

73314-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re the Guardianship of James P. Halligan, an Incapacitated Person

VICTORIA E. HALLIGAN,

Appellant,

v.

NORTHERN TRUST COMPANY and DAVID N. DEL SESTO,

Respondents.

STATE OF WASHINGTON
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APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Contrary to Respondents allegations, Victoria Halligan is not, nor has she ever acted in her individual capacity or for her own benefit in this matter. Likewise, she is not attempting to make revisions to her parents' estate plan. Quite the opposite, in her role as Guardian, Ms. Halligan is trying to effectuate her parents' intent, as stated in their Trust Agreement, to exercise her father's right as Surviving Trustor to change trustees to a single, well-qualified corporate trustee willing to administer the Trust at substantially less expense than the current Co-Trustees are charging.

RCW 11.92.043(4) explicitly empowers Ms. Halligan as Guardian to "assert [her father's] rights and best interests." The trial court abused its discretion when it failed to give effect to the clear language of the Trust and prevented Ms. Halligan from exercising her father's right to remove and replace the Co-Trustees.

II. ARGUMENT

A. **It Is in Pat Halligan's Best Interest to Significantly Reduce the Trustee Fees.**

Respondents repeatedly criticize the basis for Victoria Halligan's request for court approval to replace the current trustees, which they characterize merely as "cost savings." Ms. Halligan is not clipping coupons or attempting to purchase a generic brand of laundry detergent to save a few cents. Her decision to change trustees to a well-qualified corporate trustee will save hundreds of thousands of dollars each year.

Respondents incorrectly state that the trial court “determined that ‘cost savings’ were not synonymous with Mr. Halligan’s ‘best interests.’” Respondents’ Brief, p. 3. The trial court made no such finding, nor is there any evidence to support such a finding.

Likewise, Respondents’ reliance on *In re Trust Estate of Powell*, 68 Wn.2d 38, 40, 411 P.2d 162 (1966) for the proposition that a court will not grant a request to change a trustee solely on the basis of cost, is misplaced. The *Powell* Court denied a beneficiary’s request to remove a trustee because the decedent, who established the testamentary trust, had an unquestioned right to select an individual trustee, rather than a corporate trustee. *Id.*, 40. However, the Washington Supreme Court was extremely concerned about the cost of the individual trustee and remanded the case with instructions that the trustee fees be reduced to a “just and reasonable fee.” *Id.*, 41-42.

There is absolutely nothing in the Trust regarding payment of fees, particularly the payment of fees in excess of what a single corporate trustee would charge. Nonetheless, Respondents imply that Pat and Marcia Halligan knew they would charge fees for their services and intended to pay them more than a single trustee would charge. There is no evidence to support this implication. Generally, under Washington law, where there is more than one trustee, the trustees split the fee that one trustee would charge. *Fred Hutchinson Cancer Research Center v. Holman*, 107 Wn.2d 693, 710, 732 P.2d 974 (1987).

Respondents also imply that no harm will come to Pat Halligan as a result of the one-time estate settlement fee, which between the two Co-Trustees is \$385,000, because it will all be charged to Marcia Halligan's half of the Trust and the separate Marcia S. Halligan Trust. In addition, the Co-Trustees argue that their regular fees, which are admittedly more than Whittier will charge, will not affect Pat greatly because half will be charged to principal. What those arguments ignore is that Pat is the beneficiary of Marcia's one-half of the Trust, and regardless of whether the fees are charged to income or principal, the fees are a drain on the cash in a Trust that the Co-Trustees admit has liquidity issues. CP 221.

The Guardian made several attempts to negotiate a lower fee with Northern Trust and Mr. Del Sesto. CP 193; 203. Northern Trust and Mr. Del Sesto were not willing to do so beyond a vague promise to look at the fees for future years. CP 75. As stated in the Declaration of Victoria Halligan submitted in conjunction with the Petition, Northern Trust and David Del Sesto's fees after the first year in which they have agreed to discount their trust administration fees to .94% or \$460,000 (while also charging a one-time estate settlement fee of \$385,000) would be a total of 1.6% or \$785,526 unless the Co-Trustees agree to a future discount. CP 72.

Whittier Trust, on the other hand, is willing to charge a lower, set fee and will not charge any estate settlement fee. Based on the estimated value of \$48.9 million for the Trust, Whittier's total fees for the first year of the Trust will be approximately \$302,120 at the agreed rate of .618%.

CP 147. In other words, Whittier's **total** fees for the first year will be over \$150,000 less than the current Co-Trustees intend to charge without taking into account the \$385,000 estate settlement charge. Therefore, it is clearly in Pat Halligan's best interests to change trustees.

B. The Trust Agreement Gives the Surviving Trustor the Ability to Remove and Replace the Trustee Without Cause.

Respondents devote a significant portion of their brief to the notion that Marcia and Pat Halligan, as Trustors, named David N. Del Sesto and Northern Trust as Co-Trustees of the Trust, and thus, must have intended them to serve. Respondents also make several conclusory statements about the intent of Marcia and Pat Halligan that are not contained in the Trust itself nor supported by any evidence in the record.

Similarly, the trial court found that Mr. Halligan, while he was competent, chose Mr. Del Sesto and Northern Trust, and found no "reason here to change the Trustee from what he chose." RP 17. But Respondents and the trial court ignore the intent of the Trustors. The interpretation of the Trust advanced by the Respondents and accepted by the trial court would essentially eliminate important language in the Trust, that the Trustors clearly intended to permit them to change the trustee.

The Trustors, Marcia and Pat Halligan, specifically included a provision in Paragraph B. of Article VIII, which allows the Surviving Trustor to "remove any Trustee hereunder." CP 328. The court's paramount duty in construing a testamentary instrument is to give effect to the maker's intent, which is to be determined from the instrument as a

whole. *In re Estate of Bernard*, 182 Wn. App. 692, 693-94, 332 P.3d 480 (2014). Paragraph B. of Article VIII of the Trust does not require the Surviving Trustor to provide evidence of “good cause” as Respondents assert. In fact, Paragraph B. of Article VIII of the Trust does not require the Surviving Trustor to provide any reason for removing and replacing the Trustee. The trial court abused its discretion in failing to give effect to Paragraph B. of Article VIII, which allows the Surviving Trustor or his guardian to remove and replace the Trustee.

Although the Trust does not specifically grant a guardian the right to exercise the Surviving Trustor’s power to remove and replace the Trustee, it also does not limit a guardian’s right to exercise that power. With certain limited exceptions, such as the right to make a will, the right to marry, and the right to vote, a guardian has the power to exercise the rights of the ward. *See, e.g., Guardianship of Lamb*, 173 Wn.2d 173, 195-96, 265 P.3d 876 (2011).

In fact, the provision of the Trust relied on by the Respondents to buttress their argument relating to the Trustors’ power to amend or revoke the Trust supports the conclusion that the guardian has the power to exercise the Surviving Trustor’s power to remove and replace the Co-Trustees. Article VII Paragraph C provides:

C. Powers Personal to the Trustors
The powers of the Trustors to revoke or amend this Agreement are personal to them and not exercisable by any other person on their behalf. However, a Court, after notice to the Trustee, may authorize a guardian or

conservator of either Trustor to exercise such Trustor's power to revoke or amend.

CP 328. There is no equivalent paragraph contained in Article VIII or elsewhere in the Trust making the power to remove and replace any trustee personal to the Surviving Trustor. CP 328-29. As a result, contract construction principles dictate that the right to remove and replace any trustee is not limited to the Surviving Trustor personally, but may also be exercised by a fiduciary, such as the guardian, on his behalf. *See, e.g., Comfort & Fleming Ins. Brokers v. Hoxsey*, 26, Wn. App. 172, 176, 613 P.2d 138 (1980).

C. RCW 11.98.039(4) Does Not Apply to the Trust.

Respondents' improperly cite to RCW 11.98.039(4) to assert that Ms. Halligan is required to show good cause to remove the Co-Trustees. RCW 11.98.039(4) starts by stating, "**Unless subsection (1), (2), or (3) of this section applies. . .**" In other words, if RCW 11.98.039(1), (2), or (3) applies to a change of trustee, RCW 11.98.039(4) does not apply. RCW 11.98.039(1) states that a successor trustee "selected pursuant to the procedure therefor established in the governing instrument is entitled to act as trustee except for good cause or disqualification." Because Paragraph B of Article VIII of the Trust contains a procedure for selection of a successor trustee, RCW 11.98.039(4) does not apply to this Trust.

D. Respondents Improperly Invoke a Provision of the Trust that Only Applies to David Del Sesto.

Respondents cite to a provision in Paragraph A of Article VIII of the Trust, which allows Mr. Del Sesto to remove and replace a corporate

fiduciary with another corporate fiduciary having funds under management of not less than 80% of the current corporate fiduciary. Respondents rely on that provision for the proposition that any new corporate trustee must have assets under management of at least 80% of the assets under management of the prior corporate fiduciary. CP 328.

Respondents argument ignores the plain language of Paragraph B. of Article VIII, which authorizes the Surviving Trustor to remove “**any Trustee acting hereunder**” and appoint “**any person, persons, or a corporation qualified to conduct a trust business in any jurisdiction**” as Successor Trustee. CP 328. In other words, the power to remove and replace the Trustee vested in the Surviving Trustor under Paragraph B is much broader than that vested in Mr. Del Sesto in Paragraph A. If Mr. Del Sesto’s interpretation of his power under Paragraph A were given credence, he would have the power to remove any corporate trustee appointed by Pat Halligan as Surviving Trustor, even if Pat removed Mr. Del Sesto as Trustee and replaced him with a corporate trustee. Such an interpretation of the Trust provisions is clearly inconsistent with the Trustors’ intent.

E. There Is No Evidence to Support Respondents’ Claim that the Co-Trustees Have a Long History with Pat Halligan.

Contrary to Respondents’ assertions, there is no evidence in the record demonstrating that Pat Halligan ever used David Del Sesto in an advisory role or that he had any history with Northern Trust and David Del Sesto, much less a long history. Likewise, Northern Trust and David

Del Sesto do not have a long history as Trustees of the Trust. Each accepted Trusteeship of the Trust in August 2014. CP 214. David Del Sesto has acted as accountant for the family and been involved with managing property held in various LLCs and LLPs owned in part by the Trust. However, there is nothing unique with respect to the assets held in the Trust. Replacing Mr. Del Sesto as Co-Trustee does not remove him from his current roles with the business entities. In fact, the Trust does not own any real estate other than two residential properties. The remainder of the real estate investments are held in LLCs and LLPs, all except one of which has a corporate general partner/manager.

Whittier Trust has experience managing trusts with similar investment structures and specializing in managing relationships with an average of \$30 million in assets. CP 135-138; 145-149. Whittier is well-qualified to step in and take over as Trustee.

F. Ms. Halligan Did Not Assert a Claim that Her Father Lacked Capacity to Execute the 2008 Trust Amendment.

Respondents mistakenly assume that Ms. Halligan made a claim that her father lacked testamentary capacity to execute the 2008 Trust Amendment. Ms. Halligan is not challenging the validity of the Trust. She is simply pointing out that the trial court's basis for denying Ms. Halligan's request to replace the Co-Trustees is not supported by the evidence. The trial court specifically ruled that, "Mr. Halligan, while he was competent, made these choices along with his wife, and he has chosen that it be this particular trust company." RP 17. While Mr. Halligan may

have had testamentary capacity to execute the Trust Amendment, the evidence shows he was not capable of meaningfully participating in any of the decisions made in the 2008 Trust Amendment, including the decision about who would serve as a successor trustee.

The Medical Report submitted as part of this guardianship proceeding was completed by Dan Fisher, M.D., who has been Pat Halligan's "primary care internist since 1994." CP 368-69. Dr. Fisher stated that Pat Halligan has "severe frontal lobe dementia . . . - present since at least 2008." CP 369. In particular, Dr. Fisher concluded that Pat Halligan "does not appear to have capacity to independently make decisions regarding personal care, finances, medical or legal issues . . . since at least 2008." CP 370. Consequently, Pat Halligan could not have participated in the selection of Northern Trust and David Del Sesto as Co-Trustees and the trial court's ruling is not supported by the evidence.

III. CONCLUSION

The trial court's ruling is not only not supported by the evidence, but the trial court abused its discretion when it failed to give effect to the Trust provision that gives Pat Halligan, or his Guardian, the right to remove and replace the Co-Trustees for any reason.

RESPECTFULLY SUBMITTED this 19th day of January, 2016.

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CERTIFICATE OF SERVICE

I, Susan Cartozian, hereby certify that on January 19, 2016, I served a copy of the foregoing document (*Appellant's Reply Brief*) on the parties listed below in the manner shown:

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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Dated this 19th day of January, 2016.


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