conceptually, compelling Ms. Denny against her will to endure a stranger living with her in her Aljoia apartment is a comparable restriction on her liberty. The superior court should have at least appointed a guardian ad litem to independently determine if Ms. Denny opposed having stranger care workers residing with her, and, if so, hold a hearing at which a lawyer may advocate her expressed preferences. Under the 2009 order, Ms. Denny retained “the right to decide who shall provide care and assistance” for herself.

- 13. The superior court did not comply with applicable law when it, in its June 19, 2012 order, enjoined Richard and Mr. Anderson from assisting Ms. Denny to express her concerns about OFC's misconduct.**

The superior court completely ignored applicable law, RCW Ch. 7.40 and CR 65, as well as simple due process, by entering its order enjoining Richard and Mr. Anderson from assisting Ms. Denny to express her concerns about OFC and its misconduct. What's more, the superior court's finding that Ms. Denny did not understand the documents that she signed ignores the only relevant evidence. Ms. Donna Mansfield, the receptionist at the office of Ms. Denny's CPA, declared under penalty of perjury that she privately conferred with Ms. Denny about the significant letters that she signed and sent to OFC, and Ms. Mansfield expressed her strong belief that those documents reflected Ms. Denny's expressed wishes. CP 1323-24.

- 14. The court may and should award attorney fees to Richard.**

RCW 11.96A.150 provides that in guardianships cases the superior courts and appellate courts have discretion to award attorney fees to and from any party in such amount as it determines equitable. Considering the misconduct described above, at pages 8 - 13, the court should recognize the equity of awarding Richard fees against OFC.

CONCLUSION

Ms. Denny was only mildly disabled when the 2009 order was entered. Any ambiguity in that order should be resolved consistent with the GAL's and psychologist's reports, and consistent with the court's responsibility to protect the autonomy, civil rights, and liberties of persons under guardianship to greatest extent within their abilities.

The 2009 order did not specify that Ms. Denny lost her right to representation by counsel. Her loss of her right to manage her financial estate and enter into contracts concerning her estate should not, considering applicable statutes, be interpreted to have revoked her right to representation by counsel concerning the rights over her person that she retained.

All persons, including Ms. Denny, have constitutional due process rights when facing the prospect of judicial revocation or restriction of their liberty interests, such as their right to manage their health care, personal care, and social life. Ms. Denny's constitutional rights were ignored.

All persons, including Ms. Denny, have statutory due process rights under Washington law when a court is petitioned to revoke or restrict their civil rights, such as their right to manage their health care, personal care, and social life. That was clarified by remedial 2015 legislation that must be given retroactive effect. Ms. Denny's statutory

rights were ingored.

The superior court acted irrationally and abused its discretion by ruling that Ms. Denny lacked requisite capacity to express to a lawyer her preferences concerning the threatened restrictions on her retained civil rights, particularly when it recognize her as having the capacity to communicate with her tax attorney concerning complex estate planning.

Orders that were entered restricting or revoking the rights that Ms. Denny retained under the 2009 order are void.

Courts have a responsibility, as superior guardian, to protect the rights and interests of persons under guardianship.

The superior court is responsible to supervise guardians and attorneys. The superior court was presented with substantial credible documentary evidence of misconduct by OFC and its counsel. The court should have addressed that misconduct by imposing some sanctions.

The superior court abused its authority by entering its 2013 order barring Richard from participating in Ms. Denny's health care and from accessing her medical information without evidence to support the need for such a bar.

The superior court abused its authority by authorizing OFC to place live-in care workers within Ms. Denny's residence without obtaining credible, objective evidence of her consent.

The superior court abused its discretion by ignoring applicable law when it enjoined Richard and Mr. Anderson from assisting Ms. Denny to express her concerns about OFC's misconduct.

Respectfully submitted this 9th day of November, 2015.



/s/ Douglas A. Schafer

Douglas A. Schafer, Attorney for Appellant
Richard Denny (WSBA No. 8652)

APPENDIX CONTENTS

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In Re the Guardianship)	
)	NO. 09-4-04984-7 SEA
of)	
)	GUARDIAN AD LITEM REPORT
ELLANORA DENNY,)	RCW 11.88.090
)	
An Alleged Incapacitated Person.)	(RTGAL)
_____)	

RECOMMENDATION: I recommend the appointment of Ohana Fiduciary Corporation as full guardian of the estate of Ellanora Denny, and limited guardian of the person of Ellanora Denny.

I recommend that the limited guardian of the person have the following powers only:

1. The selection of an appropriate living situation.
2. The selection of an appropriate living facility should be made only after consultation with Ellanora Denny.
3. Consent to necessary medical and dental treatment, except where contrary to law, provided that Ellanora Denny is not able to consent, or unreasonably withholds or consents to reasonable or necessary medical or dental treatment.
4. To arrange for doctor visits.
5. To ensure that the Mediset is properly configured with proper medications.
6. To assist with issues involving medication and related matters.

FILED

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

EXPOI

ISSUED

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In the Guardianship of:

ELLANORA DENNY

An Alleged Incapacitated Person.

NO. 09-4-04984-7SEA
ORDER APPOINTING LIMITED
GUARDIAN OF THE PERSON AND FULL
GUARDIAN OF THE ESTATE

THIS MATTER came on regularly for hearing on a Petition for Appointment of a Guardian of the Person and Estate of EllaNora Denny, the Alleged Incapacitated Person.

The following persons were present at the hearing: Petitioner Richard Denny, represented by Janet H. Somers, EllaNora Denny, represented by Timothy Austin, Guardian ad Litem Erv DeSmet, Marianne Zak, represented by Laura Hoexter, and _____

The Court considered the written report of the Guardian ad Litem and the Medical/ Psychological, the pleadings and declarations submitted by all parties and witnesses, remarks of counsel, and the Documents filed herein. Based on the above, the Court makes the following:

FINDINGS OF FACT

1.1 Notices: All notices required by law have been given and proof of service as required by statute is on file.

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ORIGINAL

1 **1.2 Jurisdiction:** The jurisdictional facts set forth in the petition are true and correct, and
2 the Court has jurisdiction over the person and estate of the Alleged Incapacitated Person.

3 **1.3.Petition Filed in Good Faith; Burden of Proof Met:** Based on the evidence
4 presented to the court, the Court finds that the petition was filed in good faith and was not
5 frivolous. The Court further finds that Petitioner has met its burden of establishing the statutory
6 bases for imposition of guardianship by clear, cogent and convincing evidence.
7

8 **1.4 Guardian ad Litem:** The Guardian ad Litem appointed by the Court has filed a
9 report with the Court. The report is complete and complies with all the requirements of RCW
10 11.88.090.

11 **1.5 Alternative Arrangements Made By Ms. Denny:**

12 Mrs. Denny has made alternate arrangements in the form of Durable Powers of Attorney
13 and/or Trusts and/or LLCs, but such arrangements are inadequate as, inter alia, they are currently
14 revocable by Ms. Denny.
15

16 **1.5 Capacity:** Ms. Denny is at significant risk of financial harm based upon a
17 demonstrated inability to adequately manage property, including her real property or financial
18 affairs. She is vulnerable to undue influence, is no longer capable of managing her financial
19 affairs without assistance and is in need of a full guardianship over her estate. Ms. Denny is
20 partially incapacitated as defined by RCW 11.88 because she is at significant risk of personal
21 harm based upon a demonstrated inability to provide independently for nutrition, health, housing
22 and physical safety. Therefore, she is capable of managing her personal affairs only with
23 assistance and is in need of a limited guardianship of her person as set forth herein. EllaNora
24 Denny has the capacity to exercise the retained rights as set forth in Conclusions of Law.
25
26

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1 **1.6 Guardian:** The proposed Guardian is qualified to act as Limited Guardian of the
2 Person and Full Guardian of the Estate of EllaNora Denny. The proposed Guardian's contact
3 information is:

4 Ohana Fiduciary Corporation
5 Lynne Fulp, President
6 PO Box 33710
7 Seattle, WA 98133
8 Ohana CPG#10747
9 (206)782-1189
10 lmf@ohanafc.com

11 **1.8 Guardian ad Litem Fees and Costs:** The Guardian ad Litem was appointed at
12 estate expense and shall submit a motion for payment of fees and costs pursuant to the local
13 rules. The Guardian ad Litem has requested a fee of \$9,875.00 for services rendered and
14 reimbursement of \$815.00 for costs incurred while acting as Guardian ad Litem. Fees in the
15 amount of \$9,875.00 and costs in the amount of \$815.00 are reasonable and should be paid by
16 the Guardian from the guardianship estate.

17 **1.9** The fees and costs of Janet H. Somers as Petitioning Attorney as set forth in
18 separate declaration are reasonable and should be paid by the Guardian from the guardianship
19 estate. The fees and costs of Timothy Austin as court appointed counsel for EllaNora Denny and
20 Laura Hoexter as attorney for Marianne Zak as set forth by separate declarations are reasonable
21 and should be approved to be paid by the Guardian from the guardianship estate.

22 **1.10 Bond:** Bond should be set in the amount of \$100,000.00.

23 **1.11 Right to Vote:** Ms. Denny is capable of exercising the right to vote and her right to
24 vote should not be restricted.
25
26

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CONCLUSIONS OF LAW

1 2.1 EllaNora Denny is an Incapacitated Person within the meaning of RCW Chapter 11.88,
2 and a Full Guardian of the Estate and a Limited Guardian of the Person should be appointed.
3 Ohana Fiduciary Corporation is a fit and proper agency as required by RCW 11.88.020 to be
4 appointed as Guardian of the Estate and to be appointed as Limited Guardian of the Person.
5

6 **2.2 Rights Retained.**

7 a. Mrs. Denny shall retain the right to make or revoke a will, trust or other
8 testamentary device under the direction of competent independent counsel. This estate planning
9 may include, but not be limited to, gifting and transfer of interests to a family trust.
10

11 b. Mrs. Denny shall retain the right to consent to or refuse medical treatment, subject
12 to the conditions set forth herein.

13 c. Mrs. Denny shall retain the right to decide who shall provide care and assistance,
14 subject to the conditions as set forth herein.
15

16 d. Mrs. Denny shall retain the right to make decisions regarding the social aspects of
17 her life, subject to the conditions as set forth herein.

18 **2.3 Limited Guardian of the Person’s Authority and Duties:**

- 19 • In consultation with Ms. Denny, to select an appropriate living situation.
- 20 • To consent to reasonable or necessary medical or dental treatment if EllaNora Denny is
21 unable to consent to necessary medical or dental treatment, or unreasonably withholds her
22 consent to same.
23 • To arrange for medical, dental and other therapeutic appointments;
24 • To supervise medications, including ensuring Mediset is properly configured and all other
25 issues related to medication.
26

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1 2.4. The limitations and restrictions placed on Ms. Denny should be as follows:

2 a. Mrs. Denny shall have the right to enter into contract provided it is solely under
3 the advice and direction of competent independent counsel and in furtherance of her
4 estate planning. Mrs. Denny shall also have the right to appoint someone to act on her
5 behalf pursuant provided such appointment is solely in a testamentary devise. In all
6 other areas, Mrs. Denny shall not have the right to enter into a contract.

7
8 b. Mrs. Denny shall not have the right to sue or be sued other than through a
9 guardian.

10 c. Mrs. Denny shall not have the right to possess a license to drive.

11 d. Mrs. Denny shall not have the right to buy, sell, mortgage or lease property other
12 than through the guardian.
13

14 2.5 Upon the issuance of Letters of Limited Guardianship, the Limited Guardian of the
15 Person shall have the following authority and responsibilities:

- 16 • All of the powers and responsibilities of a Guardian of the person pursuant to the
17 provisions of Chapter 11.92 RCW, limited by the language in this Order, including but
18 not limited to:
19
- 20 • To review, release, consent to the release of and use as appropriate all medical, dental,
21 mental health, psychological, psychiatric, medication, laboratory and social services
22 work records, charts, evaluations and reports concerning the incapacitated person;
- 23 • To monitor the conditions and needs of the incapacitated person;
- 24 • After consultation with Ms. Denny, and subject to the provisions of paragraphs 2.2 and
25 2.3, to consent to and arrange for, or refuse to consent to, medical, dental,
26

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1 psychological or psychiatric treatment and care, including any and all medications,
2 diagnostic testing, evaluation, examination, placement and/or transfer to an appropriate
3 health care facility such as, but not limited to, an adult family home, hospital, assisted
4 living facility or nursing home;

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

7
8 • After consultation with Ms. Denny, to decide code status of the ward, including the use
9 of life sustaining measures, including intravenous therapy, tube feedings, hydration,
10 antibiotics, pain medications and comfort care;

11 • Subject to the provisions of paragraphs 2.2 and 2.3, to provide substitute informed
12 consent (RCW 7.70.065) to medical or dental treatment, medications for the
13 incapacitated person, including surgery, except where contrary to law;

14
15 • To provide for or contract for case care or management services on behalf of the
16 incapacitated person;

17 • To provide for such other personal assistance as the incapacitated person requires;

18 • If needed, to establish a pre-need burial or cremation plan for the incapacitated person;

19
20 Pursuant to 45 CFR 164.514, all providers who are covered entities under the Health
21 Insurance Portability and Accountability Act (HIPAA), and/or their business associates shall
22 release any and all health information requested by the Guardian of the Person to the Guardian of
23 the Person, upon receiving a copy of this document.

24
25 **2.6** Upon the issuance of Letters of Guardianship, the Guardian of the Estate shall
26 have, the following authority and responsibilities:

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- 1 • All of the powers of a Guardian of the estate pursuant to the provisions of Chapter 11.92
2 RCW, including but not limited to:
- 3 • To undertake the management of the financial affairs of the incapacitated person,
4 including but not limited to contracting for and incurring obligations on behalf of the
5 incapacitated person, becoming representative payee of any income from Social
6 Security, income from employment of the incapacitated person, and any other sources
7 of revenue or income;
- 8
- 9 • To locate and gather assets;
- 10 • To enter any safe deposit boxes held in the name of the incapacitated person
11 (individually or with another), and inventory and/or remove any contents there from
12 which belongs to the incapacitated person as his sole and separate property, and to
13 maintain and/or close said boxes or to add items thereto, or to drill open the safe
14 deposit boxes in the event the keys to the boxes are misplaced or missing, as deemed by
15 the Guardian to be in the incapacitated person's best interests;
- 16
- 17 • To close any financial accounts, including bank accounts held individually by the
18 incapacitated person as his separate property, and to make withdrawals, deposits or
19 transfer of funds into or out of any such accounts;
- 20
- 21 • To establish guardianship accounts;
- 22 • To proceed to expend funds as necessary for the benefit of the incapacitated person
23 subject to review by the Court;
- 24
- 25 • To convert all holdings, including but not limited to savings accounts, money market
26 accounts, IRAs, mutual funds, stocks, bonds, cash, automobiles, mobile homes, and

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1 any other personal property, including pensions, annuities, 401Ks, and any other
2 income, into the name of said Guardian for the purposes of the guardianship, provided
3 such accounts are held by the incapacitated person as her sole and separate property;
4 and make arrangements for management of the estate, including removing family
5 members from bank accounts of the Incapacitated Person;

- 6
- 7 • this power is without liability to the financial institution for reliance upon the guardian's
8 authority.
- 9 • The signature of the guardian of the estate holds the full force and effect of the signature
10 of EllaNora Denny, with all the rights and authority and access to the asset as the
11 signature of EllaNora Denny would provide, whether the account is individually held
12 by EllaNora Denny or held jointly with another person;
- 13
- 14 • To sell, exchange lease or mortgage real property, pursuant to the requirements of
15 RCW 11.92, and to negotiate and determine the value of real property holdings and /or
16 interest in real property;
- 17
- 18 • To conduct an audit covering the past two years of the books and records of the limited
19 liability companies in which EllaNora Denny is a member, as well as an audit of the
20 financial records covering the past two years of the property management company
21 regarding any holdings of EllaNora Denny.
- 22
- 23 • To make disbursements for residential care, medical and incidental expenses on behalf
24 of EllaNora Denny;
- 25 • all other reasonable duties required of a Guardian.

26 Additionally:

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- 1 • Any bank, savings and loan, credit union, stock brokerage, insurance company, or other
2 institution holding separate assets of the incapacitated person, including but not limited to
3 cash, investments, stocks, bonds, certificates, funds, safe deposit box or personal
4 property, shall release information or deliver the assets to the Guardian of the Estate as
5 directed by the Guardian of the Estate.
- 6 • The Guardian of the Estate is further authorized to remove the Incapacitated Person's
7 name from any joint bank account and/or financial account and to change the mailing
8 address of any bank and/or financial statement to any address the Guardian may request.
- 9 • If the Incapacitated Person's name appears on any bank account, credit card or financial
10 account held jointly with another person, the Guardian of the Estate shall have authority
11 to change the mailing address of any such bank and/or financial statement to any address
12 the Guardian may request. In the event that an asset has signatories or co-owners in
13 addition to the incapacitated person, the Guardian shall have the authority to block all
14 access to such account, safe deposit box or property until true ownership has been
15 determined.
- 16 • If necessary, the Guardian shall also have authority to arrange pre-need cremation or
17 burial arrangements as may be necessary;
- 18 • The Guardian is authorized to enter any dwelling, residence or storage area rented or
19 owned by the incapacitated person. The Guardian shall also have the authority to remove,
20 change, and/or re-key any lock to the incapacitated person's home, apartment, storage
21 unit, rental property, vehicles or any other locked property that is owned by the
22 Incapacitated Person.
23
24
25
26

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1 Ohana Fiduciary Corporation upon the filing of an oath and the posting of bond in the amount of
2 \$100,000. The Guardian of the Estate is authorized to pay all fees and costs awarded in this
3 Order and all outstanding liabilities of EllaNora Denny determined to be due and owing. After
4 such disbursements are made, all liquid assets in excess of \$100,000 are to be held in blocked
5 accounts with receipts filed with this court within sixty (60) days of this order. Assets that are
6 held in trust shall be deemed outside the scope of this guardianship. Monthly income up to the
7 amount of \$ 10,000.00 shall be available to the Guardian of the Estate to pay monthly
8 expenses.
9

10 **3.3. Notification of Loss of Voting Rights:** Does not apply.

11 **3.4 Report of Substantial Change in Income of Assets:** Within 30 days of any
12 substantial change in the Estate's income or assets, the Guardian of the Estate shall report to the
13 Court and schedule a hearing. The purpose of the hearing will be for the Court to consider
14 changing the bond or making other provision in accordance with RCW 11.88.100.
15

16 **3.5 Inventory:** Within three months of appointment, the Guardian of the Estate shall file
17 a verified inventory of all the property of the Incapacitated Person, which shall come into the
18 Guardian's possession or knowledge, including a statement of all encumbrances, liens and other
19 secured charges on any item. A review hearing upon filing of the inventory is required.
20

21 **3.6 Disbursements:** On or before the date the inventory is due, the Guardian of the
22 Estate shall also apply to the Court for an Order Authorizing Disbursements on behalf of the
23 Incapacitated Person as required by RCW 11.92.040.
24
25
26

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1 **3.7 Personal Care Plan:** The Guardian of the Person shall complete and file within
2 three (3) months after appointment a Personal Care Plan which shall comply with the
3 requirements of RCW 11.92.043(1). A review hearing on the Personal Care Plan is required.

4 **3.8 Status of Incapacitated Person:** Unless otherwise ordered, the Guardian of the
5 Person shall file an annual report on the status of the Incapacitated Person that shall comply with
6 the requirements of RCW 11.92.043(2).
7

8 **3.9 Substantial Change in Condition or Residence:** The Guardian of the Person shall
9 report to the Court within thirty (30) days any substantial change in the Incapacitated Person's
10 condition, or any change in residence of the Incapacitated Person.

11 **3.10 Designation of Standby Guardian:** Within three months, the Guardian shall file a
12 written designation of a standby Guardian that complies with the requirements of RCW
13 11.88.125.
14

15 **3.11 Authority for Investment and Expenditure:** No investments shall be made
16 without prior order of the court in any property other than unconditional interest bearing
17 obligations of this state or of the United States and in obligations the interest and principal of
18 which are unconditionally guaranteed by the United States, and in share accounts or deposits
19 which are insured by an agency of the United States government.
20

21 **3.12 Duration of Guardianship:** This Guardianship shall continue in effect until
22 terminated pursuant to RCW 11.88.140;

23 **3.13 Discharge/Retention of Guardian ad Litem:** The Guardian ad Litem is
24 discharged;
25
26

1 **3.14 Notice of Right to Receive Pleadings:** The following persons are described in
2 RCW 11.88.090(5)(d), and the Guardian shall notify them of their right to file with the Court and
3 serve upon the Guardian, or the Guardian's attorney, a request to receive copies of pleadings filed
4 by the Guardian with respect to the Guardianship:

5 Richard Denny
6 C/O Janet H. Somers
7 Somers Tambllyn King PLLC
8 2955 80th Avenue SE, Suite 201
9 Mercer Island, WA 98040

10 Marianne Zak
11 32101 Weston Drive
12 Beverly Hills, MI 48025

13 Martin Anderson shall not receive notice, copies of pleadings or reports in this
14 guardianship.

15 **3.15 Guardian ad Litem Fee.** The Guardian ad Litem fees and costs are approved as
16 reasonable in the amount of \$9,875.00 for services rendered and reimbursement of \$815.00 for
17 costs incurred while acting as Guardian ad Litem and should be paid by the Guardian from the
18 guardianship estate.

19 **3.16. Legal Fees:** The legal fees and costs of the following are approved as reasonable
20 and shall be paid from the guardianship estate.

21 The Petitioner's attorney, Janet H. Somers in the amount of \$9,515.22; [fees of
22 \$9,107.00 and costs of \$408.22].

23 The AIP's court appointed attorney, Timothy Austin, in the amount of \$6,780.00;

24 Marianne Zak's attorney, Laura Hoexter, in the amount of \$2,172.50.

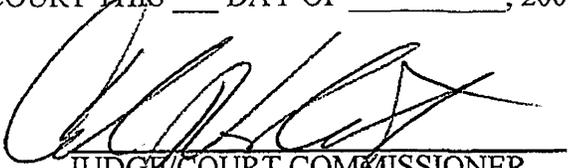
25 **3.17. Guardian's Report:** The Guardian's report shall cover the 12 (twelve) month
26

SOMERS TAMBLYN KING PLLC
2955 80th Avenue SE, Suite 201
Mercer Island, WA 98040
Phone: (206) 232-4050
Fax: (206) 232-4049

1 period following the anniversary date of the appointment. The Guardian's report is due within
2 90 days of the end of the reporting period and shall comply with the requirements of RCW
3 11.92.040(2).
4
5
6

7 **3.18 Other.** _____
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19

20
21 DATED AND SIGNED IN OPEN COURT THIS 12/17/09 DAY OF _____, 2009
22

23 
24 JUDGE/COURT COMMISSIONER
25
26

SOMERS TAMBLYN KING PLLC
2955 80th Avenue SE, Suite 201
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Phone: (206) 232-4050
Fax: (206) 232-4049

1
2 Presented by:

3 

4 Janet H. Somers, WSBA # 18605
5 Of Somers Tamblyn King,
6 Attorney for Petitioner

7
8 Approved:

9 

10
11 Ervin A. DeSmet, WSBA #8105
12 Guardian ad Litem

13
14 COPY RECEIVED; APPROVED
15 NOTICE OF PRESENTMENT WAIVED

16
17 

18 Timothy Austin, WSBA # 2939
19 Attorney for EllaNora Denny

20
21
22
23
24 Laura Hoextler, WSBA #23246
25 Of Helsell Fetterman
26 Attorneys for Marianne Zak

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE SENATE BILL 5607

Chapter 293, Laws of 2015

64th Legislature
2015 Regular Session

GUARDIANSHIP--MODIFICATION--TERMINATION

EFFECTIVE DATE: 7/24/2015

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

BRAD OWEN

President of the Senate

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

FRANK CHOPP

Speaker of the House of Representatives

Approved May 18, 2015 2:18 PM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

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

HUNTER G. GOODMAN

Secretary

FILED

May 18, 2015

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE SENATE BILL 5607

AS AMENDED BY THE HOUSE

Passed Legislature - 2015 Regular Session

State of Washington **64th Legislature** **2015 Regular Session**

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

READ FIRST TIME 02/20/15.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Passed by the Senate April 23, 2015.

Passed by the House April 14, 2015.

Approved by the Governor May 18, 2015.

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

FILED
COURT OF APPEALS
DIVISION I

2015 NOV -9 PM 3:03

STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Guardianship of
ELLA NORA DENNY,
a Partly Incapacitated Person.

No. 69117-1-I
Proof of Service

I served today in the manner indicated to the below parties at their indicated addresses the Appeal Brief of Richard Denny, and this Proof of Service:

Carol S. Vaughn, Attorney for Ohana Fiduciary Corporation.
Thompson & Howle
601 Union St, Suite 3232
Seattle, WA 98101-2331
by email with permission: carolv@thompsonhowle.com

Marianne Zak
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Thomas Anderson
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November 9, 2015



Douglas A. Schafer, WSBA No. 8652 Counsel for
Appellant Richard Denny

COURT OF APPEALS
STATE OF WASHINGTON
2015 NOV 12 PM 12:04
