

No. 70312-9-I

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

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

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

REPLY BRIEF OF RICHARD DENNY

Attorney for Appellant Richard Denny:

Douglas A. Schafer (WSBA No. 8652)
Schafer Law Firm
950 Pacific Ave., Suite 1050
P.O. Box 1134
Tacoma, WA 98401-1134
(253) 431-5156
schafer@pobox.com

BY _____
DEPUTY
STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2016 MAR -8 AM 11:46

FILED
COURT OF APPEALS
DIVISION II

2016 MAR -4 AM 11:56

TABLE OF CONTENTS

INTRODUCTION.....	1
ARGUMENT.....	1
1. OFC Brf page 6: Multiple Mischaracterizations..	1
2. OFC Brf pages 10 - 14: Standard of Review..	4
3. OFC Brf pages 15 - 21: Application of RAP 7.2..	6
4. OFC Brf pages 23 - 38: Denny Resources LLC is a guardianship asset that OFC manages and disburses its half- million dollars of annual income..	11
5. OFC Brf page 38 - 39: OFC's deficient reporting concerning Ms. Denny's welfare....	14
6. OFC Brf pages 39 - 42: Whether interested parties may express concerns to the court and whether some discovery by such parties should be permitted..	14
7. OFC Brf pages 42 - 45: The vindictive order barring Richard from filing pleadings until he pays two small judgments... ..	15
8. OFC Brf pages 46-50: Denying Ms. Denny's right to counsel..	17
CONCLUSION.	19

TABLE OF AUTHORITIES

Cases

Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987). 18

Dolan v. King Cty., 172 Wn.2d 299, 258 P.3d 20 (2011). 4

Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216 (9th Cir. 2012). 17

In re Guardianship of Way, 79 Wn. App. 184, 901 P.2d 349 (1995). . . . 10

In re Marriage of Langham & Kolde, 153 Wn.2d 553, 106 P.3d 212 (2005). 5

In re Marriage of Rideout, 150 Wn.2d 337, 77 P.3d 1174 (2003). 5

In re Welfare of Kevin L., 45 Wn. App. 489, 726 P.2d 479 (1986). 9

Lockwood v. AC & S, Inc., 44 Wn. App. 330, 722 P.2d 826 (1986) *aff'd*, 109 Wn. 2d 235, 744 P.2d 605 (1987). 10

Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 884 P.2d 592 (1994). 5

Roberts v. U.S. Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). 18

Smith v. Skagit County, 75 Wn.2d 715, 453 P.2d 832 (1969). 5

State v. Kipp, 179 Wn.2d 718, 317 P.3d 1029 (2014). 4

United States v. Heavrin, 330 F.3d 723 (6th Cir. 2003). 15

Statutes

RCW 11.88.100. 11

RCW 11.90.240. 8

RCW 11.92.010..... 8

RCW 11.92.043..... 14

Other Authorities

CR 52..... 7

CR 59..... 7

CR 60..... 7

GR 9..... 11

RAP 2.2..... 8

RAP 7.2..... 6-11

RAP 8.3..... 10

INTRODUCTION

This brief by appellant Richard Denny (“Richard”) is in reply to the “Brief of Respondent Guardian Ohana Fiduciary Corporation in Response to Opening Brief of Appellant Richard Denny,” such brief referred to here as “OFC Brf”. This second appeal is linked with an earlier appeal (no. 69117-1-I) and shares its record and central issues. Richard’s opening brief in the first appeal is referred to a “RD 1st Op. Br.” and that in this second appeal as “RD 2nd Op. Br.”. Clerk’s papers in the first and second appeal are be referred to as CP1 and CP2, respectively. The first appeal’s record included reports of proceedings numbered RP1 through RP11, so, as stated in RD 2nd Op. Br. at 1, the transcripts in this second appeal are referred to as RP12 (April 1, 2013 hearing) and RP13 (June 26, 2013 hearing).¹

Ohana Fiduciary Corporation is referred to as OFC. Richard’s mother, the respondent in this guardianship proceeding, is Ella Nora Denny, referred to here as “Ms. Denny.”

ARGUMENT

1. OFC Brf page 6: Multiple Mischaracterizations.

Richard’s filed objections to OFC’s Third Annual Report consisted of

¹ In OFC Br at 3 n.5, it chose “1 RP” to refer to the April 13, 2013, transcript and “2 RP” to refer to the June 26, 2013, transcript.

merely six pages. CP2 264-9.

At OFC Brf, page 6, ¶ 4, OFC falsely states “Richard objected to the fees requested by Mrs. Denny’s estate planning attorney Timothy Austin.” In fact, Richard only objected to OFC’s failure to include with its annual report Mr. Austin’s invoices that document his multiple attorney-client meetings with Ms. Denny. CP2 266-7, RP12 32-3. Richard thought that documentation in the court record of her multiple attorney-client meetings and decisions concerning complex matters would lead an objective jurist to question the assertion that Ms. Denny lacks capacity to engage in an attorney-client relationship concerning her fundamental rights over her personal care. Richard wrote (CP2 267):

This Court’s approval of Ms. Denny’s attorney-client relationship with Mr. Austin and her execution, upon his advice and guidance, of complex gifting transactions involving transfers of limited liability company interests, amendment to trusts, assignment of a deposit, forgiveness of debt, and cash gifts, obviously calls into question this Court’s refusal to allow her to be represented by counsel in this guardianship proceeding. As noted, that is one of the subjects of the pending appeal.

Due to Richard’s objection, Mr. Austin filed a fee declaration with invoices detailing his representation of Ms. Denny in 2012. CP2 292-303.

At OFC Brf, page 6, ¶ 5, OFC falsely states, “Richard objected to Ohana’s decision not to pursue a protection order against Marianne Zak.” In fact, Richard simply wrote (CP2 267-8):

This Court should also require an explanation by Ohana why it apparently rejected the recommendations made to it by Mercer Island Police Detective Erickson on December 19, 2012, after he had consulted with a King County Deputy Prosecutor, that Ohana should seek a vulnerable adult protection order for Ms. Denny. . . . [quoting OFC's timeslip entries of December 19, 2012] Both Ohana and this Court were quite critical of the undersigned counsel for having telephoned that recommendation to attorney Keller's assistant also on December 19, 2012.

OFC had never before revealed to its supervising superior court that the investigating detective and a consulted prosecutor had recommended on December 19, 2012, that OFC obtain a protection order against daughter Marianne Zak. CP2 275; CP1 1864, 1886, 1992; RP11 at 16 (Ms. Vaughn merely reported: "We had one child demanding a restraining order against the other child."). Commissioner Velategui had ridiculed Richard's counsel for having made that same recommendation as did the detective and the prosecutor on that same date. RP 11 at 11-13 (The Court: "And the request to get some sort of restraining order to protect her from her daughter I thought was bizarre.")

Perhaps if OFC had been forthcoming to Commissioner Velategui about the facts as they appeared on December 19 to the detective and the prosecutor, that jurist may have not have ridiculed Richard's counsel for harboring the same concerns as those professionals.

It plainly seemed appropriate at a review hearing to invite OFC to explain why it had rejected the recommendation of the investigating detective and the consulted prosecutor and why it had concealed that fact

from the court before and at the January 24, 2013, hearing.

At OFC Brf, page 6, ¶ 6, OFC mischaracterizes as “accusations of misconduct” Richard’s simple request for explanations about two incidents involving her, one being described in a OFC timesheet entry and the other reported to him by the police detective. CP2 268. Richard’s counsel orally stated his satisfaction with the explanations that Ms. Zak provided before the hearing. RP13 at 30, CP2 281-3.

When Ms. Zak’s counsel at the hearing sought sanctions against Richard’s counsel for inquiring about the incidents, Commissioner Velategui also was interested in her explanations of the incidents. RP13 at 39 - 40 (The Court: “Well, what did happen?”) Apparently he had not read Ms. Zak’s responsive explanations. CP2 281-3.

2. OFC Brf pages 10 - 14: Standard of Review.

At OFC Brf pages 10 - 14, OFC argues that this court should apply a deferential standard of review, citing mostly intermediate appellate court opinions. But our state supreme court has consistently, and recently, affirmed that a *de novo* review is appropriate in a case, such as this, in which the trial court did not hear live testimony and make credibility determinations nor weigh conflicting factual evidence. *State v. Kipp*, 179 Wn.2d 718, 727, 317 P.3d 1029, 1033 (2014); *Dolan v. King Cty.*, 172

Wn.2d 299, 310-11, 258 P.3d 20, 26-27 (2011); *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 559, 106 P.3d 212, 215 (2005); *In re Marriage of Rideout*, 150 Wn.2d 337, 350, 77 P.3d 1174 (2003); *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994); *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969).

A representative quotation from those opinions is the following from

Dolan v. King County, 172 Wn.2d at 310-11:

Where the record at trial consists entirely of written documents and the trial court therefore was not required to “assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence,” the appellate court reviews de novo. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash.2d 243, 252, 884 P.2d 592 (1994) (quoting *Smith v. Skagit County*, 75 Wash.2d 715, 718, 453 P.2d 832 (1969)). However, where competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate. *In re Marriage of Rideout*, 150 Wash.2d 337, 351, 77 P.3d 1174 (2003).

....

Appellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court. Washington has thus applied a de novo standard in the context of a purely written record where the trial court made no determination of witness credibility. See *Smith*, 75 Wash.2d at 719, 453 P.2d 832.

In the pending case, there was no witness testimony nor competing documentary evidence. Richard attempted to present for consideration by

the trial court some important evidence that OFC had not presented, but there was no competing evidence to be weighed. For example, Dr. Gorman's records indicating that the alarming lab test report was a false positive and that Ms. Denny was only moderately impaired. CP1 1956-62. Records from the police detective and Adult Protective Service worker showing that their investigations were closed and that Richard was never an "alleged perpetrator". CP 2015-20. Uncontested records showing that OFC exceeded its limited authority from at least mid-2010 through 2012. RD 1st Op. Br. at 8 - 12 and the clerk's papers cited in those pages.

Applying state supreme court precedent, this appellate court should apply the de novo standard of review.

3. OFC Brf pages 15 - 21: Application of RAP 7.2.

In OFC Brf at 15, OFC acknowledges that RAP 7.2(a) applies to guardianship cases—contrary to assertions by its counsel Mr. Keller and Commissioner Velategui at the April 1, 2013, hearing that if the rule applied "the ward would be left without any court supervision." RP12 at 12-15. Instead, OFC now argues that the superior court was authorized to enter its April 1, 2013, order (CP2 312-23) pursuant to exceptions in one or more of the subsections of RAP 7.2.

Subsection (c) authorizes a trial court to enforce its unstayed decisions and judgments while their appeal is pending. But nothing in the

April 1, 2013, order supports OFC's argument that it was merely enforcing a previous order or judgment. Commissioner Velategui's annual ritual of giving blanket approval of OFC's every action and request is plainly not the enforcement of a previous order or judgment.²

Subsection (e) of RAP 7.2 permits the superior court to consider postjudgment motions authorized by court rules and actions to modify a decision pending appellate review, but requires a party to seek permission of the appellate court before formal entry of a trial court decision that changes a decision on review. OFC's petition for approval of its Third Annual Report was not a postjudgment motion authorized by court rules (a motion under CR 52(d), CR 59, or CR 60) nor an action to modify a previous trial court decision—except for OFC's request to change from the previous order under appellate review its restrictions on Ms. Denny's travel. The superior court's entry of the April 1, 2013, order granting that change, without OFC first having obtained permission from the appellate court, was without authority.

OFC argues that RAP 7.2(*l*) authorized the superior court to enter its April 1, 2013, order. That exception is for cases involving multiple parties, claims, or counts, and authorizes the trial court to act on the

² At that hearing, Commissioner Velategui lauded OFC, "This is not their only case. They have much experience. They have appeared in my court hundreds of times, if not thousands. And I have, to my recollection, no substantive complaints about the services that they have provided" RP12 at 27. The record shows that the Commissioner never disapproved any action or denied any request of OFC.

portion of the case that is not being reviewed by the appellate court. But the exception in subsection (l) only applies, by its express terms, “[i]f the trial court has entered a judgment that may be appealed under rule 2.2(d) in a case involving multiple parties, claims or counts.” RAP 2.2(d) permits interlocutory appeals in cases involving multiple parties or multiple claims only if the trial court when dismissing a claim makes an express determination, supported by written findings, that there is no just reason to delay the appeal of that judgment. No such express determination or written findings were made by the superior court in this guardianship case. So RAP 7.2(l) cannot here exempt the superior court from the application of RAP 7.2(a)’s divestiture of its jurisdiction.

OFC implies the absurd argument (OFC Brf at 19) that only the superior court—to the exclusion of the appellate courts—has jurisdiction over a guardian, quoting parts of RCW 11.92.010 and 11.90.240 stating that an guardian at all times is subject to the direction and control the court making the appointment, and that the appointing court has exclusive and continuing jurisdiction over the guardianship proceeding. But the statutory references to “the court” must be read consistent with our judicial system to include the state’s higher courts with appellate jurisdiction over the lower state courts.

At OFC Brf page 19 - 20, OFC attempts to distinguish Richard’s cited case law (RD 2nd Op. Br. at 11 - 12) that shows our state courts

consistently have applied RAP 7.2(a) and the common law doctrine it codifies in *parens patriae* cases involving the welfare of children. Those cases are precedential here, because the judiciary protects both children and persons under guardianship alike based on its common law *parens patriae* responsibility to do so. *In re Welfare of Kevin L.*, 45 Wn. App. 489, 498, 726 P.2d 479, 484 (1986)(“*Parens patriae* literally means “father of the country” and refers to the role of the state as guardian of persons with legal disabilities such as minors or those mentally incompetent.”)

At OFC Brf page 20, OFC misleadingly states that the case law cited in RD 2nd Op. Brf at 13 - 15 merely holds “that trial courts may not enter orders that modify decisions on appeal.” That is false. The cited cases are representative of many that strictly apply RAP 7.2 and hold that the superior court loses jurisdiction over a case once an appeal is filed (except as that rule permits), and that superior court proceedings conducted without jurisdiction are void. OFC then argues that the April 1, 2013, order does not violate RAP 7.2 because it did not *materially* change the restrictions on Ms. Denny’s travel from those in the March 29, 2012 order (CP1 618 ¶11, 440 ¶23) under appeal.

The March 29, 2012, order initially under appellate review listed four criteria in Ms. Denny’s travel restrictions. The April 1, 2013, order adds the phrase “or her companion” to the third criteria, adds three words

(advance, overnight, advance) to the fourth criteria, and adds a fifth criteria. Plainly it was a “change to the decision then being reviewed by the appellate court” and was entered without first obtaining permission from the appellate court, as RAP 7.2(e) requires.

At OFC Brf pages 22 - 23, OFC argues that the application of RAP 7.2 to guardianship cases violates public policy. Richard disagrees. As OFC notes, *In re Guardianship of Way*, 79 Wn. App. 184, 901 P.2d 349 (1995), illustrates that an appellate court is quite capable of addressing the welfare of a person under guardianship once jurisdiction in the case passes to the appellate court. The appellate court’s commissioner or other judicial officer may address motions that arise or the appellate court, under RAP 7.2(a) and RAP 8.3, may refer issues to the trial court with appropriate instructions. *In this guardianship case, had the appellate court upon initially accepting review simply referred ongoing supervision of the case to the trial court with a directive to allow Ms. Denny to retain counsel to advocate her rights, many issues now in this appellate review of linked cases would not have arisen.*

In *Lockwood v. AC & S, Inc.*, 44 Wn. App. 330, 361, 722 P.2d 826 (1986) *aff’d*, 109 Wn. 2d 235, 744 P.2d 605 (1987), an asbestos case involving multiple defendants, after an appeal had been filed, two defendants reached a settlement with the plaintiff. A statute required that the reasonableness of the settlement be judicially determined following a

fact-finding evidentiary hearing. A commissioner of the court of appeals conducted that hearing and found the settlement reasonable. Another defendant later challenged that procedure, but the appellate court rejected the challenge, writing at 361, “Except as specifically provided in the rules, the trial court loses the power to act when the Court of Appeals assumes jurisdiction. *See* RAP 7.2.” In a footnote to that passage, the appellate court quoted RAP 7.2(e) followed by the statement, “While there is no reason that a post-judgment settlement hearing could not be conducted in the trial court, permission of the appellate court is required.”

If OFC’s believes that the application of RAP 7.2 to guardianship cases violates public policy, it should propose, pursuant to GR 9, a change in the rule. But RAP 7.2, as presently written, ought not be ignored.

4. OFC Brf pages 23 - 38: Denny Resources LLC is a guardianship asset that OFC manages and disburses its half-million dollars of annual income.

Though not the principal issue in these linked cases, Commissioner Velategui’s disregard, when setting OFC’s bond, of OFC’s management and disbursement of roughly a half-million dollars of annual income from Denny Resources LLC (“DR LLC”) warrants close scrutiny. RCW 11.88.100 provides that when setting a guardian’s bond, the court shall take into account “the character of the assets on hand or anticipated and the income to be received and disbursements to be made.”

The DR LLC's income distribution numbers are readily determined. The 2012 DR LLC income that OFC, as its manager, disbursed to Ms. Denny for her 64 percent ownership, was \$333,330 (CP2 31), so the total LLC income that OFC disbursed to all owners (Ms. Denny and her Family Trust) of the LLC was about **\$550,800** (\$333,330 divided by 0.64). For 2010, the DR LLC income was **\$460,100**, according to OFC's financial report at CP1 192 ("LLC distrns Bachtel Property Mgmt" listed under "Income and Benefits"). For 2011, the DR LLC's disbursed income of **\$495,593** is cleaned from OFC's financial report entries at CP1 447 and 451. As noted in OFC Brf at 26 - 27, through 2011, the Family Trust's 36 percent share of DR LLC's income was applied to a promissory note³ held by Ms. Denny. During 2011, that note's balance was reduced by \$153,068 (CP1 451, \$1,382,703 minus \$1,229,635) and the note's interest income was \$23,929.50 (CP1 447). Add to those the \$318,595.50 reported as DR LLC distributions in 2011 to Ms. Denny (CP1 447 "Denny Resources LLC Owner Distrns" under "Income and Benefits") and the sum is \$495,593.

Though DR LLC, with a reported 2012 year-end market value of about \$6.5 million (CP2 39), is 64 percent owned by Ms. Denny, she owns

³ That promissory note was not listed in OFC's initial inventory, filed March 16, 2010. CP1 58-62. It was mistakenly listed at a value of \$4.5 million in OFC's amended inventory, filed December 3, 2010. CP1 at 142. That gross mistake was repeated in OFC Brf at 26. In OFC's report filed March 14, 2011, the promissory note's face amount was corrected to \$1,572,000, and its unpaid balance at December 31, 2010, was stated as \$1,382,703. CP1 188, 195.

100 percent of its voting units (CP2 38), which votes OFC apparently cast to elect itself as the LLC's manager, OFC claims it is not an asset of the guardianship. And Commissioner Velategui entered OFC's order asserting "Clear, cogent and convincing evidence establishes that Denny Resources, LLC is not an asset of the guardianship estate." CP2 318 ¶ 2.18) One wonders if the "clear, cogent, and convincing evidence" included the fact that OFC had listed DR LLC as an asset of the guardianship in every report that it previously had filed with the court: Initial Inventory (CP1 62), Amended Inventory (CP1 145), First Annual Report (CP1 201), Second Annual Report (CP1 454-5), Third Annual Report (CP2 38-9).

OFC emphasizes repeatedly (OFC Brf at 28, 33, and 37) its claim that the superior court *expressly* approved its assumption of the role of manager for DR LLC by its order of March 29, 2012. Perhaps that approval was not apparent to Commissioner Velategui when he signed that order because at the hearing on April 1, 2013, when told that OFC has access to the unblocked liquid funds of DR LLC, he asked "Do they write the checks on the corporation?" When told "They do," he expressed surprise, "Oh, really?" RP12 at 30.

It should be apparent to jurists that when they appoint a corporation, such as OFC, to a position that enables it and its employees to take custody of and disburse a half-million dollars a year, it should ensure that

the rightful owners of those funds are protected by adequate bonding from possible defalcations by any of those employees.

5. OFC Brf page 38 - 39: OFC's deficient reporting concerning Ms. Denny's welfare.

Richard asserted (RD 2nd Op. Br. at 17-19) that OFC should have sought and reported to the court relevant information about the drug test report and about the alleged incidents of misbehavior by Ms. Zak referenced in its staff's timesheet entries. OFC's response (OFC Brf at 39) is that it has no duty to inform the court of such matters because those items are not specifically listed in RCW 11.92.043(2) that directs guardians to annually report to the court.

6. OFC Brf pages 39 - 42: Whether interested parties may express concerns to the court and whether some discovery by such parties should be permitted.

As Richard addressed in his brief (RD 2nd Br. at 19 - 22), because his counsel inquired about entries in OFC's filed Third Annual Report and questioned if OFC's placement of live-in home care agency workers with Ms. Denny was recommended by any health care professional, his counsel was threatened with sanctions and told he needed admissible evidence to support any concerns, but his request for limited discovery was denied. RP12 at 42 - 45. OFC's response (OFC Brf 39 - 42) is little more than

citing a case asserting that a trial judge may control “litigants who threaten the orderly conduct of legal proceedings.” That response is so obviously inapplicable to the facts of this case to not warrant a reply.

7. OFC Brf pages 42 - 45: The vindictive order barring Richard from filing pleadings until he pays two small judgments.

At OFC Brf at 42 - 45, OFC attempts to defend Commissioner Velategui’s vindictive order (CP2 464-9) that bars Richard from filing further pleadings in his mother’s guardianship case until he pays two small judgments that he has appealed. OFC asserts that the sanction is reasonable because OFC alleges that Richard has abused the judicial process and engaged in a “pattern of abusive and frivolous litigation.” OFC Brf at 44 - 45. OFC cites to cases in which judges impose restraints and sanctions on vexatious *pro se* litigants.

The term “vexatious” embraces the distinct concept of being brought for the purpose of irritating, annoying, or tormenting the opposing party. The word “frivolous” connotes filing a lawsuit or pleading, without bad faith or a wrong motive, but which lacks foundation or a basis for belief that it might prevail. *United States v. Heavrin*, 330 F.3d 723, 729 (6th Cir. 2003).

Nobody denies that Richard has genuine concern and love for his mother, Ms. Denny, with whom he spends several hours nearly every day

going for walks, coffee shops and restaurants, and outings.. CP1 1441-2, 1953, 1959, 1964. When Richard's attorney filed declarations by Ms. Denny's relatives reporting that his sister has openly expressed her wish for their mother to die, it was not to vexatiously annoy or torment Richard's sister, but is to inform the court of information that warrants caution and justifies suspicion when Ms. Denny is hospitalized following her visits. CP1 1811, 1806, 1968. And not even Commissioner Velategui has asserted that the pleadings by Richard's counsel, all supported by research, are *frivolous*. But plainly the Commissioner does not appreciate any challenge to his actions or those of OFC who, he says, has appeared before him hundreds if not thousands of times. RP12 at 27. At the hearing on June 26, 2013, the Commissioner justified his vindictive sanction against Richard by saying (RP13 at 16):

In this instance, the Court does believe that Mr. Denny's actions really have had little if any benefit—no benefit, actually—to the Estate of Ellanora Denny, that he has run up attorney's fees arguing matters that are of little consequence in the big picture, and has simply unreasonably forced the guardian to incur fees, expenses and waste time responding to these motions.

The requirement that Richard pay about \$20,000 to his mother's multi-million dollar estate, of which he likely will inherit half, serves no legitimate judicial purpose. But rather than pay that sum and render moot a challenge to the injudicious order, Richard and his counsel have chosen simply to appeal it so this appellate court better understands what they

have faced. And they recognize the futility of filing pleadings that raise any concerns or issue so long as Commissioner Velategui continues to claim exclusive jurisdiction over Ms. Denny's case. CP1 954.

8. OFC Brf pages 46-50: Denying Ms. Denny's right to counsel.

OFC continues to assert (OFC Brf 46 - 50) that Ms. Denny had no right to representation by legal counsel. The basic issue has been significantly addressed in prior briefs. RD 1st Op. Br. 31 - 39; RD 2st Reply Br. 14-15. Here, OFC argues that Ms. Denny's right to counsel is not implicated because the April 1, 2013 order (CP2 312-323) merely approved a routine annual report and did not restrict Ms. Denny's retained rights. OFC Brf at 49. That is false. The April 1, 2013, order continued, with some changes, the restrictions on Ms. Denny's fundamental right to travel (CP2 320 ¶ 3.8), that she had retained under the 2009 Order.

Of greater concern to Ms. Denny, the April 1, 2013, order authorized OFC to place a stranger (a home care agency worker) as a full-time resident in Ms. Denny's apartment. CP2 318 ¶ 2.17. This forced placement of a roommate violated Ms. Denny's right of private or intimate association that she had retained under the 2009 Order. Such right has been recognized as a fundamental liberty interest protected by Due Process, as explained recently in *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1220-21 (9th Cir. 2012),

as follows:

The Supreme Court has recognized that “the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights.” *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 545, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987). “[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). ...While the right protects only “highly personal relationships,” the right isn’t restricted exclusively to family. The right to association also implies a right not to associate. [Some citations omitted.]

To determine whether a particular relationship is protected by the right to intimate association we look to “size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.” The roommate relationship easily qualifies: People generally have very few roommates; they are selective in choosing roommates; and non-roommates are excluded from the critical aspects of the relationship, such as using the living spaces. Aside from immediate family or a romantic partner, *it’s hard to imagine a relationship more intimate than that between roommates*, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms. [Citations omitted; emphasis added.]

So Ms. Denny had a right to have her chosen counsel advocate for her fundamental right to refuse to share her apartment with a stranger from a home care agency. The record amply shows that Ms. Denny did not want, and did not need, a live-in home care agency worker living in her private apartment. CP1 266, RP11 at 28-29. RP12 at 19, 26.

CONCLUSION

The court should vacate the void *ex parte* orders that modified Ms. Denny's retained rights without affording her counsel and due process.

Respectfully submitted this 4th day of March, 2016.



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

Proof of Service

I served today in the manner indicated to the below parties at their indicated addresses this Reply Brief of Richard Denny:

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
32101 Weston Drive
Beverly Hills, MI. 48025
by USPS First Class mail

Thomas Anderson
1508 N. Yachats River Rd.
Yachats, OR 97498-9514
by USPS First Class mail

FILED
COURT OF APPEALS
DIVISION II
2016 MAR -4 AM 11:56
STATE OF WASHINGTON
BY _____
DEPUTY

March 4, 2016



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