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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.

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APPEAL BRIEF OF RICHARD DENNY

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INTRODUCTION

This appeal is of three additional orders entered in 2013 by King County Superior Court Commissioner Carlos Velategui in the guardianship of Ella Nora Denny. This appeal is linked ¹ with an earlier appeal (no. 69117-1-I) of previous orders entered in that ongoing guardianship proceeding. The appellants are Ms. Denny, her son Richard Denny, and her nephew Thomas Anderson as her next friend and as an aggrieved party himself. This brief is by Richard.

This second appeal involves (1) as in the first appeal, the right of a person under guardianship to be represented by retained counsel, (2) whether RAP 7.2 applies to a guardianship proceeding, and (3) the roles and responsibilities of the guardian, the superior court, and interested parties in an ongoing guardianship proceeding.

The record in the linked first appeal consisted of clerk's papers that, if cited in this appeal, will be referred to as CP1 and reports of proceedings (RP) numbered RP1 through RP11. Clerk's papers in this second appeal will be referred to as CP2 and the additional two hearing transcripts will be referred to as RP12 (April 1, 2013 hearing) and RP13 (June 26, 2013 hearing). Ohana Fiduciary Corporation will be referred to as OFC.

¹ By a notation ruling dated November 2, 2013, this court's Commissioner Mary Neel linked the two appeals in part to avoid duplication of the record. She previously, by a ruling dated July 24, 2013, had denied a motion to consolidate the two appeals.

ASSIGNMENT OF ERROR & ISSUES

Assignment of Error #1: The superior court erred in ruling concerning the rights retained by Ms. Denny in its 2009 order without allowing her to retain counsel to advocate on her behalf.

Issue #1: Does the record indicate that Ms. Denny is capable of having an attorney-client relationship?

Issue #2: Did the April 1, 2013 order address Ms. Denny's retained rights?

Assignment of Error #2: The superior court erred by entering the April 1, 2013, order contrary to RAP 7.2(a).

Issue #3: Does RAP 7.2(a) apply to guardianship proceedings?

Issue #4: Did RAP 7.2(a) divest the superior court of authority to enter the order of April 1, 2013?

Assignment of Error #3: The superior court erred by ruling that Denny Resources LLC is not a guardianship asset.

Issue #5: Is Denny Resources LLC a guardianship asset?

Issue #6: Should the court consider the funds of Denny Resources LLC that are controlled by OFC in setting the guardian's bond amount?

Assignment of Error #4: The superior court erred in approving OFC's failure to report to the court material events concerning Ms. Denny's welfare.

Issue #7: Should OFC, as limited guardian, have sought and reported

to the court relevant information about the drug test report?

Issue #8: Should OFC, as limited guardian, have informed the court about alleged incidents of misbehavior by Ms. Zak referenced in its staff's timesheet entries?

Assignment of Error #5: The superior court erred in admonishing and threatening Richard's counsel with sanctions for inquiring about alleged incidents that relate to Ms. Denny's welfare.

Issue #9: Must an interested party independently verify alleged incidents concerning the welfare of a person under guardianship and prove them by admissible evidence before calling them to the attention of the court?

Issue #10: Should the court permit an interested party to engage in discovery if the court requires compliance with rules of evidence when raising any concerns about the welfare of a person under guardianship?

Assignment of Error #6: The superior court erred by ordering Richard to file no further pleadings with the court until he pays judgments that he has appealed.

Issue #11: Was it an abuse of discretion for the superior court to order Richard to file no further pleadings with the court until he pays judgments that he has appealed?

STATEMENT OF THE CASE

In the first appeal, on March 6, 2013, this appellate court's Commissioner Mary Neel granted Richard's motion to amend his notice of appeal (CP1 2000) to add the superior court's order entered January 25, 2013 (CP1 1845). Richard on February 13, 2013, had filed a motion to modify Commissioner Neel's January 22, 2013, ruling that denied his emergency motion to stay further superior court orders restricting Ms. Denny's retained civil rights without her being represented by counsel. The motion to modify sought to stay the superior court order of January 25, 2013, as having been entered without authority due to the application of RAP 7.2 and without affording Ms. Denny her statutory and due process right to counsel. This court denied that motion to modify on May 20, 2013, without explanation.

On March 14, 2013, OFC filed its Petition for Approval of Third Annual Report (CP2 3-186, 480-91, 194 pages) with its counsel's fee declarations (CP2 187-262, 74 pages) and noted a hearing for April 1, 2013. CP2 1. On March 26, 2013, Richard filed a short pleading objecting to selected items and inquiring about certain items in OFC's petition package. CP2 264-271. Richard objected to (1) insufficient notice,² (2) the open-ended budget for an allegedly unnecessary live-in home care agency worker, (3) OFC's failure to report the high-balance bank account

² Richard is not appealing the sufficiency of notice.

of Denny Resources LLC as part of the unbonded liquid assets controlled by it as guardian, (4) OFC's requesting approval of its payment of over \$12,000 to Ms. Denny's tax attorney without filing a fee declaration by him supporting such payment, (5) OFC's mistaken assertion that the police investigation was ongoing relating to the drug test report from December 16, 2012, (6) the fees at \$415 per hour charged by OFC's counsel Tom Keller, and (7) the court's continuing to restrict Ms. Denny's retained civil rights without allowing her to retain counsel. Concerning the fifth listed item, Richard asked the court to consider (1) if OFC should have stayed abreast of the status of that drug-test-related police investigation and reported to the court when and why it was closed, and (2) if OFC should have informed the court, as indicated by its timesheet entries, that a county prosecutor on December 19, 2012, had recommended it seek a vulnerable adult protection order to protect Ms. Denny. In reply, OFC acknowledged that the prosecutor's concern was about Ms. Denny's daughter, Marianne Zak. CP2 275.

In his pleading with those objections, Richard also requested (CP2 268-69) that OFC provide information about incidents reported in its timesheets and an incident reported to him by a police officer, which reports would cause persons concerned about Ms. Denny's welfare to inquire further. Both OFC (CP2 275-76) and Ms. Zak (CP2 281-83) replied with explanations about those reports, and Richard's counsel later

indicated his satisfaction with those explanations. RP12 34.

At the hearing on April 1, 2013, Richard's counsel asserted that due to RAP 7.2, the superior court lacked authority to enter OFC's proposed order, but both Mr. Keller and Commissioner Velategui expressed their disagreement (RP12 12-16), and when signing OFC's proposed order the Commissioner stated that it is not precluded by that rule because it does not affect the issues that are before this appellate court. RP12 44.

At that hearing, Commissioner Velategui dismissed each objection that Richard's counsel raised. RP12 12-33. Upon that counsel indicating satisfaction with the explanations provided of the incidents inquired about, the Commissioner stated, "I don't see that the requests for the explanations provided any benefit to the estate, but they were provided." RP12 34.

In the hearing at that point, Ms. Zak's counsel, Karolyn Hicks, requested sanctions against Richard or his counsel for not having supported the request for explanations with declarations by persons with first-hand knowledge under ER 601 or other non-hearsay evidence. RP12 34-36. After a discussion in which the Commissioner acknowledged that Richard's counsel was not permitted to engage in discovery and could not have forced Ms. Denny's residential care facility's director or anybody else to do a declaration or give testimony (RP12 37-38), the Commissioner began berating Richard's counsel for "artfully" raising issues "where none exists." RP12 42-43. The Commissioner then

threatened Richard's counsel with sanctions, presumably under CR 11, if he should raise any further issues without first conducting a reasonable investigation or supporting the issue with declarations, though denying counsel's request for discovery authority. RP12 44-45. The Commissioner incorporated his oral ruling in his written entered order. RP12 45, CP2 322 ¶ 3.18.

On April 11, 2013, Richard filed a motion to reconsider the April 1, 2013, order based on the application of RAP 7.2. CP2 328-38. Commissioner Velategui denied that motion without a hearing on May 23, 2013, and ordered Richard to pay OFC's attorney fees incurred responding to the motion in an amount to be later determined. CP2 404-08. Then on June 12, 2013, OFC filed a petition for a judgment against Richard for its attorney fees and moved to bar him from filing any further pleadings in the guardianship proceeding until he pays that judgment and a previously entered judgment that awarded OFC attorney fees against him. CP2 411-16. On June 24, 2013, Richard filed a response arguing that it was inequitable to award OFC attorneys fees against him and that OFC's request to bar him conditionally from filing further pleadings was a sanction unsupported by law. CP2 434-37. At the hearing on June 26, 2013, Commissioner Velategui rejected Richard's arguments, asserted that he had not found any of Richard's motions to be reasonable or meritorious, and asserted that under the authority of a case named *In re*

Marriage of Giordano the court could bar Richard from filing any further pleadings until he paid the judgments. RP13 17. The Commissioner then entered OFC's proposed order. CP2 464-69.

Richard has appealed. CP2 439, 472.

On June 4, 2013, attorney Elena Garella petitioned this appellate court for permission to represent Ms. Denny in her pending appeals. On September 30, 2013, this court denied that petition. Ms. Garella petitioned for discretionary review by the state supreme court, but a commissioner of that court on December 12, 2013, denied that petition. On April 2, 2014, a panel of that court denied Ms. Garella's motion to modify that commissioner's ruling.

On April 11, 2014, Richard's counsel emailed this court's assigned case manager, Ms. Nakamichi, a message requesting a briefing schedule and information about the effect on briefing of the linkage of the two consolidated cases. He sent her that message again on May 16, 2014, but received no response to either message. On December 1, 2014, in response to a letter from this court's clerk inquiring about consolidation of a third appeal (No. 72014-7-I), Richard's counsel described and attached his emailed messages to the case manager and again requested a response to them. He received none. The clerk's letter of October 12, 2015, set a briefing schedule.

ARGUMENT

1. The record indicates that Ms. Denny is capable of having an attorney-client relationship.

Ms. Denny's tax and estate planning attorney, Timothy Austin, upon Richard's request, filed an affidavit (CP2 292-303) supporting the over \$12,000 in fees paid to him in 2012. He stated, "Due to the size of Mrs. Denny's estate, many of the planning strategies that I have recommended and which have been implemented are rather complex." CP2 292. His invoices indicated that he met with Ms. Denny on December 19, 2011 (CP2 294), on January 4, 2012 (CP2 298), and February 17, 2012 (CP2 300). OFC's reports indicate that "During the review period, Mrs. Denny participated in additional gifting transactions with the advice and direction of her estate planning attorney, Timothy Austin," and summarizes the complex transactions. CP2 19. OFC's reports indicate that the market value of those gifting transactions exceeded \$3.5 million. CP2 32, 34, 39-40. It is illogical for OFC and the superior court to assert that Ms. Denny is unable to participate in an attorney-client relationship with an attorney to advocate in the guardianship proceeding her expressed wishes concerning her person while both recognize that she consults with and accepts advice and direction from an attorney concerning complex, multi-million dollar gifting transactions.

2. The April 1, 2013 order did address Ms. Denny's retained rights.

The superior court's order entered, following a hearing, on April 1, 2013, (CP2 312-23) did address fundamental rights that Ms. Denny had retained in the 2009 initial guardianship order, so she had a statutory and due process right to be represented by counsel at that hearing. See Richard's opening brief in the first appeal (RD 1st Op.Br.), pages 31-39. The 2009 order reserved to Ms. Denny the right to decide about her health care, about who shall provide care and assistance to her, and about social aspects of her life, and did not limit her right to travel. But the April 1, 2013, order authorized OFC to place in her home a live-in home care agency worker (§§ 2.1, 2.17), restricted her right to travel (§§ 2.12, 3.8), and approved all past acts of OFC (§§ 1.3, 2.21) though the record indicates that it continuously had usurped her right to make decisions about her health care. RD 1st Op.Br. 8-13.

Had Ms. Denny been allowed to express to her own independent attorney her wishes concerning the live-in home care agency worker, and had that attorney been allowed to consult with Ms. Denny's health care providers concerning the need for such a 24-7 worker, the superior court would have been able to make a wiser decision concerning that quite intrusive imposition upon her and the quite significant expense of it. See RP12 16-28.

Because of its impact on Ms. Denny's retained rights, she had a right

to an attorney advocating her wishes concerning that April 1, 2013 order.

3. RAP 7.2(a) does apply to guardianship proceedings.

In response to argument by Richard's counsel that RAP 7.2 applied to divest the superior court of authority after review was accepted by the appellate court, Mr. Keller asserted that the rule was inapplicable to guardianship proceedings, and Commissioner Velategui agreed saying that if it applied, "the ward would be left without any court supervision." RP12 12-13. But the rule does not by its terms provide an exception for guardianship proceedings. No Washington case addresses the issue, but an Indiana appellate opinion applied its comparable rule in a guardianship case. In that case, a son appealed a trial court order appointing a guardian for his mother because he had unduly influenced her to transfer to him controlling stock in the family business. Later, the trial court ordered him to transfer that stock to her appointed guardian. The appellate court ruled that the trial court had lost jurisdiction to enter that later order because the son's appeal of the first order transferred jurisdiction to the appellate court. *In re Guardianship of Hickman*, 811 N.E.2d 843 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 737 (2005).

A type of case analogous to a guardianship is one involving custody of minor children, in which courts often are asked to modify prior orders in a child's best interest. Over a century ago, our state supreme

court ruled that while an appeal is pending of a superior court's child custody order, the superior court loses jurisdiction to modify that order, and only the appellate court has jurisdiction to do so. *Irving v. Irving*, 26 Wash. 122, 66 P. 123 (1901). A half-century later, the court approvingly cited that case, stating:

“We have consistently held that, when an appeal to this court is perfected in a divorce case, the superior court loses all jurisdiction to change or modify the decree appealed from, and that, while the appeal is pending before us, this court has the sole power to make orders with reference to the custody and disposition of children when changed conditions require revision of the order for such custody.”

Walkow v. Walkow, 36 Wn.2d 510, 219 P.2d 108 (1950).

In *Walkow*, given the urgent circumstances claimed by the father, the supreme court's June 5 ruling remanded the case temporarily to the superior court for a hearing to determine whether to modify the terms of the mother's custody scheduled for July in that year, and then to return the case to the supreme court. Similarly, current RAP 7.2(a) provides that the appellate court after accepting review of a superior court's order may restore some authority to that superior court pursuant to RAP 8.3.

There is simply no basis in the law to assert that RAP 7.2 is inapplicable to appeals of orders in guardianship proceedings. If there is an urgent need to address matters in an guardianship proceeding while jurisdiction resides in the appellate court, the appellate court may address them or, under RAP 7.2(a) and 8.3, authorize the superior court to address

them. RAP 8.3 provides that requests for relief should be made by motion of a party. This appellate court indicated in *In re Guardianship of Way*, 79 Wn. App. 184, 192, 901 P.2d 349 (1995) (in guardianship cases, the reviewing court must have the most current information about a ward) that it would address the best interests of a person under guardianship based upon the most current information available to it without needing to restore jurisdiction to the superior court to first consider that information.

4. RAP 7.2(a) divested the superior court of authority to enter the order of April 1, 2013.

Washington state cases are clear and consistent that pursuant to RAP 7.2 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. Below are excerpts from some such cases.

“Finally, we consider whether the trial court had authority to grant the Guild’s motion for binding arbitration. This court may raise at any time the question of jurisdiction. RAP 2.5(a); See CR 12(h)(3). **We hold that the trial court was without jurisdiction** to hear or grant the Guild’s motion for binding arbitration.

....

“RAP 7.2 governs the authority of a trial court after acceptance of appellate review. **Except for the limited circumstances outlined in RAP 7.2(b)-(j), the trial court has no authority to act after a notice of appeal is filed.** See *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wash.2d 438, 445, 423 P.2d 624 (1967); *Phillips v. Wenatchee*

Valley Fruit Exch., 124 Wash. 425, 428, 214 P. 837 (1923).” [Emphasis added.]

Clallam County Deputy Sheriff's Guild v. Bd. of Clallam County Com'rs, 92 Wn.2d 844, 852-53, 601 P.2d 943 (1979).

“Preliminarily, we should note that any attempted proceedings in the superior court subsequent to filing of the notice of appeal on November 15, 1968, occurred after **the trial court lost jurisdiction** over the proceedings. Rule on Appeal I-15 (formerly RA 15); *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wash.2d 438, 423 P.2d 624 (1967). Hence, any **judgment based upon such proceedings is void and unenforceable**. *Phillips v. Wenatchee Valley Fruit Exchange*, 124 Wash. 425, 214 P. 837 (1923).” [Emphasis added.]

Tinsley v. Monson & Sons Cattle Co., 2 Wn. App. 675, 677, 472 P.2d 546 (1970).

“As a final matter, we observe that in granting a protective order to a non-party witness while this review was pending, the trial court decided a matter pending on appeal in violation of RAP 7.2. We therefore vacated that order and stayed further discovery.”

King v. Olympic Pipeline Co., 104 Wn. App. 338, 376, 16 P.3d 45 (2000).

Washington state cases also are clear and consistent that courts have a nondiscretionary duty to vacate void orders and judgments. ***Allstate Ins. Co. v. Khani***, 75 Wn. App. 317, 323, 877 P.2d 724 (1994); ***Leen v. Demopolis***, 62 Wn. App. 473, 478, 815 P.2d 269 (1991), *rev. 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).

OFC should have moved in this appellate court under RAP 7.2(a) and 8.3 to grant the superior court authority to address its Petition for Approval of its Third Annual Report. Had it done so, Richard or Ms. Denny through her next friend Thomas Anderson then could have argued in support of her right to be represented by counsel in the requested superior court proceeding. But because OFC sought no order under RAP 8.3, the superior court acted without jurisdiction, so its order of April 1, 2013, is void. This appellate court has a nondiscretionary duty to vacate that order.

5. Denny Resources LLC is a guardianship asset.

Richard's written objections (CP2 266) and his counsel's arguments at the April 1, 2013, hearing (RP12 28-31) alerted the superior court that OFC has appointed itself manager of Denny Resources LLC, the holding company (having subsidiary LLCs that own apartment houses) in which Ms. Denny holds a controlling 64% equity interest. OFC's reports show that Ms. Denny's 64% interest has a market value of nearly \$6.5 million (CP2 39), and her 64% share of its distributions in 2012 was \$333,330. CP2 31. Accordingly, the total distributions in 2012 from that holding company made by OFC as its manager would have been about \$550,800. (\$333,330 divided by 0.64).

But in response to Richard, OFC and its counsel Mr. Keller inexplicably responded in writing (CP2 274) and orally at the hearing (RP12 30) that Denny Resources LLC is not an asset of the guardianship estate over which the court has jurisdiction, though Mr. Keller acknowledged that OFC as its manager writes the checks on its bank account. *Id.* Though Commissioner Velategui expressed skepticism at Mr. Keller's position (*Id.*), the Commissioner inexplicably signed and entered Mr. Keller's proposed order without striking its clearly erroneous finding of fact that "Denny Resources, LLC is not an asset of the guardianship estate." CP2 315 ¶2.2.

6. The court should consider the funds of Denny Resources LLC that are controlled by OFC in setting the guardian's bond amount.

In *Estate of Treadwell ex rel. Neil v. Wright*, 115 Wn. App. 238, 61 P.3d 1214, *review denied*, 149 Wn.2d 1035 (2003), the court interpreted RCW 11.88.100 and .105 as requiring a guardian to post a fidelity bond that is adequate to protect the person under guardianship and her creditors from possible defalcation by the guardian. Considering that OFC appointed itself manager of Denny Resources LLC in which capacity it writes checks and disburses over \$550,000 per year among Ms. Denny and her children, the superior court should take that cash into account in fixing the amount of its fidelity bond.

OFC had reported that the year-end balance of all unblocked funds was only \$73,687, (CP2 19) failing to report the unblocked LLC's bank account's year-end balance of \$51,000 (CP2 38) or that over \$550,000 had been managed and disbursed by OFC from that account during the year.

7. OFC, as limited guardian, should have sought and reported to the court relevant information about the drug test report.

In OFC's care plan report (CP2 481-91) signed by its officers on March 7, 2013, it mistakenly asserted (CP2 484) that the Mercer Island Police investigation was ongoing relating to the December 16, 2012, drug screen report. The record reflects no effort was made by OFC to monitor the status of that investigation or its closure. When Richard's counsel filed a declaration on March 7, 2013, (CP1 2015-20) documenting that both the police investigation and Adult Protective Service investigation had closed without finding crime or misconduct, OFC's counsel filed an objection. CP1 2021. Richard's counsel, upon learning early on that the investigating detective suspected the December 16, 2012, drug test report was a false positive and that December 19, 2012 drug test was negative, strongly urged OFC, by messages of January 2 and 4, 2013, to its counsel, to seek an opinion of a qualified professional on whether the first test report was actually a false positive. CP1 1904, 1907. OFC declined to take any such steps (CP1 1946; RP11 32), apparently preferring to leave

Richard and Ms. Zak under a cloud of suspicion because that enhanced OFC's degree of authority and control over Ms. Denny. When Richard obtained and filed a statement by Ms. Denny's neurologist, Dr. Gorman, opining that the drug test report was likely a false positive (CP1 1957), OFC objected. CP1 1816. Though Commissioner Velategui struck the filed record of Dr. Gorman's opinion (CP1 1857), the Commissioner later acknowledged his awareness that a medical professional had concluded the drug test report was likely a false positive. RP12 20-21.

Notwithstanding that, the Commissioner continued to exclaim his biased suspicion that Richard had given cocaine to his mother (RP12 43) as he had exclaimed at the previous hearing. RP11 12 ("as I was reading the pleadings I was laughing to myself. Well, Richard did it for goodness sake."). And notwithstanding his awareness of the report that the drug test was false positive, Commissioner Velategui asserted that the quite intrusive and expensive live-in home care worker was hired to protect Ms. Denny from being given an illicit drug again. RP12 20.

A court genuinely concerned about the welfare of a person under guardianship should demand timely and accurate information about an allegation that she has been given an unlawful drug rather than let suspicions linger for months. And OFC had an inherent duty to attempt promptly to seek a qualified professional's opinion on whether the drug test report may have been a false positive, as the detective initially

suggested, before taking and continuing for months drastic measures that altered Ms. Denny independent living situation at great expense to her estate.

8. OFC, as limited guardian, should have informed the court about alleged incidents of misbehavior by Ms. Zak referenced in its staff's timesheet entries.

Pursuant to RCW 11.88.040 and .043, OFC filed annual reports concerning the financial and personal affairs of Ms. Denny. Its annual report filed March 14, 2013, with a petition requesting its approval was 194 pages (CP2 3-186, 480-91), including 137 pages of detailed staff timesheet entries. CP2 49-186. Buried within those timesheet entries were references to behavioral incidents that a court genuinely concerned about Ms. Denny's welfare would inquire about (CP2 268-69), but OFC did not mention them in its 15-page summary (CP2 15-29). It is unreasonable for OFC to assume the court will have time and inclination to read the detail in its 137 pages of timesheets, so OFC's inherent duty of candor to the court requires that it make reference to significant incidents affecting Ms. Denny welfare in its summary. It failed to do so.

9. Interested parties are not required independently to verify alleged incidents concerning the welfare of a person under guardianship and prove them by admissible evidence before calling them to the attention of the court.

As noted above, at the hearing on April 1, 2013, Commissioner Velategui threatened Richard's counsel with sanctions, presumably under CR 11, if he should raise any further issues without first conducting a reasonable investigation or supporting the issue with declarations, though he denied counsel's request for discovery authority. RP12 44-45.

Neither an interested party nor their counsel in a guardianship proceeding is permitted to engage in discovery without express permission granted by the court. RCW 11.96A.115(2). And, as Commissioner Velategui recognized (RP12 37-38), without discovery power counsel cannot compel anybody to give testimony or a declaration. It's common sense that the director of a for-profit residential care facility would not give, or permit her staff to give, testimony adverse to a guardian having power to retaliate by relocating to another facility a long-time resident unless compelled by law to truthfully testify.

The superior court, as superior guardian of a person under guardianship, has inherent and statutory authority to appoint a guardian ad litem to investigate any interested party's allegations concerning the welfare of the protected person. RCW 11.88.120.

It is an abdication of the superior court's supervisory role to require that parties interested in the welfare of a person under guardianship independently investigate any significant concerns that come to their attention before informing the superior court of the concerns.

Commissioner Velategui's threats to Richard's counsel were an abuse of his authority and discretion.

10. The court should permit interested parties to engage in discovery if the court requires compliance with rules of evidence when raising any concerns about the welfare of a person under guardianship.

Ever since 1975, RCW 11.88.045(3) has required that a person's loss of capacity over their personal or financial affairs be proven by clear, cogent, and convincing evidence, implicitly requiring application of the rules of evidence. However, in *In re Guardianship of Stamm v. Crowley*, 121 Wn.App. 830, 837, 91 P.3d 126 (2004), the court held that a guardian ad litem may state hearsay as a basis of his or her opinions. But no rule, statute, or case requires or permits a court supervising an ongoing guardianship case to ignore or disregard credible information about the welfare of a person under guardianship simply because it would be inadmissible under the rules of evidence. If information appears credible to the court, the court should consider it or appoint an guardian ad litem to investigate it further. In fact, RCW 11.88.120(2) requires that a court supervising an ongoing guardianship to consider any complaint, even by an unrepresented party, unless it is facially without merit or frivolous.

If a court were arbitrarily to rule that it would only consider evidence admissible under the rules of evidence in an ongoing

guardianship cases, as Commissioner Velategui suggested, then it should authorize interested parties to engage in discovery to substantiate any concerns, unless the court's actual objective is to prevent any credible concerns from being presented to it.

11. It was an abuse of discretion for the superior court to order Richard to file no further pleadings with the court until he pays judgments that he has appealed.

When OFC filed its pleading (CP2 411-16) requesting judgment against Richard for the attorney fees it incurred responding to his motion for reconsideration based upon RAP 7.2, it included an extraordinary request that the court bar Richard from filing any further pleadings until he has paid OFC its requested judgment amount and an earlier judgment that he had appealed. OFC cited no specific legal authority for such a bar, citing merely general statutes, RCW 11.96A.020, .040, and .060, that recognize the court in probate matters has plenary power to issue orders that it deems necessary or proper to its jurisdiction. CP2 415-16.

But OFC's cited "plenary power" statutory language—that has been substantially unchanged since the 1917 probate code—does not empower a court to ignore applicable law. In *Mayer v. Rice*, 113 Wash. 144, 193 P. 723 (1920), the court rejected an argument that such "plenary power" statutory language empowered the guardianship court to ignore applicable law, quoting the language of section 219 of 1917 Laws,

Chapter 156, as follows:

“It is the intention of this act that the courts mentioned shall have full and ample power and authority to administer and settle all estates of decedents, minors, insane and mentally incompetent persons in this act mentioned. If the provisions of this [act] with reference to the administration and settlement of such estates should in any cases and under any circumstances be inapplicable or insufficient or doubtful, the court shall nevertheless have full power and authority to proceed with such administration and settlement in any manner and way which to the court seems right and proper, all to the end that such estates may be by the court administered upon and settled.”

In *State ex rel. National Bank of Commerce v. Frater*, 18 Wn.2d 546, 140 P.2d 272 (1943), the supreme court rejected an argument that the foregoing broad statutory language, that it quoted at 552-53 from Rem.Rev.Stat. § 1589, empowered the probate court to act contrary to law. And in *Henley v. Henley*, 95 Wn. App. 91, 974 P.2d 362 (1999), the court held, at 97, that the “plenary power” language of RCW 11.96A.020 does not give a court power to ignore applicable law.

Clearly, RCW 11.88.120 and 11.92.150 allow the family members of a person under guardianship to participate as parties in the guardianship and file pleadings with their concerns or objections. And no law requires that a judgment debtor voluntarily pay a judgment, particularly when the debtor is appealing that judgment.

And given the facts and circumstances of 92-year-old Ms. Denny’s case, including the reasonable assumption that her testamentary plan is to

divide her wealth between Richard and Ms. Zak, the sanction sought by OFC appears merely to spite Richard for having exposed its wrongdoing.

Commissioner Velategui, in granting the extraordinary request by his familiar colleague (“They have appeared in my court hundreds of times, if not thousands.” RP12 27) cited a case that he reported is “well familiar with,” *In re Marriage of Giordano*, 57 Wn .App. 74, 787 P.2d 51 (1990). In that case, the trial court restrained Ms. Giordano from filing any more motions until her trial date, since her numerous motions “threatened to preempt the family law motions calendar and to involve all 39 superior court judges.” *Id.* at 75. The behaviors of the vexatious pro se litigant in that extreme case, and other vexatious pro se litigant cases, are so far removed from the pleadings composed and filed in good faith by Richard’s counsel in this case as to be wholly inapplicable as authority for Commissioner Velategui’s sanction against Richard.

12. 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 information presented in the first appeal and this appeal indicating that OFC abused its authority and is retaliating against Richard and his cousin, Mr. Anderson, for attempting to expose OFC’s misconduct, the court

should recognize the equity of awarding Richard fees against OFC.

CONCLUSION

The record of Ms. Denny's ongoing attorney-client relationship with her tax and estate planning lawyer advising her concerning complex multi-million dollar transactions demonstrates that she possesses the capacity of participate in an attorney-client relationship. Accordingly, she should have been allowed to retain and be represented by counsel at the hearing on April 1, 2013, concerning OFC's requested order that addressed the rights that she retained in the initial 2009 guardianship order.

RAP 7.2 does apply to guardianship proceedings, and the April 1, 2013 order and subsequent orders of the superior court were entered without authority and are void.

Ms. Denny's most significant asset, Denny Resources LLC, of which OFC appointed itself manager, is indeed an asset of her estate. Since OFC's managerial power over its checking account involves disbursing over a half-million dollars annually, the court should take it into account in setting the amount of OFC's fidelity bond.

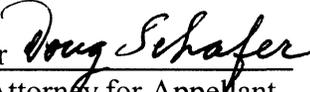
OFC, as limited guardian, has a duty to become informed about, and inform the superior court about, significant incidents concerning Ms. Denny's welfare. It failed to fulfill that duty.

Family members and other parties interested in the welfare of a person under a guardianship are statutorily empowered to bring their concerns relating to her welfare to the attention of the superior court, and the court has a duty to consider them. It was error for the superior court in this case to threaten sanctions against Richard's lawyer unless he independently investigates information underlying any concerns relating to Ms. Denny's welfare. And if the superior court considers it essential that all concerns be supported by testimony of persons with first-hand knowledge, the court should allow interested parties to engage in discovery

It was a abuse of its authority and discretion for the superior court to bar Richard from participating in Ms. Denny's guardianship proceeding until he pays judgments that has appealed.

It is equitable to award attorney fees to Richard.

Respectfully submitted this 30th day of November, 2015.

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

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Brief of Richard Denny with this appended page by the means indicated

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November 30, 2015

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