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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.

REPLY BRIEF OF RICHARD DENNY

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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." Richard's opening brief is referred to a "RD Brf." Richard's mother, the respondent in this guardianship proceeding, is Ella Nora Denny, referred to here as "Ms. Denny." "2009 Order" refers to he initial guardianship order, entered December 17, 2009. CP 18-32 and included in the appendix to RD Brf.

ARGUMENT

1. OFC Brf page 1: Guardianships not adversarial; courts as superior guardians.

At page 1, first paragraph, OFC correctly asserts that guardianships are not adversarial proceedings, but are protective proceedings intended to provide respondents (anachronistically labeled as "wards") only as much assistance as they actually require, while protecting their civil rights and autonomy to the fullest extent possible. Yet OFC's conduct in this case has been most adversarial. The paragraph recognizes that the lower courts are "superior guardians" of respondents under guardianship, but the appellate courts are as well, with the same duty to ensure their needed assistance while protecting their civil rights and autonomy to the fullest

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

2. OFC Brf page 1: Meaning of "incapacitated person."

At OFC's second paragraph, and throughout its brief and repeatedly in pleadings and oral argument in the lower court, OFC stresses that Ms. Denny in the 2009 Order was adjudicated to be an "incapacitated person." The subtle implication is that "incapacitated person" is merely the contemporary label for the anachronistic label "incompetent"—understood to mean a person fully incapable of caring for him or herself, so stripped of all civil rights. But that is not at all what our legislature intended when, in its 1990 major reforms of our guardianship statutes, it inserted the term "incapacitated" in place of the terms "incompetent" and "disabled person." The latter term since 1975 had referred to a person who was ***not*** incompetent but who needed some assistance for which a "limited guardian" was appointed. Since 1975 legislation, Washington courts have been encouraged to appoint merely limited guardians, with limited authority, for persons who were disabled in some respect but who were not incompetent. Laws of 1975, 1st Ex. Sess., ch. 95. After the legislature made some minor edits to the statutes by Laws of 1977, 1st Ex. Sess., ch. 309, RCW 11.88.005 and .010 read as follows, with emphasis here added:

RCW 11.88.005 (1977)

It is the intent and purpose of the legislature to recognize that **disabled persons** have special and unique abilities and competencies with varying degrees of disability.

Such persons **must be legally protected without the necessity for determination of total incompetency and without the attendant deprivation of civil and legal rights that such a determination requires**.

RCW 11.88.010 (1977)

(1) The superior court of each county shall have power to appoint **guardians** for the persons and estates, or either thereof, of **incompetent persons**, and guardians for the estates of all such persons who are nonresidents of the state but who have property in such county needing care and attention.

An **"incompetent"** is any person who is either:

(a) Under the age of majority, as defined in RCW 11.92.010, or

(b) **Incompetent** by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his property or caring for himself or both.

(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 as provided by RCW 11.88.090 as now or hereafter amended. 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. In addition, the court order shall state the period of time for which it shall be applicable.

For the purposes of chapters 11.88 and 11.92 RCW the term **"disabled person"** means an individual who is in need of protection and assistance by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, **but cannot be found to be fully incompetent.**

(3) Venue for petitions for **guardianship or limited guardianship** shall lie in the county wherein the alleged **incompetent or disabled person** is domiciled, or if such person is a resident of a state institution for developmentally disabled persons, in either the county wherein such institution is located, the county of domicile, or the county wherein a parent of the alleged **incompetent or disabled person** is domiciled.

In 1990, the Washington legislature enacted comprehensive revisions of our guardianship statutes. One change was the abandonment of the labels "incompetent person" and "disabled person" and replacing both with the label "incapacitated person" while adding considerable language intended to ensure that persons with capacities to exercise some of their autonomy and civil rights still would be permitted to do so. So after enactment of Laws of 1990, ch. 122, RCW 11.88.005 and .010 read as follows, with emphasis here added:

RCW 11.88.005 (1990)

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

RCW 11.88.010 (1990, in relevant part)

(1) The superior court of each county shall have power to appoint guardians for the persons and/or estates of **incapacitated persons**, and guardians for the estates of nonresidents of the state who have property in the county needing care and attention.

(a) For purposes of this chapter, a person may be deemed

incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.

(b) For purposes of this chapter, a person may be deemed **incapacitated as to the person's estate** when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

[(c), (d), (e) and (f) omitted as not here relevant.]

(2) The superior court for each county shall have power 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**. After considering all evidence presented as a result of such investigation, the court shall impose, by order, only such specific limitations and restrictions on an incapacitated 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 incapacitated 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.** In addition, the court order shall state the period of time for which it shall be applicable.

(3) Venue for petitions for guardianship or limited guardianship shall lie in the county wherein the alleged **incapacitated person** is domiciled, or if such person resides in a facility supported in whole or in part by local, state, or federal funding sources, in either the county where the facility is located, the county of domicile prior to residence in the supported facility, or the county where a parent or spouse of the alleged **incapacitated person** is domiciled.

[Next paragraph of (3) omitted as not here relevant.]

So an adjudication that a person is an incapacitated person could mean that the person merely needs the assistance of a limited guardian with one narrow aspect of their personal or financial affairs, but the person is fully capable of exercising all of their other rights concerning their

personal and financial affairs. An incapacitated person in not an incompetent person!

In ***In re Way*** at 188-89, this court focused on RCW 11.88.045(3) in which the legislature used the plural form of *issue* in the phrase "on the issues of his or her alleged incapacity" to hold that a jury, if requested, decides what civil rights a guardianship respondent should lose or retain, recognizing that a respondent may lack capacity to exercise some rights but possess the capacity to exercise others. Similarly, in RCW 11.88.005 and RCW 11.88.095(1) and (2)(a) (unchanged since 1990) the legislature used the plural term "incapacities" to indicate that possessing capacity is not a singular all-or-nothing condition, but refers a person's ability to manage one or more particular aspects of his or her personal and financial affairs. In the case of Ms. Denny, the 1990 order expressly adjudged that she possessed the capacities (1) to execute estate planning documents and transactions with the advice of her attorney, (2) to consent to or refuse medical treatment, (3) to decide who shall provide her care and assistance, (4) to decide the social aspects of her life, and (5) to vote. CP 19-21. That order expressly adjudged Ms. Denny to be "partly incapacitated" to manage her personal affairs, and it appointed OFC as merely a limited guardian of her person. CP 19.

3. OFC Brf page 2: No "campaign to disrupt the guardianship."

Illustrating its adversarial style, OFC described the efforts by Richard and his cousin, Tom Anderson, to correct OFC's and the lower court's abuses of Ms. Denny's rights as "a campaign to disrupt the guardianship." But they simply have been responsibly petitioning their government on her behalf, along with attorneys Mark Wilson, Brian Isaacson, and Elena Garella, because OFC usurped her adjudicated retained civil rights and the lower court has abrogated her retained civil rights without due process. RCW 11.88.120 plainly contemplates that family members of a person under a guardianship may become advocates for their loved one.

4. OFC Brf page 2: Appellate court should consider evidence ignored by the lower court.

OFC asserts that weighing the evidence that was before the lower court is "not the proper role for an appellate court," and in some types of cases that is true, but that is not consistent with its role as a superior guardian in a guardianship case, as discussed below. And when the lower court has ignored the evidence of a guardian's misconduct, as it did here of OFC's misconduct (see RD Brf at 13-14 "The commissioner stated that he had read the motion to remove but had not gleaned that OFC had exceeded its authority.") it is imperative that the appellate court consider

the ignored evidence.

5. OFC Brf page 3: Alleged appellate procedure mistakes.

Beginning on page 3 and throughout OFC's brief it's Harvard-trained lawyer, wielding her sharpest adversarial skills, urges this appellate court to ignore the substantive issues of Ms. Denny's mistreatment by asserting that Richard's counsel has failed to "dot the i's and cross the t's" of some appellate procedure rule. Were this an adversarial proceeding disputing a pot of money between OFC and Richard, perhaps technical errors by Richard's lawyer would be dispositive. But this is a guardianship proceeding in which the judiciary's role as superior guardian is, according to the legislature, to restrict Ms. Denny's liberty and autonomy "only to the minimum extent necessary to adequately provide for [her] health or safety." RCW 11.88.005. Ms. Denny did not choose Richard's lawyer, and she should not be penalized for his procedural errors. Ms. Denny was wrongly denied a lawyer of her own choice to defend her fundamental civil rights. She might have hired a Harvard-trained lawyer, too.

6. OFC Brf page 4: Timeliness of notice of appeal.

On page 4, OFC asserts that Richard's notice of appeal was untimely. Commissioner Neel directed Richard, by a notation ruling enter October

26, 2012, to address the timeliness issue. Richard responded with a brief filed November 13, 2012, and a reply filed November 29, 2012, both of which are included in the appendix to this brief. Commissioner Neel on November 30, 2012, entered a notation ruling that, "The issues of whether the appeal is timely as to all orders and the proper scope of review are referred to the panel that considers the appeal on the merits."

7. OFC Brf page 5: Standard of review by superior guardian court.

OFC asserts that this court's standard of review is for an abuse of discretion. While that obviously is met here, that standard is inconsistent with the recognition that the judiciary, collectively, acts as the superior guardian in a guardianship case. This appellate court acknowledged in ***In re Way*** that the appellate court, like the superior court, becomes the superior guardian of a person under guardianship and must consider the most complete and up-to-date record possible to fulfill that role, even considering evidence that was not before the superior court. The appellate court's role as superior guardian is inconsistent with OFC's assertion that a lower court's guardianship rulings are reviewed only for an abuse of discretion.

Contrary to OFC's assertion, Richard is not asking the appellate court to "reweigh the evidence" but to at least consider it all because the lower

court expressly did not consider it. At the April 27, 2012 hearing, Commissioner Velategui stated that he had read Mr. Anderson's Motion to Replace Guardian, filed April 9, 2012, but that he had not "gleaned" evidence of OFC's misconduct, though that motion and its appendix included extensive documented evidence of OFC's misconduct. RD Brf at 13-14, RP5 5.

8. OFC Brf pages 6-12: Interpreting the 2009 Order.

OFC seeks to interpret the convoluted 15-page 2009 Order with subject-to-this, subject-to-that circularity that only a Harvard-trained lawyer might understand. But the starting point for interpreting a guardianship order should be the statutes.

RCW 11.88.010(2) since 1990 has included the following directive: "A person shall not be presumed to be incapacitated 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." So specificity is required if a respondent placed under a limited guardianship is to lose any legal rights.

The 2009 Order, at Conclusions of Law ¶ 2.4, (CP 22) specifies the legal rights that Ms. Denny lost—the rights (1) to enter into contracts

except for estate planning purposes, (2) to sue or be sued, (3) to drive, and (4) to buy sell, mortgage, or lease property. Those are the ***only*** legal rights that she lost ***if*** the statute, RCW 11.88.010(2), is to be respected.

RCW 11.88.095(3) since 1990 had directed, "If the court determines that a limited guardian should be appointed, the order shall specifically set forth the limits by either [Option 1] stating exceptions to the otherwise full authority of the guardian or [Option 2] by stating the specific authority of the guardian." The 2009 guardian ad litem appointed to investigate Ms. Denny's capacities and needs filed a report (CP 1220) recommending Option 2—"I recommend that the limited guardian of the person have the following powers only:" listing six specific and limited powers. But Richard's attorney, who shortly thereafter withdrew (CP 1465) after telling him that she represents OFC in other cases, attempted to draft an order applying both Option 1 and Option 2. At its Conclusions of Law ¶ 2.3, the order implements the guardian ad litem's recommendations using Option 2 by stating the specific and limited powers of the limited guardian of the person. But at the order's Conclusion of Law ¶ 2.5 the scrivener also attempted to use Option 1, but did a very poor job of it, creating circular references. The 2009 Order should be interpreted, consistent with the guardian ad litem's recommendations, and with Ms. Denny having by its terms lost only those rights that were specified in its Conclusions of

Law ¶2.4.

While OFC's argues that Richard should suffer the penalty of his then lawyer's careless drafting, that is no basis to penalize Ms. Denny for that lawyer's ineptitude.

9. OFC Brf page 14: The March 23, 2012 hearing.

At page 14, OFC "spins" the facts from a March 23, 2012, hearing that Ms. Denny and Richard attended at which her attorney Mark Wilson requested permission to represent her in the guardianship case. OFC claims, "Ms. Denny was confused about why she was in court and asked whether her son was in trouble." But her inquiry was following the hearing during which Commissioner Velategui had spoken sternly to Richard, and after she had responded to the Commissioner's post-hearing "neighborly small talk" with "Oh. I don't hear very well." RP2 at 27-29. Spinning or fabricating further, OFC asserts, "Commissioner Velategui observed that Mrs. Denny did not know who Mr. Wilson was, and believed that he was the judge." Admittedly, at a hearing ten months later (January 24, 2013) the Commissioner stated that following the prior March 23 hearing he overhead Ms. Denny while exiting the courtroom ask Mr. Wilson, "Are you the judge?" though the Commissioner stated that she had been standing with Mr. Wilson while he argued for permission to

represent her. But as reported in Richard's Motion to Modify and Stay, filed with this appellate court February 13, 2013, at pages 10-11, two witnesses recalled that Ms. Denny was seated in the middle of the courtroom during that March 23 hearing, and her inquiry was directed to a gentleman following her while they exited the courtroom. If Ms. Denny were afforded a lawyer and due process rights to clarify this incident, they might show that immediately before entering the courtroom she was informed that local lawyers, such a OFC's Mr. Keller, sometimes don black robes and serve as judges *pro tem* in that courtroom, in which case her mistakenly overheard question to her lawyer, "Are you a judge?" is quite rational.

Commissioner Velategui stated (RP11 at 30) that the March 23 incident was the reason he determined that Ms. Denny lacked capacity to establish an attorney-client relationship, but RCW 11.88.010(1)(c) directs court to determine a respondent's capacities based on "demonstrated management deficiencies over time," not based on isolated incidents.

10. OFC Brf page 16: No service on Richard's attorney.

At page 16, OFC mistakenly claims that in April 2012 it served pleadings on Richard's attorney. Richard was unrepresented by counsel from late May 2011 (CP 1481) until the undersigned counsel entered an

appearance on May 17, 2012. CP 1527.

11. OFC Brf page 18-19: Constitutional right to counsel.

At pages 18-19, OFC argues that Ms. Denny has no constitutional right to retain counsel with her own ample funds by citing to inopposite cases that deny appointment of publicly-funded counsel in cases unless a party's physical liberty is at risk. But OFC there acknowledges that a constitutional right to counsel does apply when a person's fundamental liberty interest is at risk. In the superior court proceedings, Ms. Denny's right to make her health care decisions, her right to travel, and her right to intimate association with her family, have all been at risk, and each of those rights has been recognized as a constitutionally protected, fundamental liberty interest.

The right to choose one's medical treatment or to refuse medical treatment is recognized as a fundamental constitutional right. ***In re Guardianship of Ingram***, 102 Wn.2d 827, 836, 689 P.2d 1363 (1984). (Right to choose or refuse medical treatment is "a constitutional privacy right protected by the Fourteenth Amendment.")

The right to travel as one chooses is recognized as a fundamental constitutional right. ***Eggert v. City of Seattle***, 81 Wn. 2d 840, 845, 505 P.2d 801, 804 (1973) (Right to travel described as "a fundamental right"

and "an unconditional personal right guaranteed by the constitution."); ***Halsted v. Sallee***, 31 Wn. App. 193, 196, 639 P.2d 877 (1982) ("The right to travel is a fundamental right protected by the equal protection clause of the Fourteenth Amendment.")

And the right of intimate association with one's family members is recognized as a fundamental liberty interest. ***Roberts v. U.S. Jaycees***, 468 U.S. 609, 620, 104 S. Ct. 3244, 3251, 82 L. Ed. 2d 462 (1984) (Constitution protects the freedom of association with one's family as "an intrinsic element of personal liberty.")

12. OFC Brf page 22: Several hearings modified the guardianship.

At page 22, OFC asserts that amended RCW 11.88.120(1) (affirming that persons under guardianship have a right to counsel for any hearing to modify the guardianship) is inapplicable because, according to OFC, there were no hearings to modify Ms. Denny's guardianship. Richard disagrees. The orders of December 17, 2010 (CP 165), March 29, 2012 (CP 613, 616), and of January 25, 2013 (CP 1845), each resulted from a hearing and each modified the guardianship by enlarging the authority of the limited guardian, OFC.

13. OFC Brf page 26: OFC's misrepresentations to physicians.

At page 26, OFC asserts that the 2010 letters OFC mailed to Ms. Denny's physicians "did not represent that Ohana was full guardian of the person," but each letter expressly stated, falsely, that "Mrs. Denny is no longer able to provide consent to medical treatment." CP 794, 799, 801. OFC asserts that such letters enclosed Letters of Limited Guardianship of the Person, but that is not at all clear from the record. Those letters to physicians did not refer to enclosed letters of ***limited*** guardianship, so they may have only enclosed the 2009 letters of guardianship of the estate. CP 36. And providing the physicians only the letters of guardianship of the estate is consistent with OFC's corporate position that its appointment as guardian (even as limited guardian) of a person's estate endows OFC with exclusive authority to give consent to the person's medical treatment. OFC Brf at 36-37.

14. OFC Brf page 29: References to *ex parte* hearings and orders.

On page 29, footnote 14, OFC objects to Richard's references to multiple hearings and orders as "*ex parte*." The Latin term is understood to mean a judicial hearing at which all parties in the controversy are not represented. OFC asserts that the very brief hearing on March 29, 2012, at which Commissioner Velateguis entered two orders adverse to Ms. Denny was not held *ex parte* because attorney Mark Wilson, though previously

denied permission to represent Ms. Denny, attended as an observer. RP3. Richard's position is that Ms. Denny had a constitutional right to be represented by counsel of her choice at such hearings, which right was denied, so the label *ex parte* properly applies to such hearings and the orders entered at them. OFC has acknowledged that Ms. Denny was never represented by counsel after the guardianship was established. RD Brf at 16.

15. OFC Brf page 30: Richard supported the motion to remove OFC.

At page 30, OFC misleadingly asserts that Richard did not join, implying he did not support, Mr. Anderson's motion to replace OFC. At the May 31, 2012, hearing, Richard's newly retained counsel observed that Richard had not signed the April 9 motion to replace OFC. RP8 at 6. And his pleading filed the previous day (CP 1029-30) simply was stating who had signed which pleadings, according his review of the public court file. Richard later explained in his reply for the motion for revision that he supported the motion to replace OFC for its abuses of authority that were well-documented in that motion. CP 1201-02. Richard certainly had a right to seek review of the order denying that motion to replace because it directly enjoined Richard from assisting his mother to express her concerns about OFC. CP 1167 ¶ 3.

16. OFC Brf page 33: OFC's authority over Ms. Denny's lab tests.

At the foot of page 33, OFC continues, as it did in the lower court, to complain that Ms. Denny's hospital physician on December 16, 2012, had her urine sample tested for toxins without advance notice to and approval by OFC. CP 1861, 1863, 1864 fn.1, 1921-22, 1846, 1850. But nothing in the record prior to that time indicates that OFC, as limited guardian of the person over Ms. Denny, had any authority that required it to be notified of, or to consent to, such a lab test. It as apparent, however, from Commissioner Velategui's many statements during the hearing on January 24, 2013, that he wrongly considered OFC as having such authority as a full guardian of her person. RP11.at 13, 14, 32, 34.

Similarly, at page 35 if its brief, OFC complains that Richard met with, and obtained signed "progress notes" (CP 1956-62) from, his mother's neurologist, Dr. Gorman, without OFC's knowledge or permission, though such a notice and permissions plainly was unnecessary since prior orders had expressly approved Richard's participation in his mother's health care. CP 165, 613. RP11 at 32-33.

On page 36 of its brief, OFC refers to Commissioner Velategui's *ex parte* order of January 25, 2013, as a "decision to ***return*** health care decision-making to the guardian's exclusive control," yet nothing in the record indicates that such authority ever previously was vested in limited

guardian OFC. That order was simply a abusive and unconstitutional abrogation of Ms. Denny's adjudicated retained authority over her own health care. RP11 at 33-36. CP 1855-56.

17. OFC Brf pages 36-38: Provider-shield statutes do not trump court orders.

At pages 36-38, OFC claims that statutes enacted to shield health care providers from informed-consent lawsuits trump any express limitations on a limited guardian's authority over health care stated in a guardianship order. OFC's absurd argument is that under RCW 7.70.065, if a guardian is appointed with any authority whatsoever over a respondent—even if merely a limited guardian over specific estate assets—the respondent is considered "incompetent" to consent to their own medical treatment and all decisions about their health care must be made by the guardian. That is absurd because if the court supervising a guardianship case has ruled, as here, that a respondent herself has the capacity to consent to or refuse medical treatment, no full or limited guardian of the respondent's estate should usurp his or her authority to make her own medical treatment decisions.

18. OFC Brf page 41: Richard seeks only to participate in his mother's health care, not to make decisions for her.

At page 41, OFC falsely suggests that Richard seeks to make health care decisions for his mother, Ms. Denny. In fact, Richard simply objects (RD Brf at 45-46) to the January 25, 2013, order that prohibits him from ***participating*** in his mother's health care, from speaking with her providers, or from accessing her medical records. OFC acknowledged in the court record that Ms. Denny prefers Richard's involvement, rather than OFC's, in her health care. OFC's filed care plan for 2011 stated its intended "coordination of Mrs. Denny's medical care with her son Richard, in deference to her preference for his involvement rather than the guardian's." CP 183. It substantially repeated that statement of her familial preference in its 2012 care plan. CP 434. Richard had regularly participated in his mother's appointments with her physicians. CP 1957-62, 1442, 132.

19. OFC Brf page 42: Authenticity of Ms. Denny's demand letters.

At page 42, OFC noted that it expressed to the lower court its doubt about the authenticity of a demand letter Ms. Denny sent to it in early 2012. In OFC's second annual report, it sought court permission to ignore that January 7, 2012, demand letter (CP 584-85) because "The wording of the letter and the fact that it was obviously composed on a computer cause the guardian to doubt it was in fact a letter from Mrs. Denny." CP 442.

OFC failed to note that it received from her an earlier demand letter dated September 16, 2011 (CP 1311) and received her handwritten similar demand letter dated October 17, 2011. CP 1345-46.

Furthermore, as noted in RD Brf at 8-9 with many citations to OFC's own records from 2011, Ms. Denny was relatively high functioning with minimal or no cognitive impairments except short-term memory and she quickly had become 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. OFC's annual report filed March 9, 2012, stated, "Mrs. Denny is excessively concerned with the details of managing her finances and this, coupled with her memory loss, has resulted in continued resistance to the guardianship. She continues to call the guardian occasionally to ask about her bills, her house, property management, and especially how she can get rid of the guardian." CP 432. The demand letters that Ms. Denny wrote and signed reflected her wishes. A responsible close acquaintance of Ms. Denny discussed with her several of her demand letters and declared under oath her belief that they reflected Ms. Denny's sincere wishes. CP 1323-24. There was simply no evidence that Richard and/or Tom Andersons were procuring Ms. Denny's signature on documents that she lacked the capacity to understand.

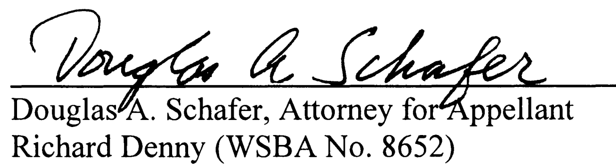
20. OFC Brf Appendix pages 1-3, 13-15: Motion to strike per RAP 10.3(a)(8).

Richard moves the court, pursuant to RAP 10.3(a)(8) to strike from OFC's brief Appendix pages 1 to 3 and 13 to 15 as material not from the record on review or permitted by RAP 10.4(c).

CONCLUSION

The court should interpret the 2009 Order as advocated by Richard and vacate the void *ex parte* orders that modified Ms. Denny's retained rights without affording her counsel and due process.

Respectfully submitted this 13th day of January, 2016.



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Richard Denny (WSBA No. 8652)

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STATE OF WASHINGTON

BY________
DEPUTY

No. 69117-1-I

COURT OF APPEALS, DIV. I

OF THE STATE OF WASHINGTON

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

THOMAS ANDERSON, Appellant,

RICHARD DENNY, Cross Appellant

and

OHANA FIDUCIARY CORPORATION, Respondent.

CROSS APPELLANT'S BRIEF ADDRESSING TIMELINESS

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Introduction

Richard Denny filed a notice of appeal on October 10, 2012, challenging eight orders of the probate court. By letter of October 29, 2012, this court's clerk stated that that notice should be treated as a cross appeal in this appellate case that had been commenced earlier by a notice of appeal filed by Thomas Anderson. That letter also directed Richard to address whether his notice of appeal was timely as to each of the eight challenged orders. This brief responds to that directive.

Factual Background

In December 2009, the probate court determined Richard's mother, Ella Nora Denny, to be partly incapacitated, but that she retained the capacity and authority (a) to engage in estate planning transactions under the direction of her tax attorney, Tim Austin, (b) "to consent to or refuse medical treatment," (c) "to decide who shall provide care and assistance," and (d) "to make decisions regarding the social aspects of her life." The court appointed Ohana Fiduciary Corporation (Ohana) as full guardian of her estate and as limited guardian of her person.

Over the next 30 months, the probate court entered several orders at Ohana's request that restricted Ella Nora's retained fundamental civil rights to make health care decisions and to travel, without affording her the due process right to be heard through her retained counsel.

Applicable Law

Courts must afford individuals due process of law before depriving them of any fundamental constitutional right. ***In re Towne***, 2000 OK 30 ¶13, 3 P.3d 154; ***Addington v. Texas***, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). A person alleged to be incapacitated in a guardianship proceeding is entitled to due process of law, including the right to be heard by counsel of her choice. ***Towne, supra***; ***Quesnell v. State***, 83 Wash. 2d 224, 230, 517 P.2d 568 (1973). This constitutional right of due process applies at any stage of a guardianship proceeding at which any of their fundamental constitutional rights may be revoked or restored. In ***In re Guardianship of Holly***, 2007 OK 53 ¶22, 164 P.3d 137, the court wrote:

> "We reject Appellees' assertion that this right to an attorney of one's own choosing does not extend with the same force to a person who has already been declared a ward in a guardianship proceeding. The "massive curtailment of liberty" associated with a guardianship proceeding continues as long as that guardianship persists. [Citation omitted.] The proceedings must continue to be conducted with the utmost care to ensure that the ward subject to that curtailment receives due process."

Recognizing the constitutional rights of persons subject to guardianship proceedings, the Washington legislature provided that "Alleged incapacitated individuals shall have the right to be represented by willing counsel of their choosing at any stage in guardianship proceedings." RCW 11.88.045(1)(a).

The right to choose one's medical treatment or to refuse medical treatment is recognized as a fundamental constitutional right. ***In re Guardianship of Ingram***, 102 Wash.2d 827, 836, 689 P.2d 1363 (1984). (Right to choose or refuse medical treatment is "a constitutional privacy right protected by the Fourteenth Amendment.")

The right to travel as one chooses is also recognized as a fundamental constitutional right. ***Eggert v. City of Seattle***, 81 Wash. 2d 840, 845, 505 P.2d 801, 804 (1973) (Right to travel described as "a fundamental right" and "an unconditional personal right guaranteed by the constitution."); ***Halsted v. Sallee***, 31 Wash. App. 193, 196, 639 P.2d 877 (1982) ("The right to travel is a fundamental right protected by the equal protection clause of the Fourteenth Amendment.").

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 Wash.App. 473, 478, 815 P.2d 269

(1991), *review denied*, 118 Wash.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).

Consistent with the case law recognizing that courts have a duty to vacate void orders, RAP 2.5(a)(3) permits a party to raise first on appeal any "manifest error affecting a constitutional right." Citing RAP 2.5(a)(3), the state supreme court has ruled that "An appellant may at any time claim an error which was not raised in the trial court if the error affects a constitutional right." ***State v. Leach***, 113 Wash. 2d 679, 691, 782 P.2d 552 (1989). And citing both RAP 2.5(a)(3) and RAP 12.2 (appellate courts to rule as "the interest of justice may require"), the state supreme court in ***State v. Santos***, 104 Wn. 2d 142, 145-46, 702 P.2d 1179 (1985) stated:

> "Issues affecting fundamental constitutional rights may also be raised for the first time on appeal, RAP 2.5(a)(3); ***State v. Dictado***, 102 Wn.2d 277, 287, 687 P.2d 172 (1984), or may be determined by this court as justice may require. RAP 12.2; ***State v. Diana***, 24 Wn.App. 908, 604 P.2d 1312 (1979)."

Several of the orders being challenged here by Richard are because they were manifest errors affecting Ella Nora's constitutional rights.

1. Order Approving Second Annual Report of the Guardian of Person and Estate, and Authorizing the Payment of Fees, Costs and Other Expenses, entered March 29, 2012 (Sub 117).

As noted in the notice of appeal, Richard filed on April 9, 2012, a timely motion under CR 59 to reconsider this order of March 29, 2012, that among other things significantly limited, without due process, Ella Nora's fundamental right to travel. After unexplained delay, the probate court on October 23, 2012, ruled on and denied that motion for reconsideration. Richard is filing promptly following this brief a timely amended notice of cross appeal to challenge that October 23, 2012, order. Richard's appeal of the March 29, 2012, order is timely under RAP 5.2(e).

2. Order Reaffirming Court's Prior Order of December 17, 2010, entered March 29, 2012 (Sub 116).

3. Paragraph 2 of the Order Approving Interim Report, entered December 17, 2010 (Sub 86).

The order entered December 17, 2010, was entered without affording due process to Ella Nora and its paragraph 2 limited her retained fundamental right to consent to or refuse health care. It required her children to notify Ohana before any health care provider appointments to enable Ohana make advance contact with the providers, and empowered Ohana to overrule Ella Nora's health care decisions. Notice of Ohana's petition for this order was not given to the attorney, Tim Austin, who was Ella Nora's attorney of record at that time in the guardianship proceeding.

The order of March 29, 2012, also was entered without affording Ella

Nora her due process rights. She had sought to be represented in the guardianship proceeding by her counsel of her choice, attorneys of the firm Isaacson & Wilson, P.S. (I&W). Following a hearing on March 23, 2012, Commissioner Velategui refused to permit I&W to represent Ella Nora. This March 29, 2012, order further limited her retained fundamental right to consent to or refuse health care by requiring that Ohana be notified at least two business days before any health care appointment and by authorizing Ohana to cancel any such appointment.

Richard apprised the probate court that these orders had violated Ella Nora's due process rights. This appellate court should review them pursuant to RAP 2.5(a)(3) and 12.2.

4. Findings of Fact, Conclusions of Law and Order on Motion, entered May 16, 2012 (Sub 157A).

5. Order Denying Motion to Reconsider Findings of Fact, Conclusions of Law and Order on Motion Entered May 16, 2012, entered June 19, 2012 (Sub 181).

On May 16, 2012, Commissioner Velategui entered Ohana's requested order, without affording Ella Nora due process rights, with extensive findings of fact and conclusions of law concerning Ella Nora's degree of capacity. She had sought to be represented by her chosen counsel, attorneys of I&W, but at a hearing on March 23, 2012, the Commissioner had refused to permit her to be so represented. Richard's

undersigned counsel recognizes that his motion to reconsider that May 16, 2012 order was tardy by minutes because he believed that the cut-off time for electronic filings was 5:00 pm, though it was 4:30 pm. Nonetheless, his motion for reconsideration and his reply to Ohana's response to it pointed out that the May 16, 2012, order was entered in violation of Ella Nora's constitutional due process right to be represented by her chosen counsel, and therefor was void. Considering the case law recognizing the duty of courts to vacate void orders, it was improper for the probate court to enters the order of June 19, 2012, upholding its order of May 16, 2012.

This appellate court should review these orders pursuant to RAP 2.5(a)(3) and 12.2.

6. Order Denying Motion to Replace Guardian and Modify Guardianship, entered June 19, 2012 (Sub 183).

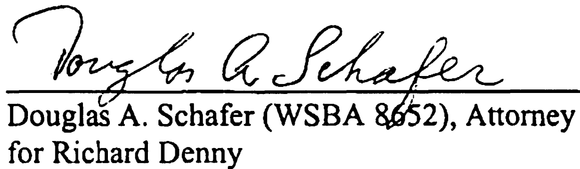
7. Order Denying Motion for Revision, entered September 10, 2012 (Sub 217).

Richard filed on June 29, 2012, a timely motion to revise Commissioner Velategui's order that was entered June 19, 2012 (though Richard's counsel was not apprised of its entry until June 26, 2012). That motion to revise was heard on August 24, 2012, and the order denying it was entered September 10, 2012. Richard's notice of appeal filed October 10, 2012, was timely under RCW 2.24.050 and RAP 5.2.

8. Order Approving Guardian's Attorney's Fees and Costs and Unblocking Accounts for Payment of Fees, entered September 14, 2012 (Sub 224).

Commissioner Velategui on September 14, 2012, ordered Richard to pay Ohana as guardian of Ella Nora's estate $2,019.50 for attorney fees incurred relating to a motion that Richard had filed. Richard's notice of appeal filed October 10, 2012, of this order was timely under RAP 5.2(a).

November 13, 2012



Douglas A. Schafer (WSBA 8652), Attorney for Richard Denny

Proof of Service

I certify today that I served by first class mail a copy of this brief on the following persons at the addresses indicated.

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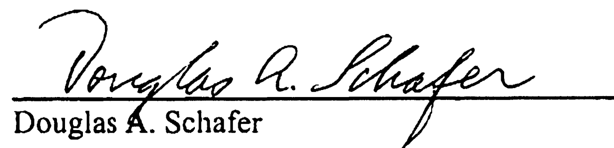

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CROSS APPELLANT'S REPLY TO GUARDIAN'S RESPONSE REGARDING TIMELINESS OF APPEAL

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Richard Denny, as cross appellant, here replies to Guardian's Response Regarding Timeliness of Appeal, filed November 28, 2012, by Ohana Fiduciary Corporation.

On page 6 of the Response, Ohana cites ***Schaefco, Inc. v. Columbia River Gorge Comm'n***, 121 Wash. 2d 366, 849 P.2d 1225 (1993), for the proposition that "the need for finality" of orders overrides other considerations even of constitutional proportions when considering the timeliness of an appeal and the application of RAP 18.8(b). The need for finality should not be a factor in appeals of interlocutory orders during an ongoing guardianship case. Washington case law hold that interlocutory orders in guardianship cases, including orders such as those that Ohana here asserts were not timely appealed, are **not final orders.** In ***In re Guardianship of Rudonick***, 76 Wash. 2d 117, 123-24, 456 P.2d 96, 100 (1969), the court held that probate court orders entered in an ongoing guardianship proceeding at hearings in which the ward was not represented by an advocate, such as guardian ad litem or attorney, are not final orders, and "may be modified when the interests of justice demand." The full relevant passage, from pages 123-24 of ***Rudonick***, reads:

> "The guardian contends that the ex parte interim orders approving her expenditures are res judicata, and if not res judicata at least prima facie correct. RCW 11.92.050 provides a statutory method by which a guardian's intermediate accounts may receive judicial approval in the form of a final order. That statute provides for a hearing on the guardian's actions and accountings at which a guardian ad litem is appointed to

represent the ward. The result of such a hearing is a final order which is res judicata.

"The guardian contends that RCW 11.92.050 permits a final order to be entered without the appointment of a guardian ad litem. We do not agree.

"The statute provides that 'in the event such a hearing be ordered, the court shall also appoint a guardian ad litem,' and at 'such hearing' the court may enter an order, and 'such order' shall be final. **Ex parte orders entered during the pendency of guardianship proceedings are not res judicata, but may be modified when the interests of justice demand.** *E.g., see* Grady v. Dashiell, 24 Wash.2d 272, 163 P.2d 922 (1945). If the legislature had intended to change the rule and allow final orders to be entered ex parte, it would have used more specific language. **Further, even had the legislature expressly provided for final orders without representation of the ward, an obvious constitutional issue would be presented.** Rather, by enacting RCW 11.92.050, the legislature has offered the guardian some relief from the problem of justifying expenditures years after the fact, but has only done so after the interests of the ward have been protected by the appointment of a guardian ad litem. Under these circumstances, **we cannot say that a guardian ad litem is required only as a matter of form. Such representation is an essential prerequisite to the finality of the resulting order.** Therefore, we hold that in the event a court decides to hold the hearing provided for by RCW 11.92.050, it must appoint a guardian ad litem before orders resulting from 'such hearing' will be final. The orders approving the guardian's interim reports entered in 1960, 1963, and 1965 are not res judicata as the ward was not represented by a guardian ad litem at those hearings." [Emphasis added.]

While the ***Rudonick*** opinion was addressing a probate court's orders approving a guardian's interim reports, such as Ohana's requested Order Approving Interim Report, entered December 17, 2010, logic requires that it apply to any order affecting a ward's interests and rights that is entered

during a guardianship case at a hearing in which the ward is not represented by an advocate. It is undisputed that Ms. Denny's attorney of record as of December 2010 (tax attorney Timothy L. Austin) was not even notified by Ohana of its Petition for Approval of Interim Report (see Exhibit A) and that Commissioner Velateui refused to allow Ms. Denny to be represented by counsel when he approved the orders of March 29, 2012, and May 16, 2012.

In Justice Guy's dissent in ***Schaefco***, he noted the inherent equity power of the court, quoting from ***State ex rel. Davis & Co. v. Superior Ct. for King Cy.***, 95 Wash. 258, 261, 163 P. 765 (1917), as follows:

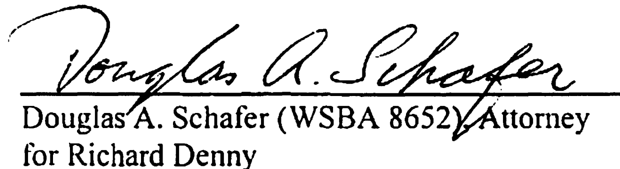
> "This court, in aid of its appellate jurisdiction ... possesses all inherent power of courts of equity, and when it is made to appear that a party is being denied relief to which in equity and good conscience he is entitled, it is the duty of this court to find some method within its jurisdiction by which such relief may be granted."

The Court's duty to grant equitable relief is perhaps at its strongest when the constitutional rights of a ward in a guardianship case have been ignored. "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).

This Court, as Ms. Denny's ***superior guardian*** ought not turn a blind eye to the egregious violations of her constitutional rights arising from the superior court's entry of the orders that Ohana challenges as untimely appealed.

November 29, 2012



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Proof of Service

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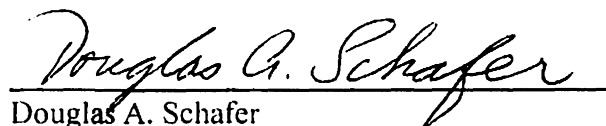

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I served today in the manner indicated to the below parties at their indicated addresses the Reply Brief of Richard Denny, and this Proof of Service:

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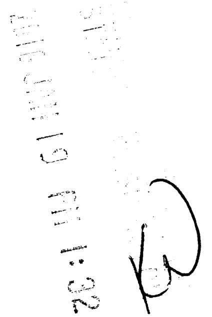

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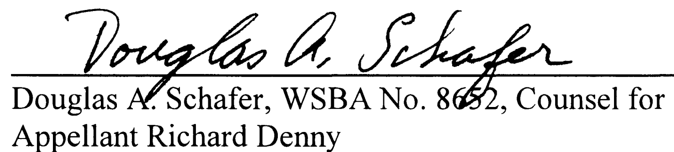

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