

No. 69117-1-I (consolidated w/ 69610-6-I and linked w/ 70312-9-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re 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.

**BRIEF OF RESPONDENT GUARDIAN OHANA FIDUCIARY
CORPORATION IN RESPONSE TO BRIEF OF APPELLANT
THOMAS ANDERSON (INDIVIDUALLY AND NOT AS THE
"NEXT FRIEND" FOR ELLA NORA DENNY)**

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ORIGINAL

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I. INTRODUCTION

The brief that appellant Thomas Anderson (Anderson) filed under his own name, instead of as the “next friend” of the ward Ella Nora Denny, raises two issues not already addressed in other briefing: (1) whether the superior court had the authority to require Anderson to post a nonresident plaintiff security bond under RCW 4.84.210; and (2) whether the superior court had authority under RCW 11.96A.150 to require Anderson to pay the attorney fees incurred by the guardianship estate in responding to his motion to remove Ohana Fiduciary Corporation (Ohana) as Mrs. Denny’s guardian. As discussed in the other two briefs filed by Ohana in response to Anderson, his standing as Mrs. Denny’s next friend was never recognized by the superior court. Instead of petitioning the superior court for appointment as Mrs. Denny’s next friend, Anderson unilaterally inserted himself into this case. Not having been recognized by the superior court in any representative role, Anderson individually is accountable for the costs of this litigation. This Court should affirm the superior court’s order dated May 10, 2012 that required Anderson to post a nonresident plaintiff security bond of \$35,000, and its order dated September 7, 2012 that awarded Mrs. Denny’s guardianship estate

reasonable attorneys' fees and costs of \$4,411.50.¹

II. RESTATEMENT OF ISSUES

Anderson makes four assignments of error, two of which were addressed in the brief that he filed under the name of Ella Nora Denny. The new issues raised by Anderson under his own name² are properly stated as follows:

1. Did the superior court misinterpret RCW 4.84.210 when it ordered Anderson to post a nonresident plaintiff security bond? (Assignment of Error 2.)
2. Did the superior court misinterpret RCW 11.96A.150 when it ordered Anderson to pay the reasonable attorneys' fees and costs incurred by the guardianship estate in opposing his motion to remove Ohana as Mrs. Denny's guardian? (Assignment of Error 4).

III. RESTATEMENT OF THE CASE

Anderson's statement of the case misrepresents the record.

A. After Anderson Appeared In This Case For The First Time In April 2012 By Filing Four Motions Between April 9 And April 19, The Superior Court Granted Ohana's Motion To Require Anderson To Post A Nonresident Plaintiff Security Bond.

On April 9, 2012, CP 1103, Anderson filed two motions: (1) a

¹ This brief incorporates by reference all briefs filed by Ohana in Court of Appeals Nos. 69117-1-I and 70312-9-I.

² The brief that Anderson filed under his own name is referred to as "*Anderson II Brf*".

motion to reconsider the order approving Ohana's second annual guardianship report and (2) a motion to revise the same order. CP 621-628, 1522-1523. On April 10, 2012, CP 1103, Anderson filed a 45-page motion entitled "Motions to Replace Guardian and Modify Guardianship." CP 702-746. On April 19, 2012, Anderson filed an "Emergency Motion To Enjoin Guardian," which was denied for procedural irregularities the same day it was filed. CP 637, 1103, 1349-1365.

Anderson resides in Oregon. On April 23, 2012, after receiving Anderson's four motions, Ohana filed a motion to require Anderson to post a nonresident plaintiff security bond under RCW 4.84.210. CP 681-685. On May 10, 2012, the superior court granted Ohana's motion, ordered Anderson to post a security bond of \$35,000, and prohibited Anderson from filing any "motions, petitions, declarations or objections" until posting the bond. CP 980-2. Anderson appealed.

B. In Denying Anderson's Motion To Remove Ohana As Guardian, The Superior Court Ordered Anderson To Pay Attorneys' Fees And Costs Incurred By The Guardianship Estate.

The superior court commissioner denied Anderson's motion to remove Ohana as guardian on June 19, 2012, and awarded the guardianship estate reasonable attorneys' fees and costs under RCW 11.96A.150. CP 1557-1562. Ohana filed a fee petition to approve the amount of the fees and costs under the lodestar measure. The superior

court entered judgment for \$4,411.50. CP 1430, 1432-3. Appellant Richard Denny filed a motion for revision of the June 19, 2012 Order, which was denied September 7, 2012 by Judge Sharon Armstrong, who affirmed the award of fees and costs against Anderson, and made an additional fee award against Richard Denny. CP 1414-1416.

IV. ARGUMENT

A. The Standard Of Review.

Since Anderson challenges the superior court's interpretation of RCW 4.84.210 and RCW 11.96A.150, his claimed errors should be reviewed *de novo*. As a question of statutory interpretation, this Court reviews *de novo* whether a trial court properly ordered security for attorney fees under RCW 4.84.210. White Coral Corp. v. Geyser Giant Clam Farms, LLC, 145 Wn. App. 862, 866, 189 P.3d 205 (2008), review denied, 165 Wn.2d 1018, 199 P.3d 411 (2009) (affirming trial court's dismissal of action upon failure of foreign plaintiff to post \$125,000 security for costs for defendant's prospective attorney fees).³ Similarly, although the abuse of discretion standard typically applies to the review of

³ Whether there is competent proof to support the amount of the bond would be reviewed for abuse of discretion, White Coral Corp., 145 Wn. App. at 869; however, Anderson did not challenge the amount of the bond. See *Anderson II Brf. at 10-12*.

a superior court's fees and costs award,⁴ Anderson's challenge to the application of RCW 11.96A.150 to guardianship proceedings raises a question of law to be reviewed *de novo*.

B. The Superior Court Did Not Err In Ordering Anderson To Post A Nonresident Plaintiff Security Bond.

Anderson's Assignment of Error 2 contends: "The Superior Court erroneously granted an order requiring Anderson to post \$50,000 bond." *Anderson Brf. at 3*. Anderson misreads the superior court order. The amount of the bond was \$35,000. Ohana asked for \$50,000, but only \$35,000 was ordered. CP 980-983. 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 meaning is nevertheless clear, and this clerical mistake "may be corrected by the court at any time[.]" CR 60(a).

The superior court did not err in requiring Anderson to post bond. 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. The statutory maximum is \$200, but the trial court may order additional security beyond that amount where an independent basis in contract, statute, or equity allows. White Coral Corp., 145 Wn. App. at

⁴ See, e.g., In re Guardianship of McKean, 136 Wn. App. 906, 918, 151 P.3d 223 (2007).

867. Under RCW 11.96A.150, a trial court has discretion to award attorney fees to any party in a guardianship action. This statute forms an independent basis by which the trial court could ultimately award attorney fees to the guardianship estate. Therefore, the trial court could properly require additional security for attorney fees under RCW 4.84.210.

Anderson does not challenge the amount of the bond, but asserts that he is beyond the reach of RCW 4.84.210 because he “has no legally protectable interest in this guardianship proceeding and derives no benefit or protection from the relief sought solely for the Ward.” *Anderson II Brf. at 11*. The fact that Anderson, by his own admission, has nothing at stake in this case reinforces the need to obtain some security for the loss that may be suffered by the guardianship estate in responding to Anderson’s claims. Anderson’s status as the alleged “next friend” for Mrs. Denny was never recognized by the superior court; therefore, the superior court did not err in requiring Anderson in his individual capacity to post bond under RCW 4.84.210.

C. The Superior Court Did Not Err In Ordering Anderson To Pay Reasonable Attorneys’ Fees And Costs To The Guardianship Estate.

Anderson’s Assignment of Error 3 contends: “The Superior Court erroneously granted an order allowing, and entered judgment for, costs and fees against Anderson.” *Anderson Brf. at 3*. RCW 11.96A.150

permits the superior and 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). By its express terms, and as interpreted by the appellate courts, RCW 11.96A.150 applies in guardianship matters. See In re Guardianship of McKean, 136 Wn. App. at 918. Anderson’s argument that chapter 11.96A RCW does not apply in guardianship cases is frivolous.

Furthermore, even if RCW 11.96A.150 did not apply to this case, RCW 11.88.120(d) provides additional authority for the superior court’s award of attorney fees and costs. RCW 11.88.120(d) provides:

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

RCW 11.88.120(d).⁵ In the present case, 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

⁵ This provision was enacted during the pendency of this appeal. The prior version of RCW 11.88.120 provided that the court in reviewing a motion to remove a guardian had authority to grant “such relief as it deems just and in the best interest of the incapacitated person.” RCW 11.88.120(4). The text of the prior version of RCW 11.88.120 appears in the Appendix to Ohana’s brief in opposition to appellant Richard Denny’s opening brief.

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. CP 1560-1.

Based on these findings, RCW 11.88.120(d) provides an alternative basis to affirm the fee award, if this Court finds RCW 11.96A.150 unavailable.

Anderson is not beyond the reach of RCW 11.96A.150 and RCW 11.88.120 because he claims to be Mrs. Denny's "next friend." Anderson was never appointed or recognized by the superior court as Ms. Denny's "next friend." Moreover, RCW 11.88.120(d) does not exempt persons who petition on behalf of incapacitated persons from attorney fee awards and other sanctions. Anderson voluntarily subjected himself to the jurisdiction of the superior court, which includes its plenary power over the estates of incapacitated persons. His motion was found to be without justification and he was sanctioned for making false representations in support of his motion to remove the guardian. The superior court did not err in ordering Anderson to pay attorneys' fees, and this Court should follow suit.

D. Anderson Should Be Ordered To Reimburse Mrs. Denny's Guardianship Estate For Its Attorneys' Fees And Costs On Appeal.

Anderson's brief raises frivolous arguments that disregard

established law. He should be ordered to reimburse the guardianship estate for the attorney fees incurred responding to his brief pursuant to RCW 11.96A.150.

V. CONCLUSION

This Court should affirm the superior court's orders that required Anderson to post a \$35,000 nonresident security bond and to pay attorneys' fees of \$4,411.50 to the guardianship estate. In addition, the equities support ordering the appellant Thomas Anderson to reimburse Ella Nora Denny's guardianship estate for the reasonable attorney fees and costs incurred responding to his brief.

Respectfully submitted this 12th day of February 2016.

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In re the Guardianship of
ELLA NORA DENNY.

DECLARATION OF SERVICE

CHRISTINE JAMES certifies under penalty of perjury under the laws of the State of Washington that the following statement is true and correct:

On February 12, 2016, I caused a copy of Brief of Respondent Guardian Ohana Fiduciary Corporation in Response to Brief of Appellant Thomas Anderson (Individually And Not As The "Next Friend" for Ella Nora Denny); and this Declaration of Service, to be served on counsel of record for Richard Denny and *pro se* party Thomas Anderson, via electronic mail and regular U.S. mail, postage prepaid, and *pro se* party Marianne Zak, via electronic mail.

ORIGINAL

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Signed at Seattle, Washington on February 12, 2016.

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