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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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**NO. 69117-1-I**  
(consol. with No. 69610-6-I; linked with No. 70312-9-I)

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

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

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**REPLY OF APPELLANT THOMAS ANDERSON**

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Thomas Anderson, Pro Se Plaintiff  
1508 N. Yachats River Rd.  
Yachats, OR 97498-9514  
541-547-4014, anderson.litigation@gmail.com

2 May 2016

Reply, Thomas Anderson

69117-1-I

**TABLE OF CONTENTS**

I. STANDING AS NEXT FRIEND,  
Ward Appeal-1 Resp. pp. 16 - 19 ..... 1  
    A. Limited Discretion ..... 5  
    B. Prohibited Ex Parte Advisory Opinion ..... 6  
II. CAPACITY OF PERSONS ..... 6  
III. BOND, Anderson Appeal, Resp. pp. 5 - 6. .... 7  
IV. TEDRA PLENARY AUTHORITY,  
Anderson Appeal, Resp. pp. 6 - 8. .... 8  
V. Certification Of Service ..... 9

**TABLE OF AUTHORITIES**

**CASES**

Whitmore v. Arkansas,  
495 U.S. 149, 163-164 (1990) ..... 1  
In re Ivarsson,  
60 Wn.2d 733, 736, 375 P.2d 509 (1962) ..... 3  
William v. Cleaveland,  
76 Conn. 426, 431-35, 56 A. 850, 852-54 (1904) ..... 3  
In re Guardianship of McKean,  
136 Wn. App. 906, 918, 151 P.3d 223 (2007) ..... 8

**STATUTES, RULES**

RCW 11.88.120 ..... 6  
RCW 11.88.120 ..... 7  
RCW 11.96A.150 ..... 8  
RCW 11.92 ..... 8  
RCW 11.88.120 ..... 8

**OTHER**

**SUPERIOR COURT RECORD**

Appeal-1: CP1 1-2021.

Appeal-2: CP2 1-491.

RP1: Hearings December 17, 2012; December 17, 2009; April 1, 2010; June 10, 2010; June 25, 2010; December 17, 2010; and March 31, 2011.

RP2: Hearing March 23, 2012.

RP3: Hearing March 29, 2012.

RP4: Hearing April 24, 2012.

RP5: Hearing April 27, 2012.

RP6: Hearing May 10, 2012.

RP7: Hearing May 16, 2012.

RP8: Hearing May 31, 2012.

RP9: Hearing August 24, 2012.

RP10: Hearing September 14, 2012.

RP11: Hearing January 24-25, 2013.

## I. STANDING AS NEXT FRIEND

### WARD APPEAL-1 RESP. PP. 16 - 19

OFC contends that the basic criteria for Next Friend standing on appeal are not satisfied. (1) OFC suggests that Mrs. Denny's partial incapacity has not been clearly established. (2) OFC suggests that Mrs. Denny is represented by an independent attorney not hostile or otherwise in conflict with her claims against OFC — despite its vociferous opposition to the request for appearance in these appeals by attorney Elena Garella. (3) OFC admits that Anderson is a disinterested person to these proceedings, and has no conflict of interests — such as OFC independent conduct outside the scope of authority and duty to the guardianship, which is *prima facie* hostile to the interests and legally protectable rights of Mrs. Denny. (4) OFC suggests that it is the adequate substitute for Anderson, in representing Mrs. Denny's substantial claims against itself. "Mrs. Denny's interests and retained rights are adequately represented by the Guardian." [CP 1855 ¶11].

OFC quotes *Whitmore v. Arkansas*, 495 U.S. 149, 163-164 (1990), but conveniently conceals that opinion pertains to federal habeas corpus cases: "A 'next friend' does not himself become a party to the habeas corpus action"; "Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for 'next friend' standing"; "if there were no restriction on 'next friend' standing in fed-

eral courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of ‘next friend’; “the scope of any federal doctrine of ‘next friend’ standing is no broader than what is permitted by the habeas corpus statute, which codified the historical practice.”

But the court in *Whitmore*, at 165, does make a general statement of standing (underscore added): “in keeping with the ancient tradition of the doctrine, we conclude that one necessary condition for ‘next friend’ standing in federal court is a showing by the proposed ‘next friend’ that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability.”

The record is clear that Mrs. Denny is partially incapacitated, and lacks access to the courts through an attorney independent of the hostile conduct by OFC. The “significant relationship” test is to prevent total strangers from interfering with the course of justice for their own self serving interests — in federal habeas corpus actions on capital cases.

OFC raises the issue that the 25 Jan. 2013 order disallowed Anderson as Next Friend. OFC cites no violation of that order, which clearly reflects the commissioner’s belief and incorporates prior oral statements that Next Friend standing is not recognized under Washington law: “Even if Washington courts recognized ‘next friend’ standing in guardianship matters...” [CP 1855 l.11]. “Even if” means “but they don’t.”

The commissioner's confusion about the law permeated and tainted the proceedings. E.g., [RP 6, p. 7 l. 25 to p. 8 l. 3]:

...his objections on behalf of Ms. Denny as next friend or whatever he wants to call himself, to what was occurring in the case. This has created no end of confusion for this court as to the proper procedure to follow.

The legal conclusions in the order are erroneous. The applicable standard in exercising power on behalf of a ward is substituted judgment, not best interests or the public interest [See, CP 1855 ¶¶ 8 - 9].

“Mrs. Denny’s interests and retained rights are adequately represented by the Guardian.” [CP 1855 ¶11]. As a matter of law, OFC cannot concurrently defend its actions hostile to Mrs. Denny, and adequately represent her interests against itself. A guardian may be disqualified [from legally representing a ward] by an interest hostile to that of the ward. *In re Ivarsson*, 60 Wn.2d 733, 736, 375 P.2d 509 (1962); citing with approval, *William v. Cleaveland*, 76 Conn. 426, 431-35, 56 A. 850, 852-54 (1904) and cases cited therein, which explains (citations omitted):

Neither the prochein ami nor the guardian ad litem are the real parties to the actions which they may prosecute or defend. Such suits are conducted by them in the name of the infants whom they represent, and not in their own names. ...

At common law, infants were required to both sue and defend by guardian. In England they were authorized by statute to sue by next friend as well as by guardian. The rule established by the statute of Westminster became part of our common law. The remedy thus given has been held to be cumulative, leaving

it optional with the infant to sue either by guardian or next friend...

The powers and responsibilities of a next friend and of a guardian, in the prosecution of a suit for an infant, are the same. Indeed a guardian, in bringing an action for his ward, acts in the capacity of next friend of the ward, although not so designated in the complaint. The guardian and next friend in conducting a civil action are a "species of attorney whose duty it is to bring the rights of the infant to the notice of the court," and the authority of each is limited to the proceeding in which he is appointed. Woerner's Amer. Law of Guardianship, pp. 64-71, §§ 21, 22. ...

When a general guardian has been appointed by a Court of Probate he is usually the proper person to represent the infant plaintiff in such action. But there are frequently cases when the infant may properly sue by next friend, notwithstanding the existence of such guardian, as when the guardian is ... disqualified by interest hostile to that of the infant, or is for other reasons an improper or unsuitable person to prosecute such actions in behalf of the ward. In such cases, and in the absence of any statute requiring infants to sue by probate guardian, there seems to be no good reason why actions and appeals may not at least be commenced by an infant by next friend. Reeve's Domestic Relations, 264; Woerner's Amer. Law of Guardianship, p. 65, § 21...

[I]t is not necessary that a *prochein ami* should receive authority from any court to enable him to commence an action in behalf of an infant. ...

It was not the province of the Court of Probate to decide whether an appeal ought to be taken from its own decrees, nor whether the circumstances of this case were such as to permit the minor to prosecute it by next friend, instead of by the guardian appointed by the Court of Probate of the district of Chatham, nor whether the next friend who moved for the appeal was a suitable person to represent the infant in the prosecution of the appeal. ...

It is for the benefit of infants who have no guardians, or such as from particular circumstances cannot or will not sue for them, as the case may require, to admit their suits by *prochein ami*; whose power and responsibility relative thereto, are the same as guardians. And there can be no danger to the infant from such practice; for the court, under whose inspection the suit is prosecuted, is bound to take care for the infant; and, if the *prochein ami* is not a responsible and proper person, or misconducts the suit, or institutes one not apparently for the benefit of the infant, will displace him, and, if need be, appoint another.

#### **A. Limited Discretion**

While a lower court has discretion to find a next friend unsuitable and disallowed, that discretion is rationally limited at common law and equity. In this case, OFC's actual conduct, and thus its interests, were adverse and hostile To Mrs. Denny. Thus, OFC was disqualified from representing Mrs. Denny, on her claims against OFC.

The lower court had discretion to disallow Anderson as next friend. But it did not have legal authority to continue to hear OFC, *ex parte*, without appointing a qualified independent representative for Mrs. Denny. Thus, the lower court abused its discretion by: (a) failing to admit an independent representative for Mrs. Denny; and (b) proceeding *ex parte* to hear and decide the matters in which OFC was adverse and hostile to Mrs. Denny — while she was precluded from being heard by a non-hostile representative.

The lower court's discretion was further limited by the applicable standard of substituted judgment. The lower court's discretion in disal-

lowance was limited to whether Mrs. Denny's Next Friend was executing substituted judgment on her behalf — not whether the effects of representation were in the best interests of her estate or the public interest.

**B. Prohibited *Ex Parte* Advisory Opinion**

Anderson was long ago precluded from appearing in the lower court, for want of posting a \$50,000 bond. Nine months later, the order disallowing Anderson as next friend was conducted *ex parte* (one side only, without hearing Anderson) [CP 1785 - 1786], and was a prohibited advisory opinion [CP 1784 - 1785]. That is an error of law, in violation of procedural process due Mrs. Denny.

**II. CAPACITY OF PERSONS**

In the event that Next Friend status was affirmatively disallowed, Anderson individually joined in filing the motion to replace guardian, under “any person” jurisdiction, and the interlocutory matters thereon. Anderson was never heard on the motion to replace. The Court chose to disregard procedure and conduct an *ex parte* hearing, rather than make a preliminary decision on the motion itself. The Motion to Reconsider, and all other matters, were not under RCW 11.88.120 jurisdiction, and were exclusively filed on behalf of Mrs. Denny by Anderson acting as her Next Friend.

### III. BOND

#### ANDERSON APPEAL, RESP. PP. 5 - 6.

The court order plainly states: “2. Thomas Anderson shall obtain a bond of \$50,000...” [CP 982 ¶2]. The alternative was \$35,000 cash deposit.

OFC does not address the term “plaintiff” and cites no authority explaining how a person without any legally protectable interest in an action can be a plaintiff, as required by the statute. The term is unambiguous. A “plaintiff” must assert a justiciable controversy, which requires the suffering of infringement or harm to legally protectable interest. It would seem simple enough. As defined in Black's Law Dictionary, p. 1150, (6th ed. 1990):

Plaintiff. A person who brings an action. The party who complains or sues in a civil action and is so named on the record. A person who seeks remedial relief for an injury to rights; it designates a complaint. *Vancouver v. Jarvis*, 76 Wn.2d 110, 113, 455 P.2d 591 (1969).

The guardianship was not a civil action which Anderson brought or commenced. OFC does not dispute that Anderson has merely been a nominal party. The RCW 11.88.120 motion to replace guardian was not an action, and Anderson did not seek remedy for harm he suffered.

#### **IV. TEDRA PLENARY AUTHORITY**

##### **ANDERSON APPEAL, RESP. PP. 6 - 8.**

OFC contends: “By its express terms, and as interpreted by the appellate courts, RCW 11.96A.150 applies in guardianship matters.” Citing, *In re Guardianship of McKean*, 136 Wn. App. 906, 918, 151 P.3d 223 (2007). OFC misrepresents the holding in that case and misdirects the court. The applicability is explained by, *McKean* at 914 (underscore added):

RCW 11.96A.020(2) grants the court “full power and authority to proceed with estate administration and settlement...

Chapter 11.96A RCW applies “to disputes arising in connection with estates of incapacitated persons unless otherwise covered by chapters 11.88 and 11.92 RCW. RCW 11.96A.080(2).

Here, the vast majority of matters adjudicated in the lower court were on limited guardianship of the person. The citation upon which OFC relies specifically explains that TEDRA applies only to estates, and expressly excludes those estates governed by RCW 11.88 or 11.92.

OFC does not dispute the equitable arguments made by Anderson. In particular, that costs and fees are not taxable since it has unclean hands for culpable conduct, as alleged.

The American system requires explicit authority for taxation of costs and fees. OFC Cites RCW 11.88.120(d), but acknowledges that it

was not in effect at the relevant time, was not cited in the order at issue,  
and cites no authority for retroactive application.

**V. CERTIFICATION OF SERVICE**

I certify that on this date the foregoing papers were served on the  
following persons in a first class postage paid cover:

- **Marianne Zak**, 32101 Weston Dr., Beverly Hills, MI 48025;
- **Douglas Schafer**, PO Box 1134, Tacoma, WA 98401;
- **Carol Vaughn**, 601 Union St. Ste. 3232, Seattle, WA 98101.

Dated: 2 May 2016  
Lincoln Co., OR

Signed:   
Thomas Anderson, Pro Se,  
1508 N. Yachats River Rd.  
Yachats, OR 97498  
541-547-4014,  
anderson.litigation@gmail.com