No. 93867-9

SUPREME COURT

OF THE STATE OF WASHINGTON

Court of Appeals No. 69117-1-I

In re the GUARDIANSHIP of ELLA NORA DENNY,

ELLA NORA DENNY, THOMAS ANDERSON, and

RICHARD DENNY, Appellants,

OHANA FIDUCIARY CORPORATION, Respondent.

PETITION FOR REVIEW

Attorney for Appellant Richard Denny:

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INTRODUCTION

This case involves the due process rights, including representation by counsel, of an adult under a limited guardianship (1) when fundamental rights initially reserved to her in an initial proceeding are restricted or revoked in later hearings, or (2) when she seeks to replace her limited guardian based upon evidence of the guardian's misconduct.

Ella Nora Denny was placed under guardianship in late 2009 by a superior court order that appointed Ohana Fiduciary Corporation (Ohana) as limited guardian of her person and full guardian of her substantial estate. The 2009 order reserved to her the right to make decisions concerning her health care, her personal care, and her social life. Ms. Denny was not represented by counsel subsequent to the entry of the 2009 order.

In late 2011, Ms. Denny sought to retain counsel to replace Ohana for misconduct and to oppose Ohana's petition for additional restrictions on her retained rights. Ohana argued, and the superior court agreed in 2012, that because she lacked contractual capacity, she had no right to retain counsel. The superior court in 2012 further restricted her retained rights, and in early 2013 granted Ohana exclusive authority to manage her health care and reaffirmed that she had no right to retain counsel.

The right of adults subject to a limited or full guardianship to due

process, including counsel, in judicial proceedings concerning their rights is widely and increasingly being recognized among the states. Nina A. Kohn and Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*. 91 Wash. L. Rev. 581 (2016), available at SSRN: http://ssrn.com/abstract=2788912. (hereafter, Kohn & Koss)

IDENTITY OF PETITIONER

This Petition is by Richard Denny, the son of Ms. Denny.

CITATION TO COURT OF APPEALS DECISION

Richard seek review of the Court of Appeals decision filed August 1, 2016. (Slip Op.) A majority of the three-judge panel denied Richard's motion for reconsideration by an order dated October 4, 2016. Both are in the appendix.

ISSUES PRESENTED FOR REVIEW

1. Is an adult subject to a limited guardianship entitled to due process, including the right to retain counsel, for hearings at which the court modifies the adult's clearly, or arguably, retained fundamental rights?

2. Is an adult subject to a guardianship entitled to representation by independent counsel when seeking to replace the guardian for evidence of misconduct?

STATEMENT OF THE CASE

In late 2009, Richard initiated a guardianship proceeding for his 86-year-old mother, Ms. Denny. CP 1. A psychologist then examined Ms. Denny and filed a report stating "her cognitive compromise is at most mild and in the early stages." CP 1211. A guardian ad litem (GAL) investigated and filed a report (CP 1219-34) recommending appointment of a full guardian of her substantial and complex estate and only a limited guardian of her person, stating:

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

On December 17, 2009, the superior court entered an order (CP 18-32)

appointing Ohana as full guardian of Ms. Denny's estate and as limited guardian of her person. The key first six pages of that order are in the appendix.

Ms. Denny's Retained Health Care and Other Rights

The 2009 order *specifically* stated the retained rights of Ms. Denny and *specifically* stated the limited authority of the limited guardian, Ohana, concerning her person in Conclusions of Law paragraphs 2.2 and 2.3, quoted as follows:

> **2.2 Rights Retained**
>
> a. Mrs. Denny shall retain the right to make or revoke a will, trust or other testamentary device under the direction of competent independent counsel. This estate planning may include, but not be limited to, gifting and transfer of interests to a family trust.
>
> b. Mrs. Denny shall retain the right to consent to or refuse medical treatment, subject to the conditions set forth herein.
>
> c. Mrs. Denny shall retain the right to decide who shall provide care and assistance, subject to the conditions as set forth herein.
>
> d. Mrs. Denny shall retain the right to make decisions regarding the social aspects of her life, subject to the conditions as set forth herein.
>
> **2.3 Limited Guardian of the Person's Authority and Duties:**
>
> • In consultation with Ms. Denny, to select an appropriate living situation.
>
> • To consent to reasonable or necessary medical or dental treatment if EllaNora Denny is unable to consent to necessary medical or dental treatment, or unreasonably withholds her consent to same.

- To arrange for medical, dental and other therapeutic appointments;
- To supervise medications, including ensuring Mediset is properly configured and all other issues related to medication.

So expressly in the second bullet item of Paragraph 2.3, the limited guardian's *authority to consent to Ms. Denny's medical or dental treatment arises only if she "is unable to consent to necessary medical or dental treatment, or unreasonably withholds her consent to same."* That conditional grant of health care authority to Ohana was consistent with the GAL's stated recommendation.

In March 2010, Ohana prepared for and delivered to Ms. Denny a document titled "Rights Retained and Rights Lost" that stated under a heading "RIGHTS RETAINED SUBJECT TO COURT ORDERED PROTECTION:" the following three-item list:

> "1. Right to consent to or refuse medical treatment in consultation with Guardian."
>
> "2. Right ot decide who shall provide care and assistance in consultation with the Guardian."
>
> "3. Right to make decisions regarding the social aspects of her life in consultation with the Guardian."

CP 206, 337, 341, 349, 350; Supplement to Motion for Reconsideration[1]

[1] Lacking authority to engage in discovery, Richard found a binder with this document in his mother's apartment on September 9, 2016, and filed it that date appended to his Supplement to Motion for Reconsideration, in reliance on ***In re Guardianship of Way***, 79 Wn.App. 184, 901 P.2d 349 (1995), *rev. denied* 28 Wn.2d 1014. The Court of Appeals granted Ohana's motion to strike it.

In September 2010, Ohana mailed letters to six doctors for Ms. Denny stating that she had been adjudicated incapacitated so she could no longer give consent to medical treatment, and that only representatives of Ohana could give such consent. CP 242, 246, 1327-8, 1332-5.

In December 2010, at Ohana's request (CP 123-4) the superior court entered an order stating that "The guardian is hereby authorized to allow Ms. Denny to manage her own medical and dental care with the assistance of her children," subject to conditions that the children notify Ohana in advance of any health care provider appointments and notify the provider of the guardianship and of Ohana's contact information. CP 165-68.

On March 29, 2012, that 2010 order was "reaffirmed" at Ohana's request (CP 419, 439-40) by another order with expanded conditions —two business days advance notice to Ohana of appointments and Ohana empowered to cancel any appointments it is unable to attend. CP 613-4.

In a pleading filed May 24, 2012, in response to Ms. Denny's motion to replace the guardian, Ohana asserted, "As limited guardian of the person, Ohana has taken affirmative action to preserve and facilitate Ms. Denny's exercise of her retained rights to make health and dental care decisions." CP 1009-10. In the order entered June 19, 2012, denying that motion, the court found and concluded that Ohana had acted affirmatively "to preserve and enhance Mrs. Denny's retained rights to make decisions

about her health care." CP 1165 ¶ 16.

At a hearing on January 24, 2013, in response to assertions by Richard's counsel that Ohana had been improperly holding itself out to medical providers as effectively Ms. Denny's full guardian, Ohana's counsel stated, "I believe that what Mr. Schafer is referring to was an error that the guardian made, I believe it's two years ago now, when they made that misrepresentation accidentally to a medical provider." RP11 30-31

The foregoing shows that Ohana and the superior court recognized that under the 2009 order Ms. Denny retained the right to manage her health care. But in the Court of Appeals decision, it interpreted the 2009 order as having revoked all of Ms. Denny's fundamental rights concerning her person, including her right to consent to or refuse medical treatment. Slip Op. 12, 23, 25, 26.

Denial of Ms. Denny's Right to Counsel

In July and September, 2011, Ohana and its agents instructed Ms. Denny's providers not to share her health care information with Richard and that only Ohana could make health care decisions for her. CP 526-9, 1329-30. That led Ms. Denny and Richard to learn that Ohana had obtained in June 2011 from the superior court incorrect letters of guardianship showing Ohana to be full guardian of the person and estate

of Ms. Denny. CP 414-5. In mid-September 2011, Ms. Denny signed a letter to Ohana demanding that it cause corrected letters of limited guardianship to be issued and to notify third parties of Ohana's limited authority. CP 1311.

In November 2011, Ms Denny wrote by hand and signed a declaration stating among other things, "I want to select my own attorney." CP 1345-6. She then apparently engaged lawyers Brian Isaacson and Mark Wilson, and their firm, Isaacson & Wilson, P.S. (I&W), to represent her in the guardianship case for the purpose of replacing Ohana as her guardian. CP 608, 564-5, 1348.

On March 9, 2012, in Ohana's Second Annual Report it petitioned the court to impose restrictions on Ms. Denny's freedom to travel. CP 420, 440-41. The 2009 order had not restricted her right to travel. On March 23, 2012, Ms. Denny and Mr. Wilson[2] appeared at a hearing requesting court authority, as RCW 11.88.045(2) requires, for I&W to represent Ms. Denny in the guardianship case. RP2. They filed pleadings indicating that Ms. Denny sought I&W's representation to oppose Ohana's requested travel restrictions, among other things. CP 1491-1518. Ohana opposed

[2] By March 20, 2012, since I&W still had not appeared in Ms. Denny's guardianship case notwithstanding an impending hearing on OFC's Second Annual Report, Ms. Denny signed a letter discharging that firm and its lawyers. CP 1348. The record does not indicate if that letter was delivered, but Ms. Denny apparently reconsidered that discharge.

Ms. Denny's request for counsel. RP2 10-21. The court declined then to rule, and it directed Ohana to cause Ms. Denny to be re-evaluated by the psychologist who had done so in late 2009. RP2 23-4.

On March 29, 2012, the court entered an order imposing Ohana's requested restrictions on Ms. Denny's right to travel. CP 616-20.

In mid-May, 2012, after considering the psychologist's report (CP 1370-77) indicating that Ms. Denny's cognition had worsened since 2009, the court entered Ohana's requested order denying her request for independent counsel. CP 985-88. The psychologist's report stated, however, that "she has no significant problems with either receptive or expressive aphasia," that she "was coherent," and that "She was able to process simple questions at a normal rate." CP 1372.

In a pleading filed with the Court of Appeals, Ohana acknowledged, "Mrs. Denny did not retain appointed counsel in the guardianship after the guardianship was established." and "As of December 17, 2009, Mrs. Denny did not have appointed counsel in the guardianship ...." Guardian's Response to Motion to Modify and Stay, filed Feb. 25, 2013, pgs 3, 12.

In April 2012, Ms. Denny's nephew, a nonlawyer, filed on her behalf as next friend a motion to replace the guardian, with exhibits documenting Ohana's misconduct. CP 1235-1348. In June 2012, the court denied that motion and sanctioned the nephew for having filed it. CP 1163-8.

Surprise Revocation of Ms. Denny's Health Care Rights

On December 16, 2012, while Ms. Denny was briefly hospitalized for a heart condition, a lab test indicated the presence of cocaine.[3] CP 1860. At Ohana's request, Richard and his sister, Ms. Zak, agreed to abstain from visiting with Ms. Denny until Ohana approved. *Id.* On January 10, 2013, Ohana petitioned the court for instructions on whether it should allow Ms. Denny's children to resume in-person contact with her. *Id.* That petition did not request modification of the earlier orders that preserved Ms. Denny's right to manage her health care alone or with the assistance of her children. CP 1660-73. But at the January 24, 2013, hearing on Ohana's petition, the court *sua sponte* ruled orally (RP11 33-4), and in the resulting order, to revoke Ms. Denny's retained rights concerning her health care and vested Ohana with "sole decision-making authority" over her health care, and barred her children from accessing her health care information or attending her medical appointments. CP 1855-56 ¶¶ 3, 4.

Ms. Denny had been given no prior notice that this revocation might occur of her retained rights to manage her health care and to decide who shall provide assistance to her, and, of course, she had no counsel representing her.

[3] Her doctor later opined it likely was a false positive from medications she was treated with at the hospital. CP 1945, 1957.

ARGUMENT

1. The Court should accept review of the presented issues under RAP 13.4(b)(3) because the due process rights of adults under a limited or full guardianship involve significant questions of law under the Constitution of the State of Washington and of the United States.

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

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

> Following the Supreme Court's lead, courts began to scrutinize proceedings conducted pursuant to the parens patriae power more closely. See, for example, ***Heryford v. Parker,*** 396 F.2d 393 (10th Cir.1968); ***Lessard v. Schmidt***, 349 F.Supp. 1078 (E.D.Wisc.1972); ***Quesnell v. State,*** 83 Wash.2d 224, 517 P.2d 568 (1974); ***State ex rel. Hawks v. Lazaro***, 157 W.Va. 417, 202 S.E.2d 109 (1974); ***Lynch v. Baxley***, 386 F.Supp. 378 (N.D.Ala.1974); ***Doremus v. Farrell***, 407 F.Supp. 509 (D.Neb.1975); ***Suzuki v. Quisenberry***, 411 F.Supp. 1113 (D.Haw.1976).
>
> The uniform conclusion reached by these courts was that
>
> > "[i]t matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. Where ... the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process ... [and] due process requires that the infirm person ... be fully advised of his rights and accorded each of them unless knowingly and understandingly waived."
>
> ***Heryford***, *supra* at 396."

The Missouri supreme court in that passage cited ***Quesnell v. State,*** 83 Wn.2d 224, 517 P.2d 568 (1973). In that involuntary commitment case, this court undertook to "consider and review the subject proceedings in terms of due process of law as guaranteed the appellant by U.S. Const. Amend. 14, and Wash. Const. art. 1, § 3." *Id* at 227. The court discussed the 1967 U.S. Supreme Court cases, ***In re Gault*** and ***Specht v. Patterson***, and quoted the above-quoted passage from ***Heryford v. Parker***. The court stressed that "constitutional and statutory guarantees in regard to the assistance of counsel" entitled a respondent in a commitment proceeding to "affirmative advocacy" by a lawyer who had fully investigated by consulting "meaningfully" with the client and "exploring all relevant

factors in his defense." *Id* at 237–38. Stating that "the right to trial by jury in Washington mental illness proceedings is guaranteed by the constitution (Wash. Const. art. 1, § 21)" (*Id* at 240), the court vacated the lower court's order for not having honored the appellant's jury request.

This court recognized in later cases that the due process guarantees of the Fourteenth Amendment to the U.S. Constitution must accompany civil commitment proceedings. ***State ex rel. T.B. v. CPC Fairfax Hosp.***, 129 Wn.2d 439, 452, 918 P.2d 497 (1996); ***In re Harris***, 98 Wn.2d 276, 279, 654 P.2d 109 (1982), o*verruled on other grounds by* ***Dunner v. McLaughlin***, 100 Wn.2d 832, 676 P.2d 444 (1984)).

Courts and scholars have asserted that procedural due process in guardianship proceedings should be no less than that required in civil commitment and criminal proceedings. *E.g.*, ***In re Guardianship of Hedin***, 528 N.W.2d 567, 575 (Iowa 1995); Kohn & Koss, *supra* at 598; Susan G. Haines and John J. Campbell, *Defects, Due Process and Protective Proceedings: Are Our Probate Codes Unconstitutional?*, 33 Real Prop., Probate and Trust J. 215, 244 (1998)("There is no cogent reason why the due process standard in protective proceedings should be any lower than those applicable in juvenile, criminal, or civil commitment cases."); Mark D. Andrews, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 Elder L.J. 75 (1997).

In a 1985 guardianship case, the Oklahoma supreme court articulated the elements of Fourteenth Amendment due process based on U.S. Supreme Court precedent:

> "When the state participates in the deprivation of a person's right to personal freedom, minimal due process requires proper written notice and a hearing at which the alleged incompetent may appear to present evidence in his/her own behalf. The opportunity to confront and cross-examine adverse witnesses before a neutral decision maker, representation by counsel, findings by a preponderance of the evidence, and a record sufficient to permit meaningful appellate review are concomitant rights in this context."

In re Guardianship of Deere, 1985 OK 86, 708 P.2d 1123 (1985).

There is no rational basis for holding that constitutional due process applies at an initial guardianship hearing—that might revoke only some of a respondent's fundamental rights—but fails to apply at subsequent hearings at which the respondent's remaining fundamental rights are restricted or revoked. In Kohn & Koss, *supra* at 588-612, the authors present forceful arguments that adults subject to guardianship, even if lacking contractual capacity, have a constitutional and statutory right to counsel in proceeding to modify or terminate the guardianship or replace the guardian. They cite, at 692 n.92, statutes of 38 states that expressly or implicitly provide for legal representation of such adults in some or all of such proceedings.

This court has recognized, consistent with U.S. Supreme Court

precedent, that the Fourteenth Amendment is violated if a court revokes a person's fundamental liberty rights without following the state's applicable statutory procedures. ***CPC Fairfax Hosp.***, *supra* at 453. Accordingly, a constitutional analysis requires review of our guardianship statutes.

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

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

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

> PROVIDED FURTHER, That when, in the opinion of the court, the rights and interests of an alleged **or adjudicated** incompetent

> or disabled person cannot otherwise be adequately protected and represented, the court on its own motion **shall** appoint an attorney at any time to represent such person. [Emphasis added.]

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

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

> (1)(a) Alleged incapacitated individuals shall have the right to be represented by willing counsel of their choosing at any stage in guardianship proceedings.
>
> (3) The alleged incapacitated person is further entitled to testify

and present evidence and, upon request, entitled to a jury trial on the issues of his or her alleged incapacity.

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

Lastly and recently, by Laws of 2015, ch. 293, the legislature added to RCW 11.88.120(1) a sentence reading, "For any hearing to modify or terminate a guardianship, the incapacitated person shall be given reasonable notice of the hearing and of the incapacitated person's right to be represented at the hearing by counsel of his or her own choosing." This 2015 legislation clarifies existing statutes and relates to procedure rather than substantive rights, so under existing case law it has retroactive application. ***Houk v. Best Dev. & Const. Co.***, 179 Wn. App. 908, 322 P.3d 29 (2014); ***Bayless v. Community College Dist. No. XIX***, 84 Wn. App. 309, 927 P.2d 254, 255 (1996); ***Marine Power & Equip. Co. v. Human Rights Comm'n Hearing Tribunal***, 39 Wn. App. 609, 694 P.2d 697 (1985).

2. The Court should accept review of the presented issues under RAP 13.4(b)(4) because the rights of adults under a limited or full guardianship is an issue of substantial public interest that should be determined by the Supreme Court.

The "Baby Boom" generation and their parents' generation accumulated considerable wealth, and as they age with increased longevity the number of guardianship cases is dramatically increasing. And perhaps because of their wealth, the number of actual or claimed abusive and exploitive guardianship cases is dramatically increasing. Given the interest of print and broadcast media, and of followers of "social media," the widespread visibility of these attention-getting guardianship cases is increasing. A google.com internet search for the words *abuse* and *guardianship* reports 1,040,000 results.

It is projected that in 2025 the number of adults over age 65 in the U.S. diagnosed with Alzheimer's disease will exceed seven million, a forty percent increase over 2014 figures. Kohn & Koss, pg. 585 n.14.

There were 14 bills introduced in the Washington legislature in the 2015-16 biennium relating to guardianships and it is likely that more will be introduced in future legislative sessions. Constituents who have experienced guardianship frustrations call on their legislators to "fix the system."

The National Guardianship Network, a collaborative group of national organizations dedicated to effective adult guardianship law and practice (nationalguardianshipnetwork.org), on its website's page titled "Need for Guardianship Reform" states, "With the aging of the population

and rising numbers of persons with mental disabilities, adult guardianship has received increased scrutiny in the last 25 years. The history of guardianship reform shows a marked advance in law but uneven implementation in practice." This case illustrates that *uneven* judicial implementation of past Washington legislative reforms, a problem that only this supreme court can address.

The National Guardianship Network's website reports that Washington state is one of twelve states with an active WINGS (Working Interdisciplinary Networks of Guardianship Stakeholders) program. It is a multi-disciplinary group of judges, attorneys (including Richard's undersigned counsel), and other individuals working to improve the adult guardianship system in their state. This significant commitment of time and resources illustrates the public interest in improving Washington's adult guardianship system. Addressing the issues presented in this case will advance that effort.

CONCLUSION

Richard requests that the court accept this case for review and rule (a) that all of the superior court's orders that without due process diminished or revoked the fundamental rights that Ms. Denny retained in the 2009 order are void, (b) that adults subject to a guardianship are entitled to

representation by counsel when they seek to replace their guardian based on credible evidence, and (c) vacate the attorney fee awards against Richard and Ms. Denny's nephew relating to their advocacy on her behalf.

Respectfully submitted this 3rd day of November, 2016.

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

APPENDIX CONTENTS

Proof of Service

I certify that today I provided to the following counsel/parties in this case a copy of this Petition for Review by electronic or USPS mail at their addresses shown below.

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November 3, 2016 /s/ Douglas A. Schafer
Douglas A. Schafer (WSBA 8652)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Guardianship of: ELLA NORA DENNY, an incapacitated person. RICHARD DENNY and THOMAS ANDERSON, Appellants, v. OHANA FIDUCIARY CORPORATION, FULL GUARDIAN OF THE ESTATE AND LIMITED GUARDIAN OF THE PERSON OF ELLA NORA DENNY, Respondent.	DIVISION ONE No. 69117-1 (consol. with No. 69610-6-I) UNPUBLISHED OPINION FILED: August 1, 2016

DWYER, J. — This appeal stems from proceedings in the management of the limited guardianship of Ella Nora Denny. The appellants, one purportedly acting as Mrs. Denny's "next friend," raise issues regarding nearly every decision made by the guardianship court since 2012. Finding no error in the superior court's management of the guardianship or its supervision of the guardian, we affirm.

I

Richard's Petition for Full Guardianship

In 2009, Richard Denny[1] petitioned for guardianship of his mother, Ella Nora Denny (Mrs. Denny), because Alzheimer's disease had allegedly made her unable to recall signing conflicting legal documents and placed her at risk of undue influence. Richard alleged that Mrs. Denny's incapacity was "moderate" and that she "require[d] full support and assistance in managing her finances [and] moderate assistance in managing health care and residential issues." Richard requested a full guardianship of both the person and estate of Mrs. Denny and desired the appointment of a professional guardian.

Independent counsel Timothy Austin represented Mrs. Denny in responding to the guardianship petition filed by Richard. Mrs. Denny selected Austin because he had previously represented her on other matters. In Mrs. Denny's response to the guardianship petition, she asked to retain the right to engage in estate planning, with Austin assisting her. Mrs. Denny did not ask to retain counsel for any other purpose. Mrs. Denny also requested that no information about the guardianship be shared with her brother Martin Anderson.

2009 Order Appointing Limited Guardian of the Person and Full Guardian of the Estate

On December 17, 2009, the King County Superior Court entered an order appointing a limited guardian of Mrs. Denny's person and a full guardian of her estate. Ohana Fiduciary Corporation was appointed as Mrs. Denny's limited guardian.

[1] Richard Denny is referred to hereinafter using his first name to avoid confusion.

The order provides: "The powers of the Guardian and the rights retained, limitation and restrictions placed on EllaNora Denny shall be as set forth in Conclusion of Law."

Conclusion of Law 2.1 provides: "EllaNora Denny is an Incapacitated Person within the meaning of RCW Chapter 11.88, and a Full Guardian of the Estate and a Limited Guardian of the Person should be appointed."

Conclusion of Law 2.2 identifies the rights Mrs. Denny retained after the guardianship:

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

(Emphasis added.)

Consistent with Mrs. Denny's response to the guardianship petition, the order also expressly terminated Mrs. Denny's right to enter into contracts except in the furtherance of her estate planning through court-appointed counsel:

> a. Mrs. Denny shall have the right to enter into contract provided it is solely under the advice and direction of competent independent counsel and in furtherance of her estate planning. Mrs. Denny shall also have the right to appoint someone to act on her behalf pursuant [sic] provided such appointment is solely in a testamentary devise. *In all other areas, Mrs. Denny shall not have the right to enter into a contract.*
>
> b. Mrs. Denny shall not have the right to sue or be sued other than through a guardian.

. . . .

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

(Emphasis added.)

Conclusions of Law 2.3, 2.4, 2.5, and 2.6 of the order detail the authority and responsibilities of the guardian, with express reference to the guardianship statute, chapter 11.92 RCW. Ohana received "[a]ll of the powers of a Guardian of the estate pursuant to the provisions of Chapter 11.92 RCW," and "[a]ll of the powers and responsibilities of a Guardian of the person pursuant to the provisions of Chapter 11.92 RCW, limited by the language in this Order."

The order also specified the decision-making standard as follows:

> [T]he guardian shall make reasonable efforts to ascertain EllaNora Denny's stated, current and historic preferences and shall give significant weight to such preferences. When the competent preferences of EllaNora Denny cannot be ascertained, the Guardian is responsible for making decisions which are in EllaNora Denny's best interest. A determination of her best interest shall include consideration of her stated preferences, as well as consultation with Richard Denny and Marianne Zak [Mrs. Denny's daughter].

Richard's attorney prepared and presented the order establishing the guardianship for Mrs. Denny on December 17, 2009. Richard and Mrs. Denny both attended the hearing. No objections were made to entry of the 2009 order.

Incorrect Letters of Guardianship Issued then Corrected

For the first 17 months of Mrs. Denny's guardianship, from December 21, 2009 through May 16, 2011, letters of limited guardianship of the person were in effect. These letters were provided to Mrs. Denny's medical providers during that time.

In December 2010, in response to a request from the guardian, the superior court authorized the guardian to involve Mrs. Denny's children in her healthcare as follows:

> The guardian is hereby authorized to allow Ms. Denny to manage her own medical and dental care with the assistance of her children, provided that:
> • The children inform all medical, dental and other care providers that there is a guardianship in place . . .
> • The children inform the guardian of each medical, dental or other health care appointment, in advance of the day of the appointment . . .
> • At the guardian's discretion if any proposed treatment might be detrimental to Ms. Denny's health, the guardian shall retain authority to withhold consent for the treatment; and
> • If the children fail to follow such court direction, the court will entertain an order restraining them from further involvement in their mother's health care.[2]

Soon thereafter, Ohana filed its first "Annual Report and Care Plan," which was approved on March 31, 2011, after notice to Richard and Mrs. Denny. This report correctly identified Ohana as Mrs. Denny's "limited guardianship of the person," and did not request that the superior court change the scope of the limited guardianship. The March 31, 2011 order directed the clerk of the court to reissue Ohana's letters of guardianship. However, by a drafting error of Ohana's attorney, it did not specify that letters of guardianship of the person should be limited.

On June 17, 2011, the letters of guardianship were reissued without specifying that the guardianship of the person was limited. These letters of guardianship remained in effect for just under 10 months, from June 17, 2011

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[2] Richard designated this order in his notice of appeal, filed in October 2012, almost two years later. Richard also therein designated an order entered March 29, 2012 that "reaffirm[ed]" the court's December 17, 2010 order regarding Mrs. Denny's medical care.

through April 9, 2012. The incorrect letters of guardianship were discovered by Ohana on or about September 22, 2011. Ohana requested that its attorney obtain corrected letters of limited guardianship. As the attorney later explained to the court commissioner,[3] because the error was not discovered "until nine months into the second year," the decision was made to correct the letters at the next annual review, rather than through an interim report and review. The error was corrected in the letters of limited guardianship of the person issued April 9, 2012.

During the 10 months that the incorrect letters of guardianship were in effect, Ohana's actions fell entirely within the scope of the 2009 order. The guardian's billing records for June through December 2011 reflect no significant health care decisions by Ohana, and document the involvement of Mrs. Denny's children in her health care.

Attorney Mark Wilson Petitions the Superior Court to Appoint Him to Represent Mrs. Denny

In March 2012, attorney Mark Wilson petitioned the superior court to appoint him to represent Mrs. Denny in responding to the guardian's petition for approval of the second annual report. Mrs. Denny, pro se, filed a companion motion to continue the hearing, two declarations, an ex parte motion to shorten time, and petition for appointment of independent counsel, which appear to have been prepared by Wilson's firm.

In response to the petition to appoint Wilson, the superior court ordered an

[3] At a hearing on April 27, 2012, the guardian's attorney explained, and took responsibility for, the drafting error that led to the incorrect letters of guardianship.

updated report from the psychologist who evaluated Mrs. Denny in 2009, Renee Eisenhauer, Ph.D. Dr. Eisenhauer's updated report concluded in pertinent part: "Ms. Denny's cognitive functioning has deteriorated over the last two and a half years. . . . She showed greater confusion and impaired problem solving at her current evaluation than she did at her previous evaluation. Her thinking is presently more disorganized."

As requested in the motion to shorten time signed by Mrs. Denny, the superior court held a hearing on March 23, 2012. Mrs. Denny was confused about why she was in court and asked whether her son was in trouble. Also during the March 23, 2012 hearing, Commissioner Velategui observed that Mrs. Denny did not know who Wilson was, and believed that he was the judge.

Three days before Mrs. Denny signed multiple documents stating that she wanted Wilson to represent her, she had signed a notarized statement, directed to Wilson, which provided:

> I withdraw my authorization for you to act as my attorney. You breached your agreement to enter an appearance in my case within a retainer of $20,000. You breached your alternate agreement to complete a petition to replace the guardian in my case within a retainer of $20,000. Having failed to enter an appearance or complete a petition to replace the guardian, you requested additional funds and charged additional fees.

Mrs. Denny and Richard were present when the superior court ordered the updated evaluation by Dr. Eisenhauer and did not object to the designation of Dr. Eisenhauer or request a different evaluator. Consistent with this, when Dr. Eisenhauer met with Mrs. Denny on April 3, 2012, she reported that Mrs. Denny was "agreeable to the evaluation." However, two weeks *after* consenting to Dr.

Eisenhauer's evaluation, Mrs. Denny signed a document stating, "I do not agree to be evaluated by Dr. Eisenhauer. I will only be evaluated by Dr. Gorman."

After receiving Dr. Eisenhauer's report, Ohana scheduled a hearing on its motion to dismiss Wilson's petition for May 7, 2012. Although the guardian served the hearing notice, motion, and proposed order by mail on all notice parties, including Wilson, Mrs. Denny, and Richard, none of them filed a response to the guardian's motion or appeared at the hearing.

On May 16, 2012, the superior court denied Wilson's petition to be appointed counsel for Mrs. Denny. In unchallenged findings of fact, the superior court determined that Mrs. Denny's dementia-based cognitive impairments had worsened since the guardianship order was entered, and that she remained highly susceptible to undue influence and exploitation by others. The superior court also found that Mrs. Denny lacked the mental capacity to understand whether the influence of others was contrary to her best interests or to understand and remember written documents that she had signed. Finding no credible admissible evidence that Mrs. Denny wished to retain Wilson, or that she needed independent counsel other than for estate planning purposes, and further finding that appointment of additional counsel would require the expenditure of estate assets with no discernible benefit, the superior court denied Wilson's petition.

Richard moved for reconsideration of this order, which was denied on June 19, 2012. The court also ordered Richard to pay the guardian's fees and costs associated with responding to his motion. Richard then filed a motion for

revision, which was denied by Judge Sharon Armstrong on September 7, 2012.

The Guardian's Second Annual Report is Approved

The actions undertaken by the guardian between January 1, 2011 and December 31, 2011 were described in its second annual report, dated March 6, 2012. The guardian's report correctly identified Ohana as Mrs. Denny's "limited guardian of the person," and did not request that the court change the scope of the limited guardianship.

The superior court approved the guardian's second annual report by order dated March 29, 2012, after notice to Richard, Mrs. Denny, and other notice parties. Richard did not raise any objections to the report, even though he was given additional time to respond to it. Nevertheless, Richard designated the order as a decision to be reviewed.

Thomas Anderson Files Pleadings as Mrs. Denny's "Next Friend"

In April 2012, Thomas Anderson filed numerous pleadings in this guardianship, which asserted his right to speak for Mrs. Denny as her "next friend." Anderson is the son of Mrs. Denny's brother, Martin Anderson, who she requested not receive copies of guardianship pleadings.

On April 9, 2012, Anderson simultaneously filed a motion to reconsider the order approving the second annual report and a motion to revise the same order. He filed these motions even though he had not appeared in opposition to the guardian's petition to approve the report.[4]

On April 10, 2012, Anderson filed a motion entitled "Motions to Replace

[4] Anderson's motion was denied on October 22, 2012.

Guardian and Modify Guardianship," in which he requested that the court replace Ohana and disgorge "all fees claimed on th[e] guardianship by attorney Thomas Keller from Sep. 12, 2011 forward," due to the mistaken letters of guardianship. Richard expressly declined to join this motion.

On April 19, 2012, Anderson also filed a motion entitled "Emergency Motion To Enjoin Guardian," which was denied for procedural irregularities the same day that it was filed.[5]

In denying Anderson's motion to replace the guardian, the superior court commissioner ordered him to pay the guardianship estate's reasonable attorney fees of $4,411.50.[6] In addition to the fee award, Anderson, who resides in Oregon, was ordered to post a nonresident plaintiff security bond of $35,000[7] and was prohibited from filing any "motions, petitions, declarations or objections" until posting the bond.[8] The superior court also prohibited Anderson and Richard from procuring Mrs. Denny's signatures on documents or court pleadings relating to the guardianship.[9]

Even though he had not joined Anderson's motion to replace the guardian, Richard filed a motion for revision of the June 19 order. Judge Sharon

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[5] At a hearing on April 27, 2012, the guardian was permitted to retain additional counsel to respond to the multiple motions filed by Anderson. Anderson also appeals from this order.

[6] Anderson appealed these orders but neither sought a stay of the decisions nor paid the attorney fee judgment.

[7] The amount of the bond was $35,000. Ohana asked for $50,000, but only $35,000 was ordered. The superior court commissioner crossed out $50,000 in the order portion of the decision and inserted $35,000, but neglected to do so in the conclusions of law. The order is nevertheless clear.

[8] Anderson appealed the order requiring him to post bond but neither sought a stay of the decision nor posted the bond.

[9] In violation of the superior court's orders, Anderson filed a Notice of Intent to Move for Sanctions against Ohana, because Ohana refused to provide him with copies of all pleadings filed in the guardianship, including Mrs. Denny's private financial information relating to her estate planning gifts to her children.

Armstrong denied the motion on September 7, 2012 and ordered Richard to pay attorney fees and costs incurred by the guardian.

Mrs. Denny Tests Positive for Cocaine and Ohana Seeks Instructions from the Court

In December 2012, Mrs. Denny required emergency medical attention and, without advance notice to Ohana, was administered a drug test. She tested positive for cocaine. Mrs. Denny had no recollection of the events that led to these results. At the Guardian's request, after the positive drug test, Mrs. Denny's children both agreed to temporarily suspend their in-person visits with Mrs. Denny.

In January 2013, Ohana filed a petition for instructions from the superior court related to Mrs. Denny's positive drug test. The petition for instructions requested that the superior court approve unrestricted contact between Mrs. Denny and her children, additional medication monitoring by the staff at Mrs. Denny's assisted living facility, and the hiring of a caregiver.

In response to Ohana's petition, in violation of the superior court's prior order, Anderson filed a document signed by Mrs. Denny entitled "Objection by Ward." Richard filed pleadings accusing his sister Marianne of drugging their mother, abusing drugs, cheating on her husband, and wanting their mother to die. Richard's attorney also filed a declaration that attached unauthenticated medical records of Mrs. Denny, which were obtained without the Guardian's knowledge. For her part, Marianne denied the allegations made against her, submitted polygraph test results, and requested that sanctions be imposed against Richard.

Richard also filed an emergency motion requesting that this court stay the guardianship proceedings until counsel was appointed for Mrs. Denny. This court denied Richard's motion for stay.

The superior court conducted a hearing on the guardian's petition for instructions on January 24, 2013. Although Mrs. Denny received notice of the hearing and the guardian's petition, she did not appear. The superior court entered a written order on the motion, supported by extensive findings and conclusions, the following day. Regarding Mrs. Denny's healthcare, the court confirmed Ohana's authority to hire a caregiver for Mrs. Denny. The court also returned decision-making regarding her healthcare to the guardian's exclusive control, concluding that

> the Guardian should have sole decision-making authority over all aspects of Ella Nora Denny's health care, subject to its duty to consult with Ella Nora Denny . . . [and] that it would be detrimental to Ella Nora Denny at this time for either one of her children to make health care decisions for her, except in an emergency, or to have access to Ella Nora's health care information . . . . The provisions of any prior orders that authorized Mrs. Denny's children to assist with health care decision-making for Mrs. Denny should no longer govern.

The superior court's January 25, 2013 order also addressed whether Mrs. Denny was entitled to engage counsel or have counsel appointed to represent her. The superior court reiterated that, under the 2009 guardianship order, Mrs. Denny retained the right to engage counsel only for estate planning purposes, reiterated its prior findings that she did not have the capacity to reinstate her right to engage counsel, and found that good cause was not established to appoint counsel for Mrs. Denny since her retained rights and welfare were adequately

protected. Finding of Fact 21; Conclusion of Law 3.

The January 25, 2013 order additionally addressed Anderson's standing in the guardianship. Findings of Fact 22-31; Conclusions of Law 8-12. Unchallenged Finding of Fact 29 states that "Anderson's injection of himself in the guardianship of EllaNora Denny has not benefitted Mrs. Denny" and that "his involvement has significantly increased the Guardian's attorney fees, which are paid from Mrs. Denny's funds." This finding supported the court's conclusion that

> Mrs. Denny's interests and retained rights are adequately represented by the Guardian, Mrs. Denny's children, and the superior court overseeing Mrs. Denny's guardianship. Even if Washington courts recognized "next friend" standing in guardianship matters, this Court would not find Thomas Anderson to be an appropriate person for appointment as Mrs. Denny's "next friend."

Anderson did not participate in any proceedings in the superior court subsequent to the January 25, 2013 order.

Before analyzing the merits of the claims properly before us, we address three preliminary issues.

II

One initial issue is the standard of review applicable to decisions by the superior court in managing an ongoing guardianship. Richard and Anderson contend that de novo review is required because only documentary evidence was presented to the superior court. Ohana contends to the contrary, asserting that an abuse of discretion standard applies to rulings made in the type of proceedings herein at issue. Ohana is correct.

"The management of a guardianship by the superior court is reviewed for

abuse of discretion."[10] In re Guardianship of Cornelius, 181 Wn. App. 513, 528, 326 P.3d 718 (2014) (citing In re Guardianship of Johnson, 112 Wn. App. 384, 387-88, 48 P.3d 1029 (2002)). A trial court's decision will not be reversed for abuse of discretion unless it is "'manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.'" In re Guardianship of Lamb, 173 Wn.2d 173, 189, 265 P.3d 876 (2011) (quoting Noble v. Safe Harbor Family Pres. Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009)). "'A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" Lamb, 173 Wn.2d at 189 (internal quotation marks omitted) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. Fisher Props., Inc. v. Arden-Mayfair Inc., 115 Wn.2d 364, 369, 798 P.2d 799, 804 P.2d 1262 (1990). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." Ridgeview Props. v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). An appellate court "heavily relies on the trial court's determination of what is in the best interest of the ward." Cornelius, 181 Wn. App. at 536 (citing In re Guardianship of Pawling, 101 Wn.2d 392, 401, 679 P.2d 916 (1984)). A superior court is in a better position to determine factual disputes in a guardianship case because it has a more extended opportunity to consider

[10] Notably, the 2009 order appointing a guardian for Mrs. Denny is not on appeal. The orders on appeal were all entered subsequent to this order *in the course of the management of the guardianship*.

documentary evidence, hear arguments of and question counsel, and clarify conflicts in the record.[11] In re Marriage of Stern, 68 Wn. App. 922, 928-29, 846 P.2d 1387 (1993).

Accordingly, we apply an abuse of discretion standard to the decisions made by the superior court in the course of its management of the guardianship of Mrs. Denny.

III

A second initial matter is Anderson's ability to act in the self-appointed role of Mrs. Denny's "next friend." Anderson contends that he was improperly prevented from participating as Mrs. Denny's "next friend" in the guardianship proceedings. We disagree.

Anderson frames his claim as if it presents a legal question regarding a third-party's ability to participate in a guardianship case as "next friend" to the incapacitated person. But, under the facts of this case, no resolution of that issue would entitle Anderson to appellate relief. As Anderson acknowledges, he "moved the trial court in both his individual capacity, and as next friend of [Mrs. Denny] to replace the Guardian, under 'any person' jurisdiction pursuant to RCW 11.88.120(2)." Br. of Appellant ("Next Friend") at 4 (emphasis omitted). It is true that the guardianship court expressed doubts regarding Anderson's ability to file

[11] This is consistent with the rationale for endorsing the same approach in other types of cases. For example, in In re Marriage of Rideout, the Supreme Court held that where competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate. 150 Wn.2d 337, 351, 77 P.3d 1174 (2003). More recently, in Dolan v. King County, the Supreme Court held that "substantial evidence is more appropriate, even if the credibility of witnesses is not specifically at issue, in cases such as this where the trial court reviewed an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings." 172 Wn.2d 299, 311, 258 P.3d 20 (2011). The court cited the trial court's fact-finding expertise and conservation of judicial resources as guiding rationales. Dolan, 172 Wn.2d at 311.

his motion as Mrs. Denny's next friend. However, having expressed these doubts, the court did not simply dismiss the motion but, rather, evaluated the motion on its merits. It was at this point that Anderson's motion was dismissed. As this decision—the decision on the merits of the motion—is the only decision that might entitle Anderson to appellate relief, it is the decision we will review later in this opinion.

At the time of Anderson's motion, RCW 11.88.120 provided, in pertinent part:

> (2) Any person, including an incapacitated person, may apply to the court for an order to modify or terminate a guardianship or to replace a guardian or limited guardian. . . .[12]
>
> (3) . . . The court may (a) direct the clerk to schedule a hearing, (b) appoint a guardian ad litem to investigate the issues raised by the application or to take any emergency action the court deems necessary to protect the incapacitated person until a hearing can be held, or (c) *deny the application without scheduling a hearing, if it appears based on documents in the court file that the application is frivolous.* Any denial of an application without a hearing shall be in writing with the reasons for the denial explained. . . .

Former RCW 11.88.120 (1991).

Herein, the trial court entered a written order denying Anderson's motion with prejudice. In support of its order, it entered 10 findings of fact and five conclusions of law. The order relied, inter alia, on the following factors: Anderson was not identified as a person interested in Mrs. Denny's welfare by the order that established the guardianship. He never filed a request for special

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[12] We note in passing that the language of this subsection undermines Anderson's contention regarding a third party's entitlement to participate in an ongoing guardianship by claiming to be the incapacitated person's "next friend." Because "any person" is permitted to petition under the statute, there is no need for a third party to establish itself as the incapacitated person's "next friend."

notice in the guardianship. He never applied to be appointed to speak for Mrs. Denny as her "next friend." Despite his representations to the contrary, Mrs. Denny's children did not support his motions (Marianne opposed them, while Richard declined to join them). Moreover, unchallenged findings of fact establish that Anderson violated procedural rules for filing motions, failed to post bond, failed to pay judgments for attorney fees awarded to the guardianship estate, and filed pleadings in violation of the superior court's prohibition. It is also notable that, when the guardianship was established, Mrs. Denny specifically requested that information about it be withheld from her brother, Anderson's father.

Anderson's petition offered no compelling reason for his involvement in Mrs. Denny's guardianship, particularly given that the guardianship was already contentious and Mrs. Denny's interests were capable of being represented by either of her children or the court-appointed guardian. Furthermore, Anderson demonstrated a disregard for the conservation of Mrs. Denny's estate by filing pleadings that he did not ensure were truthful or legally sound. This ran contrary to his professed desire to act in her best interests. Therefore, we conclude that the superior court's order striking Anderson's motion was proper, both as to Anderson individually and as to Anderson as Mrs. Denny's next friend.[13]

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[13] We note that, while it was permissible for Anderson to file the motion pro se to the extent that it was made in his individual capacity, he acted contrary to law by doing so in his purported capacity as Mrs. Denny's "next friend."

> We have previously explained the pertinent, "long-standing" rule.
> [W]ith limited exception, Washington law requires individuals appearing before the court on behalf of another party or entity to be licensed in the practice of law. Dutch Vill. Mall v. Pelletti, 162 Wn. App. 531, 535, 256 P.3d 1251 (2011). Ordinarily, only those persons licensed to practice law in this state may do so without liability for unauthorized practice. See RCW 2.48.170. Practicing law without a license is a gross misdemeanor in Washington. RCW 2.48.180(3)(a); Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd., 155 Wn.

Although Anderson filed briefs in this court once again purporting to act as Mrs. Denny's "next friend," he does not separately claim that he should be permitted to act as her next friend on appeal. Because we conclude that the superior court properly dismissed Anderson's motion to modify the guardianship, thereby rejecting his only asserted basis for participation in the ongoing proceedings, we do not separately address arguments regarding decisions made by the guardianship court that Anderson purports to raise as Mrs. Denny's "next friend."[14]

App. 479, 485, 230 P.3d 608, rev'd on other grounds, 170 Wn.2d 577, 245 P.3d 764 (2010).

There is a recognized "pro se exception" to these general rules where a person "'may appear and act in any court as his own attorney without threat of sanction for unauthorized practice.'" Cottringer v. Dep't of Emp't Sec., 162 Wn. App. 782, 787, 257 P.3d 667 (2011) (quoting Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n, 91 Wn.2d 48, 56, 586 P.2d 870 (1978)). But this pro se exception is limited, applying "'only if the layperson is acting *solely on his own behalf*' with respect to his own legal rights and obligations." Cottringer, 162 Wn. App. at 787-88 (emphasis added) (quoting Wash. State Bar Ass'n, 91 Wn.2d at 57).

No On I-502 v. Wash. NORML, 193 Wn. App. 368, 372-73, 372 P.3d 160 (2016).

While the legislature may create exceptions to the general rule that no one other than a licensed attorney may represent the interests of another in court, see, e.g., RCW 12.40.080(1) (allowing corporations to be represented by nonattorneys in small claims court), as a common law doctrine, "next friend" status—while allowing a person standing to assert the interests of another—does not allow the "next friend" to appear in court and act as an attorney on behalf of the ward. See, e.g., In re Guardianship of Ivarsson, 60 Wn.2d 733, 736, 375 P.2d 509 (1962) (next friend status approved; next friend represented by counsel).

[14] Anderson's brief filed as Mrs. Denny's "next friend" included the following assignments of error:

> 1. The Superior Court erroneously held that Washington does not recognize standing of a next friend. . . .
>
> 2. The Superior Court erroneously denied Ward's motion for examination exclusively by the health care professional whom she selected. . . .
>
> 3.The Superior Court erroneously denied Mrs. Denney's [sic] motion for an attorney independent from the Guardian. . . .
>
> 4. The Superior Court erroneously granted an order approving Guardian's annual report for 2011, and denied motions for reconsideration. . . .
>
> 5. The Superior Court erroneously denied Ward's motion to replace Guardian and modify guardianship. . . .

Brief of Appellant ("Next Friend") at 3. As Richard makes many of the same assignments of error, some of these alleged errors are addressed below, in our analysis of Richard's claims.

IV

A final preliminary issue is the timeliness of Richard's appeal. Ohana contends that Richard's appeal was not timely as to some of the orders designated. We agree.

A party must normally file a notice of appeal within 30 days of the decision for which review is sought. RAP 5.2(a). The 30-day period is extended, however, by a timely motion for reconsideration. RAP 5.2(a), (e). A motion for reconsideration is timely only when it is filed within 10 days after entry of the judgment, order, or decision. CR 59(b). A trial court may not extend the time period for filing a motion for reconsideration. CR 6(b); see also Schaefco, Inc. v. Columbia River Gorge Comm'n, 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993) (holding motion for reconsideration and notice of appeal were untimely notwithstanding "important [constitutional] issues").

When an appellant fails to timely perfect an appeal, the disposition of the case is governed by RAP 18.8(b). Schaefco, 121 Wn.2d at 368. That rule states:

> The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal . . . . The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

RAP 18.8(b).

Richard's notice of appeal was filed on October 10, 2012. Ohana contends that it was untimely with respect to (1) the Order Reaffirming Court's Prior Order of December 17, 2010 entered March 29, 2012; (2) the Order

Approving Interim Report entered December 17, 2010; and (3) the Findings of Fact, Conclusions of Law and Order on Motion entered May 16, 2012.

The 30-day appeal deadlines for the above three orders were not extended by the filing of any posthearing motions. No motions for reconsideration were filed with respect to the March 29, 2012 order or the December 17, 2010 order. Although a motion for reconsideration was filed with respect to the May 16, 2012 order, Richard concedes that this motion for reconsideration was not timely.[15] Absent a "timely motion," the 30-day time period for appeal was not prolonged. It expired prior to the filing of Richard's notice of appeal. See RAP 18.8(b).

Because Richard's appeal as to these three orders was untimely, and he cites no pertinent authority for extending the relevant appeal deadlines,[16] we do not review his contentions regarding these orders. Furthermore, because his appeal from the underlying May 16, 2012 order was untimely, his motion for reconsideration of that order was properly denied, and his appeal from the September 10, 2012 order denying revision is without merit.

Richard's contentions

V

Richard's first assignment of error states that "[t]he superior court erred in

[15] The deadline was May 29, 2012. Because the tenth day after the ruling fell on Saturday May 26, the next court day after May 26 was May 29, due to the Memorial Day holiday. The motion was received by the Clerk of the Court on May 30, making it one day late. Under GR 30(c)(1), "[a]n electronic document is filed when it is received by the clerk's designated computer during the clerk's business hours; otherwise the document is considered filed at the beginning of the next business day."

[16] The authorities that Richard relies on pertain to whether constitutional issues can be raised for the first time on appeal. These authorities do not justify, or even address, extending the appeal deadline. Schaefco, 121 Wn.2d at 367-68 (holding motion for reconsideration and notice of appeal were untimely notwithstanding "important [constitutional] issues").

its interpretations of its 2009 order." Br. of Appellant (Richard Denny) at 4. Richard did not, and could not now, appeal from the 2009 order. Moreover, to the extent that Richard means to argue that the allegedly improper interpretations were manifested in subsequent decisions of the guardianship court, he does not, contrary to RAP 10.3(a), identify those decisions and they are not otherwise clear from his appellate briefing. Accordingly, we do not further address this assignment of error and, instead, review the guardianship court's interpretation of the 2009 order establishing Mrs. Denny's limited guardianship where relevant to other, proper assignments of error.

VI

In his second assignment of error, Richard contends that "[t]he superior court erred by denying Ms. Denny's constitutional and statutory rights to due process when restricting or revoking her retained fundamental rights." Br. of Appellant (Richard Denny) at 4. This is so, he asserts, because Mrs. Denny was not afforded the right to representation related to Anderson's motion to replace the guardian. We disagree.

"There is a presumption that civil litigants do not have a right to appointed counsel unless their physical liberty is at risk." In re Marriage of King, 162 Wn.2d 378, 395, 174 P.3d 659 (2007) (citing Lassiter v. Dep't of Social Servs., 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)). This presumption is overcome only when the Mathews v. Eldridge balancing factors weigh heavily enough against that presumption. 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Those factors are "'[f]irst, the private interest that will be affected by the official

action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" King, 162 Wn.2d at 395 (alteration in original) (quoting Mathews, 424 U.S. at 335).

Washington's guardianship statutes are designed to comply with the requirements of due process. Thus, RCW 11.88.045(1)(a) guarantees counsel for persons who are alleged to be incapacitated and for persons already subject to a guardianship when "the rights and interests of . . . [the] adjudicated incapacitated person cannot otherwise be adequately protected and represented." The right to counsel after an adjudication of incapacity also exists where fundamental liberty interests are at stake such as commitment to an institution, electroshock therapy, psychosurgery, or psychiatric procedures that restrict freedom of movement. See RCW 11.92.043(5).[17]

Herein, as required by due process principles and the pertinent guardianship statutes, Mrs. Denny was represented by independent legal counsel when the court adjudicated her to be incapacitated.[18] It is true that she

[17] See also In re Guardianship of Hayes, 93 Wn.2d 228, 234, 608 P.2d 635 (1980) (requiring independent guardian ad litem before superior court may grant a petition for sterilization based on the "fundamental right to procreate"); In re Guardianship of K.M., 62 Wn. App. 811, 817, 816 P.2d 71 (1991) (independent counsel required because of the "gravity and finality of an authorization to sterilize"); and In re Guardianship of Ingram, 102 Wn.2d 827, 689 P.2d 1363 (1984) (independent counsel appointed where the Guardian sought authority to remove the ward's larynx).

[18] In re Guardianship of Decker held that persons subject to a limited or a full guardianship have been adjudicated to be incapacitated within the meaning of chapter RCW 11.88, and specifically rejected the argument that because a person agreed to a limited

was not provided independent counsel related to the disposition of Anderson's motion to modify the guardianship, but this was not required. It was not mandated by statute,[19] and the decision in question did not trigger due process protections because Mrs. Denny was not at risk of losing additional fundamental rights. To the extent that her fundamental rights were implicated, the court made its decision affecting those rights at the 2009 hearing establishing the guardianship.

Richard also asserts that Mrs. Denny was improperly prevented from retaining counsel on her own. The fact that Mrs. Denny was not permitted to retain independent counsel was not a matter of either constitutional or statutory law but, rather, was a consequence of the court's 2009 order establishing the guardianship.

Generally, a court order is enforced according to the plain meaning of its terms, read in light of the issues and purposes surrounding its entry. R/L Assocs., Inc. v. City of Seattle, 113 Wn.2d 402, 410, 780 P.2d 838 (1989); Zink v. City of Mesa, 162 Wn. App. 688, 707-08, 256 P.3d 384 (2011). Unambiguous orders do not require interpretation. In re Marriage of Bocanegra, 58 Wn. App. 271, 275, 792 P.2d 1263 (1990).

The 2009 order is not ambiguous regarding Mrs. Denny's right to retain independent legal counsel. Retaining a lawyer is a contractual matter, and the

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guardianship they were not adjudicated incapacitated. 188 Wn. App. 429, 440, 353 P.3d 669, review denied, 184 Wn.2d 1015 (2015).

[19] Richard contends that, pursuant to a 2015 amendment to RCW 11.88.120, an incapacitated person also has a right to counsel for motions to modify or terminate the guardianship. (It is unclear whether he believes it to be a right to appointed or retained counsel.) Apart from the issue of whether his interpretation of the new provision is correct, he cites no persuasive evidence that it was intended to apply retroactively.

order establishing Mrs. Denny's limited guardianship gave the authority to contract on behalf of Mrs. Denny to the guardian.[20] While the order included an exception for "the right to enter into contract provided it is solely under the advice and direction of competent independent counsel and in furtherance of her estate planning," the same provision reiterated that, "[i]n all other areas, Mrs. Denny [did] not have the right to enter into a contract." The request to retain independent counsel for the ongoing guardianship proceedings, allegedly made by Mrs. Denny, did not fall within this exception.[21]

Richard's contention that Mrs. Denny was improperly denied counsel (either appointed or retained) is unavailing.

VII

In his third assignment of error, Richard contends that "[t]he superior court erred by failing to supervise [Ohana] and address its fiduciary misconduct." Br. of Appellant (Richard Denny) at 5. The focus of his complaint appears to be the temporarily incorrect letters of guardianship. However, contrary to RAP 10.3(4), he fails to identify the superior court decision that allegedly was erroneous. Moreover, although Richard asserts that "[t]he superior court should have imposed sanctions against [Ohana] for its misconduct," Br. of Appellant (Richard

[20] Specifically, the order gave the guardian the authority "[t]o undertake the management of the financial affairs of the incapacitated person, including but not limited to contracting for and incurring obligations on behalf of the incapacitated person."

[21] Richard also contends that "[t]he superior court did not correctly determine in May 2012 that Ms. Denny lacked capacity to form an attorney-client relationship." Br. of Appellant (Richard Denny) at 39. As discussed above, Richard's appeal from this order ("Findings of Fact, Conclusions of Law and Order," dated May 16, 2012) was untimely. Accordingly, this contention is not addressed at length. We note briefly, however, that substantial evidence was presented that the circumstances that had justified establishing the guardianship in 2009 had deteriorated further by 2012. This supports the trial court's decision not to modify the terms of the limited guardianship to permit Mrs. Denny to retain independent counsel for the guardianship proceedings.

Denny) at 44, and offers that disgorgement was the appropriate remedy, Br. of Appellant (Richard Denny) at 45, he does not establish, by citation to the record, that he ever made such a request to the guardianship court. The absence of record citations is contrary to RAP 10.3(6), and RAP 2.5 would preclude our review of Richard's request in the first instance if, indeed, it was not first made in the superior court. See Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 191 P.3d 879 (2008) (appellants cannot raise issues for the first time on appeal because it deprives the appellate courts of an adequate record on review).[22] Therefore, we decline to further address this issue.

VIII

In his fourth assignment of error, Richard contends that "[t]he superior court erred entering its order of January 25, 2013." Br. of Appellant (Richard Denny) at 5. This is so, he asserts, because the court erred (1) by barring him from participating in Mrs. Denny's healthcare decision-making and accessing her health records, and (2) by authorizing Ohana to place a live-in healthcare worker in Mrs. Denny's residence. We disagree.

Beginning with the first asserted error, the authority to manage decisions regarding Mrs. Denny's healthcare and her health records was given to Ohana in the 2009 order establishing Mrs. Denny's limited guardianship. Pursuant to that order, Ohana was given the authority to make health care decisions for Mrs. Denny (after consulting her), to supervise medications, to provide substitute

[22] We note, however, that disgorgement is an equitable remedy within the superior court's discretion. In this case, the guardianship court accepted Ohana's explanation for the incorrect letters of guardianship and took no action against it. This fact would weigh heavily were we—contrary to our actual decision—to entertain Richard's request.

informed consent for medical treatment, to select health care providers (after consulting her), to hire caregivers and case managers, and to provide personal assistance for her. The order also gave Ohana the authority "[t]o review, release, consent to the release of and use as appropriate all medical, dental, mental health, psychological, psychiatric, medication, laboratory and social services work records, charts, evaluations and reports concerning the incapacitated person." This is the authority that Richard asserts was improperly given to Ohana in the January 2013 order.

Because the January 25, 2013 order did not expand the guardian's authority to make health care decisions for Mrs. Denny beyond the parameters of the 2009 order, Richard's challenge to the later order is, in effect, an indirect challenge to the earlier order. Richard did not timely appeal from that order and could not do so now. Accordingly, Richard's challenge to the January 2013 order, on the basis asserted, fails.[23]

Regarding Richard's second assertion, the authority to place a live-in healthcare worker in Mrs. Denny's residence was also given to Ohana in the 2009 order establishing the guardianship. Pursuant to that order, Ohana was granted the authority, "[a]fter consultation with Ms. Denny, to select or discharge any health care or medical provider," "to provide for or contract for case care or management services on behalf of the incapacitated person," and "to provide for such other personal assistance as the incapacitated person requires." Thus, the

[23] Furthermore, Richard does not establish an entitlement to participate in his mother's healthcare. Under Washington's healthcare informed consent statute, a court-appointed guardian has highest priority in terms of those who may consent to healthcare on behalf of an incompetent patient. Children may provide such consent only if the guardian is unavailable. RCW 7.70.065(1); RCW 11.88.010(1)(e).

decision to hire a caregiver fell squarely within the authority granted to Ohana by the 2009 order. Moreover, when Ohana made the decision to exercise its authority and actually hire a residential healthcare worker, the guardianship court entered a finding—unchallenged on appeal—that this decision was in Mrs. Denny's best interest.

Accordingly, Richard's challenges to the January 2013 order both fail.

IX

In his fifth assignment of error, Richard contends that "[t]he superior court erred by, in its June 19, 2012 order, enjoining Richard and Mr. Anderson from assisting Ms. Denny to express her concerns about [Ohana]'s misconduct." Br. of Appellant (Richard Denny) at 5. Richard is here referencing the court's order prohibiting him and Anderson from procuring Mrs. Denny's signature on court documents. His contention fails.

In exercising original jurisdiction over guardianship matters, superior courts have "full and ample power" to enter orders deemed "right and proper." RCW 11.96A.020, .040, .060. Moreover, when the superior court receives a petition to modify a guardianship or to replace a guardian, it may grant the relief "it deems just and in the best interest of the incapacitated person." Former RCW 11.88.120(4). Courts have long been concerned with protecting incapacitated persons from undue influence and fraud. Lamb, 173 Wn.2d at 184 (citing In re Guardianship of Bayer's Estate, 101 Wash. 694, 695, 172 P. 842 (1918)); RCW 74.34.135 (authorizing vulnerable protection orders upon the petition of an incapacitated person's guardian).

In support of the order at issue, the guardianship court found: "It is not in Mrs. Denny's best interest for third parties to procure her signature on documents that the evidence reflects she lacks capacity to understand or recall." A "best interest" finding depends on the facts and circumstances of each case and must be supported by a preponderance of the evidence. See In re Welfare of Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980).

The risk of undue influence was one of the reasons for establishing the guardianship in 2009. The record dating back to the guardianship's inception documented that Mrs. Denny was highly susceptible to undue influence. Indeed, even after the guardianship was established, Mrs. Denny frequently signed conflicting documents prepared by others, under penalty of perjury. The contradictory documents signed by Mrs. Denny related to both her estate (e.g., conflicting durable powers of attorney) and her person (e.g., conflicting statements concerning medical evaluations). Thus, the evidence amply supported the trial court's finding that the narrowly-tailored restrictions at issue were necessary to Mrs. Denny's best interests.[24]

Richard's contention to the contrary is unavailing.

Anderson's contentions

X

Anderson's first and fourth assignments of error were related to his ability to participate in the guardianship proceedings as Mrs. Denny's next friend and

[24] Furthermore, Richard's attempt to characterize the restriction as implicating Mrs. Denny's rights to free expression and to access the courts fails because the unchallenged findings of fact establish that the documents Mrs. Denny signed do not accurately represent her intent or wishes and are not credible evidence. Findings of fact 6 and 17.

the dismissal of his motion to modify the guardianship. Br. of Appellant (Thomas Anderson) at 2-3. These issues were previously resolved.

In his second assignment of error, Anderson contends that "[t]he Superior Court erroneously granted an order requiring Anderson to post $50,000 bond." Br. of Appellant (Thomas Anderson) at 3. He is wrong.

Anderson filed his motion to modify Mrs. Denny's guardianship pursuant to former RCW 11.88.120, which authorized the superior court to "grant such relief as it deems just and in the best interest of the incapacitated person." Former RCW 11.88.120(4). This statute did not set out the types of relief thereby made available to the court with any specificity. However, there is precedent for superior courts ordering nonresident plaintiffs in civil cases to post security bonds. Specifically, RCW 4.84.210 authorizes a trial court to order a nonresident plaintiff to provide security for any cost award that ultimately might be entered against it. In the statutory scheme regulating guardianships, "any person" can commence a claim, necessitating court action. The potential for abuse in such a situation is similar to the potential for abuse that gave rise to RCW 4.84.210. Because broad discretion to "grant such relief as it seems just and in the best interest of the incapacitated person" has been given to the superior court by the legislature, we conclude that applying the bond requirements applicable to out-of-state plaintiffs to out-of-state guardianship claimants was well within the superior court's discretion.[25] Anderson's claim of error fails.

[25] Anderson does not challenge the amount of the bond. Nevertheless, we note that, although the presumptive maximum non-resident plaintiff bond under RCW 4.84.210 is $200, the trial court may order additional security where an independent basis in contract, statute, or equity allows, White Coral Corp. v. Geyser Giant Clam Farms, LLC, 145 Wn. App. 862, 867, 189 P.3d

XI

Anderson's third assignment of error contends that "[t]he Superior Court erroneously granted an order allowing, and entered judgment for, costs and fees against Anderson." Br. of Appellant (Thomas Anderson) at 3. This is so, he asserts, because he was acting on Mrs. Denny's behalf. He is incorrect.

RCW 11.96A.150 permits the superior and appellate courts in guardianship matters to award attorney fees from any party to any party "in such amount and in such manner as the court determines to be equitable." RCW 11.96A.150(1); see also In re Guardianship of McKean, 136 Wn. App. 906, 918, 151 P.3d 223 (2007). Furthermore, as explained above, former RCW 11.88.120(4) broadly authorized guardianship courts to "grant such relief as it deems just and in the best interest of the incapacitated person."[26]

Herein, the superior court cited four reasons for awarding fees against Anderson: (1) his motion did not benefit Mrs. Denny or her estate, (2) Anderson falsely attributed statements to Mrs. Denny's attorney Timothy Austin, (3) Anderson falsely represented that his motion was unanimously supported by Mrs. Denny's family, and (4) the argument that Ohana's attorney had a conflict of interest in representing Ohana was not well grounded in fact or law. Based on these findings, and because Anderson was subject to the superior court's authority to enter such an order, having voluntarily submitted himself to the

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205 (2008), and the statute permitting guardianship courts to award attorney fees "in such amount and in such manner as the court determines to be equitable," RCW 11.96A.150(1), provides one such basis. Therefore, even under the general statute, the guardianship court could properly require additional security for potential awards of attorney fees.

[26] Notably, the current provision, RCW 11.88.120(2)(d) (2015), explicitly grants the court the authority to award attorney fees and costs.

court's authority, we conclude that the fee and cost award was also justified pursuant to RCW 11.88.120(4) and by RCW 11.96A.150(1).

The guardianship court's attorney fee award was properly made.

XII

Richard's final contention is that he should be awarded reasonable attorney fees on appeal. Ohana, in turn, contends that it should be awarded reasonable attorney fees relative to Richard's appeal and to each of Anderson's appeals.

RAP 18.1 permits attorney fees to be awarded on appeal if applicable law grants the party the right to recover reasonable attorney fees. RCW 11.96A.150 permits the appellate courts in guardianship, probate, and trust matters to award attorney fees from any party to any party "in such amount and in such manner as the court determines to be equitable." RCW 11.96A.150(1). In determining whether to award fees under RCW 11.96A.150, we "may consider any and all factors . . . deem[ed] to be relevant and appropriate, such as whether the litigation benefits the estate." In re Guardianship of Decker, 188 Wn. App. 429, 440, 451, 353 P.3d 669, review denied, 184 Wn.2d 1015 (2015) (awarding guardian attorney fees on appeal against ward's former attorney who sought to "vindicate" her due process rights).

As demonstrated above, the arguments made on appeal by both Richard and Anderson were contrary to established law and, frequently, were advanced in a manner that violated the rules of appellate procedure. Furthermore, the ongoing litigation is contrary to Mrs. Denny's best interests and acts as a drain on

her estate's resources. Thus, the equities weigh heavily in favor of Ohana's request and against Richard's.

Accordingly, Richard's request for an award reasonable attorney fees is denied. Ohana's request is granted. An award in favor of Ohana and against Richard is appropriate with regard to Ohana's efforts to respond to Richard's briefing. An award in favor of Ohana and against Anderson is appropriate with regard to Ohana's efforts to respond to Anderson's briefing (both "pro se" and as "next friend"). Upon compliance with RAP 18.1, a commissioner of this court will enter the appropriate orders.

Affirmed.

We concur:

COX, J.

Becker, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Guardianship of: ELLA NORA DENNY, an incapacitated person. RICHARD DENNY and THOMAS ANDERSON, Appellants, v. OHANA FIDUCIARY CORPORATION, FULL GUARDIAN OF THE ESTATE AND LIMITED GUARDIAN OF THE PERSON OF ELLA NORA DENNY, Respondent.	DIVISION ONE No. 69117-1 (consol. with No. 69610-6-I) ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION AND GRANTING OHANA'S REQUEST FOR FEES AND COSTS

The appellants, Richard Denny and Thomas Anderson, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

IT IS FURTHER ORDERED that Ohana Fiduciary Corporation's request for reasonable attorney fees and costs for responding to the motion for reconsideration is granted. Upon compliance with RAP 18.1, a commissioner of this court will enter the appropriate order.

Dated this 4th day of October, 2016.

FOR THE COURT:

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

EXPOI

ISSUED

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In the Guardianship of: **ELLANORA DENNY** An Alleged Incapacitated Person.	NO. 09-4-04984-7SEA ORDER APPOINTING LIMITED GUARDIAN OF THE PERSON AND FULL GUARDIAN OF THE ESTATE

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

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

_____

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

FINDINGS OF FACT

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

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Mercer Island, WA 98040
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Fax: (206) 232-4049

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

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

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

1.5 Alternative Arrangements Made By Ms. Denny:

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

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

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

Ohana Fiduciary Corporation
Lynne Fulp, President
PO Box 33710
Seattle, WA 98133
Ohana CPG#10747
(206)782-1189
lmf@ohanafc.com

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

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

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

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

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CONCLUSIONS OF LAW

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

2.2 Rights Retained.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- After consultation with Ms. Denny, to select or discharge any health care or medical provider;
- After consultation with Ms. Denny, to decide code status of the ward, including the use of life sustaining measures, including intravenous therapy, tube feedings, hydration, antibiotics, pain medications and comfort care;
- Subject to the provisions of paragraphs 2.2 and 2.3, to provide substitute informed consent (RCW 7.70.065) to medical or dental treatment, medications for the incapacitated person, including surgery, except where contrary to law;
- To provide for or contract for case care or management services on behalf of the incapacitated person;
- To provide for such other personal assistance as the incapacitated person requires;
- If needed, to establish a pre-need burial or cremation plan for the incapacitated person;

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

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

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