

73314-1-I

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

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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.

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APPELLANT'S OPENING BRIEF

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ASSIGNMENTS OF ERROR.....	2
III.	STATEMENT OF THE CASE .....	2
	A. The Halligan Trust Explicitly Entitles the Surviving Trustor or His Fiduciary to Replace the Trustees.....	2
	B. Mr. Halligan’s Guardian Has a Duty to Replace the Trustees of the Halligan Trust to Reduce Fees and Preserve the Estate for the Benefit of Mr. Halligan. ....	3
	C. Mr. Halligan Could Not Participate in Choosing David Del Sesto or Northern Trust to Serve as Successor Trustees. ....	5
IV.	ARGUMENT.....	6
	A. Standards of Review.....	6
	B. The Court Erred by Failing to Give Effect to the Provisions of the Halligan Trust.....	7
	C. The Trial Court Abused Its Discretion When It Substituted Its Judgment for the Informed Judgment of the Guardian...8	
	D. The Guardian Has a Duty to Change Trustees to Preserve the Estate for Mr. Halligan’s Care.....	9
	E. Pat Halligan Could Not Have Meaningfully Participated in the Decision to Name Mr. Del Sesto and Northern Trust as Successor Trustees in 2008.....	11
V.	CONCLUSION.....	12

## TABLE OF AUTHORITIES

### Cases

<i>Guardianship of Lamb</i> , 173 Wn.2d 173, 265 P.3d 876 (2011) .....	7
<i>Holland v. Boeing Co.</i> , 90 Wn.2d 384, 583 P.2d 621 (1978).....	6
<i>In re Estate of Bernard</i> , 182 Wn. App. 692, 332 P.3d 480 (2014).....	6, 7
<i>In re Fujimoto’s Guardianship</i> , 130 Wash. 188, 226 P.505 (1924).....	7, 8
<i>In re Guardianship of Johnson</i> , 112 Wn. App. 384, 48 P.3d 1029 (2002) .	6
<i>In re Marriage of Dodd</i> , 120 Wn. App. 638, 86 P.3d 801 (2004).....	6
<i>In re Michelson’s Guardianship</i> , 8 Wn.2d 327, 111 P.2d 1011 (1941) .....	8
<i>In re Rhone’s Guardianship</i> , 156 Wash. 62, 288 P.269 (1930) .....	8
<i>Nishikawa v. U.S. Eagle High, LLC</i> , 138 Wn. App. 841, 158 P.3d 1265 (2007).....	7
<i>State ex rel. Nat’l. Bank of Commerce v. Frater</i> , 18 Wn.2d 546, 140 P.2d 272 (1943).....	9

### Statutes

RCW 11.92.010 .....	6
RCW 11.92.040(5).....	8

## I. INTRODUCTION

The trial court erred when it denied Victoria Halligan's Petition to Authorize Change of Trustee. The Halligan Trust explicitly provides that the surviving trustor has the power to remove or change any trustee. Ms. Halligan, as Guardian for her father, became the surrogate decision maker for her father when she was appointed as guardian, and therefore can exercise Mr. Halligan's powers under the Halligan Trust.

The trial court also erred when it failed to give effect to the provisions of the Halligan Trust based on the court's mistaken belief that Mr. Halligan chose the trustees that are serving in that capacity and gave weight to that determination.

Although guardians act as officers of the court under judicial control, Washington courts generally follow the suggestions of the guardian and will pay particular attention to the guardian's views in determining the best course to pursue. Here, the trial court not only failed to follow the guardian's suggestion, but incorrectly interpreted the facts and improperly substituted its judgment for the judgment of the guardian, who has an affirmative duty to assert her incapacitated father's rights and best interests. Victoria Halligan provided substantial evidence showing that replacing the current trustees with Whittier Trust will significantly reduce the trustee fees to preserve the assets to provide for her father's care.

Ms. Halligan therefore appeals the trial court's Order denying her Petition to Authorize Change of Trustee and the Order Denying Guardian's Motion for Reconsideration.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred by refusing to give effect to the provision of the Halligan Trust that explicitly entitles the surviving trustor to remove or change any trustee.

2. The trial court erred when it denied the Petition to Authorize Change of Trustee based on the court's erroneous belief that Mr. Halligan chose the trustees currently serving in that capacity.

3. The trial court erred by preventing the Guardian from fulfilling her duty to protect the ward's estate from diminishing unnecessarily as the result of excessive trustee fees.

4. The trial court erred by substituting its judgment for the judgment of the Guardian, who properly exercised the ward's right to change the trustee.

## **III. STATEMENT OF THE CASE**

### **A. The Halligan Trust Explicitly Entitles the Surviving Trustor or His Fiduciary to Replace the Trustees.**

In 1996, Pat and Marcia Halligan created a revocable living trust entitled the Halligan Trust, which was amended and restated on September 26, 2008 (CP 309-349).

Article VIII, Paragraph B of the Halligan Trust provides:

The Surviving Trustor shall have the power to remove any Trustee acting hereunder, or to change any successor Trustee appointed hereunder, and the further power to appoint any person, persons, or a corporation qualified to conduct a trust business in any jurisdiction, as successor Trustee. . . . The removal of an acting Trustee shall be evidenced by delivery to such Trustee of a written notice of removal signed by the Surviving Trustor, a written appointment of the successor Trustee signed by the Surviving Trustor, and a written acceptance of the trust signed by the successor Trustee. . . .

(CP 328-329.) This power allows the Surviving Trustor, or a fiduciary acting on behalf of the Surviving Trustor, to change the trustee at any time. (CP 33.) The provision is intended to give the Surviving Trustor flexibility with respect to replacing trustees. (CP 33.) Nothing in the Halligan Trust requires the Surviving Trustor or his agent to show cause why any trustee should be removed. (CP 33.)

**B. Mr. Halligan's Guardian Has a Duty to Replace the Trustees of the Halligan Trust to Reduce Fees and Preserve the Estate for the Benefit of Mr. Halligan.**

Following the death of her mother, Victoria Halligan was appointed full Guardian of the person and estate of her father Pat Halligan on December 23, 2014. (CP 351.) Shortly after her appointment, Ms. Halligan determined that it is in the best interests of her father to exercise his power to remove the current Co-Trustees, David N. Del Sesto and Northern Trust and to appoint Whittier Trust Company as successor Trustee. (CP 352.) Whittier Trust's fees are substantially less than the current Co-Trustees are charging for their services. (CP 352.)

On the one hand, David Del Sesto's standard fee is .64% or 64 basis points of the value of the assets of the Halligan Trust for his services

as Co-Trustee. (CP 352.) In addition, Northern Trust's standard fee for the Halligan Trust is .96% or 96 basis points for its services as Co-Trustee, for a total of 1.60% or 160 basis points. (CP 352.) Mr. Del Sesto and Northern Trust agreed to discount their fees to .94% for the first year or about \$460,000. (CP 154.) However, Northern Trust and Mr. Del Sesto also required payment of a non-negotiable estate settlement fee of \$385,000 with respect to the death of Mrs. Halligan for total fees of \$845,000. (CP 34.) The Guardian made multiple attempts to negotiate a lower fee with Mr. Del Sesto and Northern Trust, but they refused to commit to any sort of a fee schedule beyond the first year of their administration. (CP 154.) Northern and Mr. Del Sesto argued that they only presented the fee schedule showing a combined fee of 1.6% per year as an illustration of what they would charge under their standard fee schedule. (CP 47.) However, that is the fee schedule which was shown to the Guardian on three separate occasions and the only basis on which she could determine the best interests of her father. (CP 47.) Based on the estimated value of the Trust assets the Co-Trustees' fees, after the first year of administration, will be approximately \$785,000 per year. (CP 47.)

On the other hand, Whittier Trust Company has agreed to serve as successor Trustee for a total of .618% or 61.8 basis points for all of its services. (CP 305). Whittier will not charge any estate settlement fee, much less an excessive fee of \$385,000. (CP 47.) Whittier's total fees for the first year of the Trust would have been \$302,120 at the agreed rate of .618%. (CP 47.) Whittier further agreed to continue to charge that rate in

future years. (CP 47.) Accordingly, Whittier's fees for the first year would have been more than \$535,000 less than the current Co-Trustees charged the Trust. (CP 38; 155.)

**C. Mr. Halligan Could Not Participate in Choosing David Del Sesto or Northern Trust to Serve as Successor Trustees.**

Respondents David Del Sesto and Northern Trust assert that Marcia and Pat Halligan choose them to serve as Successor Co-Trustees (CP 238, 270-71). Based on Mr. Halligan's Medical Report, however, it is highly unlikely that, when the Trust was amended in 2008, Pat Halligan could meaningfully participate in any way in choosing who would serve as Successor Trustee. (CP 37.)

In 2005, Mr. Halligan was diagnosed with frontal lobe dementia and was forced to close his dental practice that year because it was deemed unsafe for him to continue to practice due to his dementia. (CP 45.) According to the Medical Report submitted as part of this guardianship proceeding, "pt with severe frontal lobe dementia. Unable to reliably respond to questioning. (Emphasis in original.) (CP 358.) Unable to respond or report basic needs. Generally non verbal simple yes/no Answers or O.K. response despite question." (CP 358.) The Medical Report goes on to state "As noted above — **present since at least 2008.**" (Emphasis added.) (CP 358.) Likewise the Medical Report states, "pt does not appear to have capacity to independently make decisions regarding personal care, finances, medical or legal issues . . . since at least 2008." (CP 359.)

David Del Sesto and Northern Trust were designated as Successor Trustees of the Halligan Trust in an amendment executed on September 26, 2008. (CP 38.) At that time, Pat Halligan was suffering from severe frontal lobe dementia and did not have the capacity to make decisions regarding legal issues, including who would serve as successor trustee of his Trust. (CP 37.)

#### IV. ARGUMENT

##### A. Standards of Review.

Appellant Victoria Halligan assigns error to the trial court's refusal to give effect to the provision of the Halligan Trust that gives the surviving trustor or his fiduciary the right to change trustees. The Court of Appeals reviews de novo the interpretation of a trust document. *In re Estate of Bernard*, 182 Wn. App. 692, 697, 332 P.3d 480 (2014).

Ms. Halligan also assigns error to the trial court's reasoning for denying the Guardian's Petition to Authorize Change of Trustee because the trial court's basis is not substantially supported by the record. Challenged findings of fact are reviewed for substantial evidence. *In re Marriage of Dodd*, 120 Wn. App. 638, 643, 86 P.3d 801 (2004). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978).

The management of a guardianship by the superior court is reviewed for abuse of discretion. RCW 11.92.010; *In re Guardianship of Johnson*, 112 Wn. App. 384, 387-88, 48 P.3d 1029 (2002).

**B. The Court Erred by Failing to Give Effect to the Provisions of the Halligan Trust.**

A 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). A court applies general contract construction principles in doing so. *Id.* In interpreting a contract, it is well settled that the court is to give effect to **all** of the provisions on the agreement. *See, e.g., Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007).

By denying the Guardian's Petition to Authorize Change of Trustee, the trial court improperly ignored the clear provisions of Article VIII, Paragraph B, which allows the Surviving Trustor to "remove any Trustee hereunder" or to "change any successor trustee appointed hereunder, and the further power to appoint any person, persons or a corporation qualified to conduct a trust business as successor trustee." (CP 328-329.) Likewise, the Surviving Trustor's Guardian has the power to remove and replace the current Successor Co-Trustees. (CP 33.) Nothing in the Trust limits the Guardian's right to exercise that power. (CP 151.) In fact, with certain limited exceptions, such as the right to marry and the right to vote, a guardian has the power to exercise all the rights of the ward. *See, e.g. Guardianship of Lamb*, 173 Wn.2d 173, 195-96, 265 P.3d 876 (2011).

**C. The Trial Court Abused Its Discretion When It Substituted Its Judgment for the Informed Judgment of the Guardian.**

Although a guardian acts as an officer of the court under judicial control, “the control exercised by the court is largely theoretical; in actual practice the court knows very little concerning the guardian’s acts.” *In re Fujimoto’s Guardianship*, 130 Wash. 188, 192, 226 P.505 (1924). In *Fujimoto’s Guardianship*, the Washington Supreme Court observed that, “as a practical matter, the guardian is virtually a free agent so long as [s]he is guilty of no acts detrimental to [her] ward; that in handling the estate [s]he exercises [her] own judgment.” In this case, the Guardian did nothing detrimental to her father and carefully exercised her judgment in his best interests. *Id.*

Likewise, “in guardianship proceedings, the court will generally heed the suggestions of the guardian and will pay much attention to [her] views as to the best course to pursue.” *In re Rhone’s Guardianship*, 156 Wash. 62, 74, 288 P.269 (1930). Here, the trial court completely disregarded the Guardian’s recommendation to replace the trustees, and failed to pay any attention to the Guardian’s view that significantly reducing trustee fees (over \$500,000 in the first year alone) is the best course to pursue for Mr. Halligan. Instead, the trial court abused its discretion when it substituted its own judgment for the well-informed judgment of the Guardian.

**D. The Guardian Has a Duty to Change Trustees to Preserve the Estate for Mr. Halligan's Care.**

The guardian of an estate has a duty to “protect and preserve the guardianship estate.” RCW 11.92.040(5). Under Washington law, the real object and purpose of a guardianship is to preserve and conserve the ward’s property for his own use. *In re Michelson’s Guardianship*, 8 Wn.2d 327, 335, 111 P.2d 1011 (1941). “[G]reat care should always be taken to see that the estate of the ward is conserved to the utmost degree consistent with the ward’s welfare.” *In re Rhone’s Guardianship*, 157 Wash. 62, 72, 288 P.269 (1930). In particular, it is the duty of the guardian to protect the estate from diminution. *State ex rel. Nat’l. Bank of Commerce v. Frater*, 18 Wn.2d 546, 550, 140 P.2d 272 (1943). Likewise, “it is the guardian’s duty, by appeal or writ of review, to bring before this court orders or judgments [s]he believes will unlawfully diminish the estate in [her] custody.” *Id.* Accordingly, Ms. Halligan appeals the trial court’s Order denying her Petition to Authorize Change of Trustee, because retaining the trustees will needlessly diminish Mr. Halligan’s estate by more than \$500,000 in just the first year alone.

Exclusive of the one-time estate settlement fee of \$385,000, David Del Sesto and Northern Trust intend to charge \$460,000 in trustee fees for the first year of their administration of the Trust. (CP 154.) Whittier Trust, on the other hand, is willing to charge a lower, set fee and will not charge any estate settlement fee. (CP 155.) 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 47.) 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. (CP 155.)

Whittier Trust has experience managing trusts with similar investment structures and specializes in managing relationships with an average of \$30 million in assets. (CP 153.) Whittier is well-qualified to step in and take over as Trustee at substantially lower fees. (CP 153-154.)

Mr. Halligan explicitly retained the right to change the trustees of his Trust. (CP 151.) Mr. Halligan's Guardian believes that it is in the best interests of Mr. Halligan and his estate to exercise his right to remove David N. Del Sesto and Northern Trust Company as Co-Trustees. (CP 352-353.) The Halligan Trust is the primary source of assets available to support Mr. Halligan. (CP 353-354.) By changing trustees, the Guardian will be able to substantially lower the annual trustee fees from approximately 1.60% of the Trust assets to .62% of the Trust assets, thereby preserving the assets for Mr. Halligan's care. (CP 353.)

The trial court abused its discretion by preventing the Guardian from fulfilling her duty to protect her father's estate from these excessive trustee fees.

**E. Pat Halligan Could Not Have Meaningfully Participated in the Decision to Name Mr. Del Sesto and Northern Trust as Successor Trustees in 2008.**

The trial court erroneously concluded that Pat Halligan chose the current Co-Trustees when the Amendment and Complete Restatement of the Halligan Trust was executed in September 2008. (CP 37.) There is no evidence that Pat Halligan had any input in designating either David Del Sesto or Northern Trust as Successor Trustees. (CP 32-33.) Nor is there any evidence of a relationship between Mr. Halligan and David Del Sesto or Northern Trust, or that Mr. Halligan ever knew about, much less agreed to, the fees currently charged by the Co-Trustees. (CP 37.)

To the contrary, the evidence shows that Mr. Halligan was not capable of meaningfully participating in decisions regarding finances or legal issues when the Trust Amendment was drafted in 2008. (CP 358.) The only evidence of Mr. Halligan's participation in choosing the successor trustees are the Co-Trustees' self-serving statements. (CP 9-10.) These assertions fall far below the required substantial evidence. In fact, the trial court's basis for ruling as it did is not substantially supported by the record. (CP 358-359.)

Even if there was any evidence that Mr. Halligan participated in the selection of the Co-Trustees, the trial court abused its discretion by ignoring the Trust provision that allows the Surviving Trustor, through his Guardian, to change trustees for any reason at all. The trial court's abuse of discretion is magnified by the fact that changing trustees will save Mr. Halligan more than \$500,000 per year.

**V. CONCLUSION**

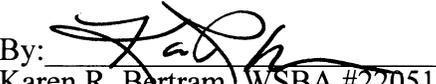
For all of the above stated reasons, Victoria Halligan requests that this Court reverse the trial court's January 26, 2015 Order Denying Petition to Authorize Change of Trustee and the February 23, 2015 Order Denying Motion for Reconsideration.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of October, 2015.

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**CERTIFICATE OF SERVICE**

I, Susan Cartozian, hereby certify that on October 15, 2015, I served a copy of the foregoing document (*Appellant's Opening 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 15<sup>th</sup> day of October, 2015.

  
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