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DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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

VICTORIA HALLIGAN,

Appellant,

v.

THE NORTHERN TRUST COMPANY and DAVID N. DEL SESTO,

Respondents.

ON APPEAL FROM ISLAND COUNTY SUPERIOR COURT
(Hon. Vickie I. Churchill)

RESPONDENTS' BRIEF

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I. INTRODUCTION

This appeal is the result of Victoria E. Halligan's ("Victoria Halligan") improper attempt to make significant revisions to the thoughtful and precise estate plan that her parents, Marcia S. Halligan and James P. Halligan ("Mr. and Mrs. Halligan"), put in place for management of their complex financial assets and family dynamics when they would be no longer able to manage these matters for themselves. Victoria Halligan asked the trial court for authority, as her father's guardian, to remove the successor Co-Trustees selected by her parents. The trial court denied her request, both on her initial Petition of Guardian to Authorize Change of Trustee and, again, on her Motion for Reconsideration, finding that removal of the currently serving Co-Trustees was not in her father's best interests. Victoria Halligan cannot meet her burden of showing that the trial court abused its discretion and, therefore, the trial court's Orders should be affirmed.

On September 26, 2008, Mr. and Mrs. Halligan amended and restated their existing revocable trust agreement. In their "Amendment to and Complete Restatement of the Halligan Trust" (the "Halligan Trust" or "Trust"), Mr. and Mrs. Halligan named two successor Co-Trustees to serve when they could no longer do so themselves: David N. Del Sesto, CPA ("Mr. Del Sesto"), with whom Mr. and Mrs. Halligan and Mrs.

Halligan's father, Raymond Spehar, had a decades-long professional relationship, and The Northern Trust Company ("Northern Trust"), which had been serving as investment advisor to Mr. and Mrs. Halligan (collectively, the "Co-Trustees"). Although Mr. and Mrs. Halligan were free to provide their children roles in connection with their estate planning, they chose not to do so; accordingly, the Halligan Trust does not provide the Halligan children (including Victoria Halligan) with any control over either Trust assets or Trustee selection.

After Mrs. Halligan died in August 2014, and because Mr. Halligan lacked capacity at that time to serve as trustee, Northern Trust and Mr. Del Sesto accepted their roles as Co-Trustees of the Halligan Trust on August 28, 2014. Victoria Halligan was appointed as guardian for Mr. Halligan on December 23, 2014. Almost immediately, she filed a petition in her capacity as guardian seeking authority to remove the Co-Trustees, based solely on her assertion that she had found another professional trustee who she believed could perform fiduciary services at a lower cost. On January 26, 2015, the trial court specifically found that there was no basis for removing the Co-Trustees selected by Mr. and Mrs. Halligan. Victoria Halligan's Motion for Reconsideration emphasized a new claim that Mr. Halligan lacked capacity to make a trustee selection

six years earlier, in 2008.¹ Following oral argument on February 23, 2015, the trial court again found that Mr. Halligan's best interests were served by retaining the Co-Trustees and denied the Motion for Reconsideration. In light of Victoria Halligan's failure to meet the clear, cogent and convincing burden of proof necessary to overcome the presumption of capacity, the trial court correctly rejected Victoria Halligan's incapacity claim, as well.

The trial court had before it the specific provisions of the Halligan Trust that limited the authority of anyone other than: (i) Mr. and Mrs. Halligan, personally, or (ii) Mr. Del Sesto, to remove the Co-Trustees selected by Mr. and Mrs. Halligan, as well as the evidence of Mr. Del Sesto's extensive prior experience managing the Trust's assets. In contrast, Victoria Halligan offered no evidence of wrongdoing by the Co-Trustees. Accordingly, the trial court was well within its discretion when it determined that "cost savings" were not synonymous with Mr. Halligan's "best interests." The trial court's rulings were consistent with longstanding Washington law. *See In re Trust Estate of Powell*, 68 Wn.2d 38, 40, 411 P.2d 162 (1966) (" . . . the fact remains that [the trustor] had

¹ Victoria Halligan made this assertion for the first time, and without any evidentiary support, in her Motion for Reconsideration, in which she purported to rely on the sealed report of an examination performed on Mr. Halligan in August 2014, six years after his execution of the Halligan Trust in September 2008. At no time have the Co-Trustees ever been provided with a copy of the sealed medical report. There is no evidence in the record that the author of the medical report examined Mr. Halligan in 2008.

the unquestioned right to select an individual to be the trustee, even if [the trustee selected] would be more expensive and less efficient than [a different trustee]. The request for a change of the trustee was properly denied.”).

On appeal, Victoria Halligan reiterates the arguments she made to the trial court. In light of the admissible evidence, the Halligan Trust’s provisions related to trustee removal, Washington guardianship law, and Washington trust law, the trial court made a sound decision and did not abuse its discretion. This Court should deny Victoria Halligan’s appeal and affirm the rulings below.

II. COUNTERSTATEMENT OF THE ISSUES

1. Has Victoria Halligan met her burden to show that the trial court abused its discretion when it declined to remove the successor Co-Trustees selected by Mr. and Mrs. Halligan based solely on Victoria Halligan’s argument that trustee fees could be lowered by their removal?

2. Did the trial court abuse its discretion when it determined that removal of the successor Co-Trustees selected by Mr. and Mrs. Halligan was not in Mr. Halligan’s best interests?

3. Did Victoria Halligan meet her burden of presenting the trial court with admissible, clear, cogent, and convincing evidence in support of her (untimely-made) claim that Mr. Halligan lacked capacity in

2008 when he and his wife jointly selected Northern Trust and Mr. Del Sesto as successor Co-Trustees of the Halligan Trust?

III. COUNTERSTATEMENT OF THE CASE²

A. **The Halligan Family, the Creation of the Halligan Trust and the Assets of the Halligan Trust.**

Mr. Halligan was married to Mrs. Halligan from 1967 until her death on August 10, 2014. Together they had three children: Victoria Halligan, Denisia Halligan, and Christopher Halligan, who are all adults now. CP 310. Victoria Halligan serves as guardian of Mr. Halligan's person and estate, pursuant to her December 23, 2014, appointment by the Island County Superior Court. CP 304.

Mr. and Mrs. Halligan originally established the Halligan Trust in 1996; they completely amended and restated their trust on September 26, 2008. CP 304; CP 309-349. The Halligan Trust provided that, upon the death of the first spouse, its assets would be divided, with half funding a Survivor's Trust, and the other half divided between a Decedent's Trust and a Marital Trust. CP 312-14. As the surviving spouse, Mr. Halligan is entitled to receive all of the income from the Decedent's, Marital and

² Victoria Halligan's brief improperly cites to her own argument, as made to the trial court, rather than to testimony or admissible evidence. *See, e.g.*, Brief of Appellant at pp. 3-4 (citing to her own Petition rather than testimony or documents regarding the amount of Mr. Del Sesto's, Northern Trust's, and the proposed replacement trustee's potential fees); *id.* at p. 4 (citing to her Reply in Support of Petition rather than testimony or documents regarding agreements to discount fees); *id.* at p. 5 (citing to her own Motion for Reconsideration rather than testimony or documents regarding Mr. Halligan's ability to choose successor trustees).

Survivor's Trusts. He is also entitled to receive discretionary distributions of principal, subject to specific standards set forth in the Halligan Trust instrument. CP 314-16.

The assets of the Halligan Trust are substantial and complex. CP 086.³ At the time of Mrs. Halligan's death, they included fractional interests in limited partnerships, limited liability companies, a corporation, promissory notes, cash, and securities. The partnerships and limited liability companies, whose interests are held in the Trust, own and operate commercial real estate, a strip shopping center, an industrial building, two large shopping centers, several ground leases with national tenants, and unimproved land. *Id.* Mr. Del Sesto has managed these holdings for nearly 20 years, and is familiar with the commercial tenants, the service providers, the outside property managers, and the daily operations. He has been instrumental in negotiating financing, leases, sales, and purchases involving these assets. CP 086-87.

B. The Halligan Trust Has Express Provisions for the Succession, Removal and Replacement of Its Trustees.

The original Trustees of the Halligan Trust were Mr. and Mrs. Halligan. CP 328. On August 28, 2014, following Mrs. Halligan's death

³ This citation is to the unredacted version of the Declaration of David N. Del Sesto. Several of the filings before the trial court were placed under seal, with slightly redacted versions filed for the public record – but both versions are included in the Clerk's Papers. Throughout this brief, Respondents will cite to the unredacted versions of the relevant filing rather than to the redacted versions.

and Mr. Halligan's incapacity, Mr. Del Sesto and Northern Trust accepted their appointment as successor Co-Trustees (CP 68, 76; 215-216), pursuant to Article VIII, Paragraph A of the Trust.⁴ In addition, regarding the removal and replacement of trustees, Article VIII, Paragraph A also provides:

. . . At any time that a corporate fiduciary is serving as Trustee hereof, DAVID N. DEL SESTO shall have the right to remove the corporate fiduciary as Trustee hereof and appoint in writing another corporate fiduciary with funds under management of not less than eighty percent (80.0%) of the funds under management of the current corporate fiduciary as of the date of the change of corporate fiduciary.

CP 328.

Article VIII, Paragraph B of the Halligan Trust provides that the survivor of the original trustors can personally remove a successor trustee. CP 328-329, CP 351-52. It is relevant to note what is *not* in the Trust. There is *no* provision in the Halligan Trust that authorizes either: (i) a guardian to exercise the trustor's personal right to remove a trustee;⁵ or (ii)

⁴ Article VIII, Paragraph A of the Halligan Trust provides: "JAMES P. HALLIGAN and MARCIA S. HALLIGAN are appointed as Co-Trustees. In the event of the death, disability, refusal to serve, or resignation of either JAMES P. HALLIGAN or MARCIA S. HALLIGAN, then the remaining person is appointed as sole Trustee. In the event of the death, disability, refusal to serve, or resignation of both JAMES P. HALLIGAN or MARCIA S. HALLIGAN, then DAVID N. DEL SESTO and NORTHERN TRUST are appointed as Co-Trustees. In the event of the death, disability, refusal to serve, or resignation of DAVID N. DEL SESTO, then NORTHERN TRUST is appointed as sole Trustee." CP 328. Mrs. Halligan also named Northern Trust and Mr. Del Sesto as Co-Executors of her estate in her Will. CP 073.

⁵ Respondents do not argue that a guardian would have no recourse to the court to seek removal of a defalcating trustee. However, in this case, there is no such accusation;

a court to grant a motion by a guardian of a trustor to remove a trustee in the absence of the court finding that it is in the incapacitated trustor's best interests to make the change.⁶ Further, there is *no* authority in the Halligan Trust to replace a corporate trustee with a different corporate trustee that does not meet the rigorous solvency and stability criteria established by Mr. and Mrs. Halligan (*i.e.*, the Trust's requirement in Article VIII, Paragraph A that any replacement corporate trustee have no less than 80% of the funds that are under management by the current corporate trustee).

C. Mr. Del Sesto Has Been a Trusted Advisor to the Halligan Family and Managed the Assets of the Halligan Trust for More than Twenty Years.

Mrs. Halligan's father, Ray Spehar, was a successful real estate developer in Southern California. CP 087. In the early 1990s, Mr. Del Sesto began working for Mr. Spehar as his CPA. *Id.* The professional relationship between Mr. Spehar and Mr. Del Sesto grew, and in 1996 Mr. Spehar engaged Mr. Del Sesto to manage all of his investments and real estate holdings. *Id.* Over time, Mrs. Halligan began assisting her father,

Victoria Halligan's sole basis for requesting court approval to remove and replace the current trustees is that she has found a less expensive alternative, and the trial court specifically found that a change of trustee was *not* in Mr. Halligan's best interests. CP 353; Transcript of January 26, 2015 hearing, p. 17.

⁶ In contrast, although at the death of the first trustor, the Decedent's Trust and the Marital Trust became irrevocable and cannot be revoked or amended at all, Article VII, Paragraph C *does* permit the court to authorize a guardian or conservator to exercise the trustor's power to revoke or amend the Survivor's Trust established under the Halligan Trust. CP 328.

Mr. Spehar, with the major decisions involving the operations of the family holdings. CP 087-88. Mr. Del Sesto worked closely with Mrs. Halligan during the late 1990s and early 2000s. CP 088. When Mr. Spehar died in 2003, Mrs. Halligan inherited the bulk of his properties. At the time of Mrs. Halligan's own death in August 2014, the Halligan Trust held most of those interests. CP 088; 304.

Following Mr. Spehar's death, Mr. and Mrs. Halligan continued the trusted relationship with Mr. Del Sesto that Mr. Spehar had begun many years before. CP 088. Mrs. Halligan expressed confidence in Mr. Del Sesto's integrity and skills; Mr. and Mrs. Halligan continued to engage Mr. Del Sesto to manage the assets she inherited from her father. *Id.* Mr. Del Sesto handled nearly all aspects of Mr. and Mrs. Halligan's personal finances. *Id.*⁷ Denisia Halligan, Victoria Halligan's sister, testified that Mr. Del Sesto was completely trusted by their parents, that Mr. Del Sesto managed their parents' property "quite profitably," that Victoria Halligan had never been involved in any of their parents' business affairs, and that "[c]hanging trustees now, to someone selected by

⁷ In addition to naming Mr. Del Sesto as a successor Co-Trustee to the Halligan Trust, Mr. and Mrs. Halligan also named him as the sole trustee of the irrevocable trusts that they established in 2008 for each of their three children. CP 085-86.

Victoria, will increase her ability to attempt control over the Trusts, which my parents vehemently opposed.” CP 277-278.⁸

D. Mr. and Mrs. Halligan Selected Northern Trust Company and They Drafted the Halligan Trust to Specify Size and Stability for a Corporate Trustee that Victoria Halligan’s Proposed Replacement Does Not Possess.

In deciding upon an appropriate entity to serve with Mr. Del Sesto as successor trustee of the Trust, Mr. and Mrs. Halligan interviewed and considered several corporate fiduciaries, and chose Northern Trust due to its size, stability, and experience. CP 086, 089. In addition, Northern Trust had been managing Mr. and Mrs. Halligan’s securities investments for more than seven years at the time of Mrs. Halligan’s death. 1/26/15 VRP at 10 and 2/23/15 VRP at 8.⁹ Northern Trust has been in business for over 125 years, has offices in more than 60 locations in the United States including offices in Seattle and Southern California, and as of December 31, 2014 has over \$923 billion of personal and institutional funds under management for its clients. CP 067-68. Under the terms of the Halligan Trust, a replacement corporate trustee must manage assets at or exceeding

⁸ Mr. Del Sesto’s testimony was consistent: “To my knowledge, Victoria Halligan has never been involved in the management of her parents’ business affairs.” CP 086.

⁹ In rebuttal to Victoria Halligan’s false accusation that Respondents had mischaracterized Northern Trust’s pre-existing relationship with Mr. and Mrs. Halligan, Respondents reaffirmed that Northern Trust’s relationship as an investment advisor was of long standing duration. Further, Northern Trust has never asserted that it was named as a successor Trustee in the 1996 iteration of the Halligan Trust. *See* 1/26/15 VRP at 10 and 2/23/15 VRP at 8. Victoria Halligan never disputed that Northern Trust had been her parents’ investment advisor for more than seven years at the time of Mrs. Halligan’s death.

80% of that amount. CP 328. As discussed below, the corporate fiduciary Victoria Halligan proposed to replace Northern Trust and Mr. Del Sesto does not remotely satisfy that standard. CP 271-72.

E. The Combined Fees Charged By Northern Trust and Mr. Del Sesto Do Not Exceed the Fees that Northern Trust Would Have Charged Under its Standard Fee Schedule if Northern Trust Were the Sole Trustee.

As testified by Mr. Del Sesto and as provided for in the Trust, Mr. and Mrs. Halligan knew that Northern Trust and Mr. Del Sesto would charge fees for their services as trustees and nonetheless chose these successor Co-Trustees. CP 086; 329. As described in Northern Trust's letter of November 6, 2014, the Co-Trustees charged a one-time estate settlement fee during the first year following Mrs. Halligan's death, to compensate the Co-Trustees for their work during *the entire period* of estate administration of Mrs. Halligan's estate, irrespective of how long that work takes, including, for example, obtaining formal appraisals for all real properties and valuations for all business entities held by the Trust at the time of Mrs. Halligan's death; handling multiple outstanding debt obligations, some of which were imminently due when Mrs. Halligan died; completing a liquidity and diversification analysis of the Halligan Trust's assets; analyzing how best to pay or refinance outstanding debt; preparing and filing income tax returns, payment of income taxes; and

responding to third party interest in acquisition of various assets, preparing and filing the federal and Washington estate tax returns, participating in any necessary interaction with the IRS or the Washington Department of Revenue until a closing letter is issued, and funding the trusts. CP 221. The estate settlement services performed by the Co-Trustees have spanned a period of time that has already exceeded one year from the date of Mrs. Halligan's death and are not yet completed. *Id.*¹⁰

This one-time fee was designed to take into account both Northern Trust's and Mr. Del Sesto's contributions to the necessary estate settlement tasks and to track Northern Trust's standard one-time estate settlement fee schedule:

Based on the Estate Settlement Fee Schedule, our initial estimates indicate that your mother's gross estate has an estimated value of \$24.45 million (i.e. ½ of \$48.9 million) and as such, per the terms of the Estate Settlement Fee Schedule, the fee for Northern Trust's service in this regard would be \$401,625. However, we have determined that a fee of \$260,000 will be charged for Northern's services. We understand that Dave's co-trustee fee for this aspect will be \$125,000. Please note that if Northern Trust was not serving with a co-trustee, our full fee would apply.

CP 75.

¹⁰ This Court can take judicial notice of the necessity of filing both federal and Washington state estate tax returns no later than fifteen months following Mrs. Halligan's death, which filings occurred November 10, 2015. IRC §6075a; IRC 6081a; RCW 83.100.050. The one-time estate settlement fee has been paid exclusively from "Mrs. Halligan's half" of the entire Halligan Trust (*i.e.*, the Decedent's/Marital Trusts) and not from Mr. Halligan's Survivor's Trust. CP 069. Thus, this one-time estate settlement fee does not diminish the assets of Mr. Halligan's Survivor's Trust. *Id.*

Northern Trust's letter of November 6, 2014, also set forth the arrangements for how the Co-Trustees would be compensated for their ongoing investment management and fiduciary management of the Trust assets during the first year following their assumption of roles as successor co-trustees, as follows:

As previously discussed, for the first year, Northern Trust agreed to charge a flat fee of \$285,000 (reduced from the fees per our Fee Schedules noted above of \$471,316), which includes the \$1,000 per entity title holding fee. During this first year, we will reassess this fee and make a determination as to what the recurring fee will be for future years. Again, please note that if Northern Trust was not serving with a co-trustee, our full fee for this first year would apply.

Due to the passing of your mother $\frac{1}{2}$ of this fee (i.e. \$142,500) will be borne by the trust that will hold your mother's $\frac{1}{2}$ share of the assets (this will be called the Marcia Halligan Administrative Trust), and $\frac{1}{2}$ of this fee (i.e. \$142,500) will be paid by the trust that will hold your father's $\frac{1}{2}$ share of the assets (this will be referred to as the Halligan Survivor's Trust). We understand that Dave's co-trustee fee in this regard will be \$175,000, such that \$87,500 will be charged to the Marcia Halligan Administrative Trust and \$87,500 will be charged to the Halligan Survivor's Trust.

CP 75-76 (emphasis in original). Thus, the successor Co-Trustees' *combined* fixed fees for investment management and fiduciary management of the Trust assets during the first year totalled \$460,000. This fee is equivalent to .94% (94 basis points) of the estimated gross value of the total Halligan Trust assets, which is *less than* what Northern

Trust's fee (alone) would have been for the Halligan Trust during its first year, based on Northern Trust's standard fee schedule. CP 83, 90.

As Northern Trust also advised in its November 6, 2014, letter, the recurring annual fee would be subject to review during the first year, after the actual values of trust assets had been ascertained, the sub-trusts had been funded, asset structure and complexities had been understood and/or simplified, and a liquidity plan had been formulated. CP 69. At no time did the Co-Trustees ever suggest that their combined recurring annual fee would exceed Northern Trust's standard fees for similar sized trusts.

F. Victoria Halligan's "Petition of Guardian to Authorize Change of Trustee" was Based Exclusively on Potential Cost Savings; Her Assertion Regarding Mr. Halligan's Alleged Lack of Capacity in 2008 was Not Made Until Her Motion for Reconsideration.

On January 5, 2015, Victoria Halligan petitioned the trial court to authorize her to exercise Mr. Halligan's personal power under Article VIII, Paragraph B to remove the Co-Trustees and replace the Co-Trustees with a different successor trustee of her choosing. *See* "Petition of Guardian to Authorize Change of Trustee" (the "Petition"). CP 350-55.¹¹

¹¹ The Petition relied on Victoria Halligan's authority under RCW 11.92.040, which recites the general duties of a guardian, including the duty to "protect and preserve the guardianship estate." RCW 11.92.040(5). Of course, the Halligan Trust is not part of the guardianship estate; neither Mr. Halligan nor his guardian hold title to the trust assets and Mr. Halligan's interest in the Halligan Trust remains that of a beneficial interest in the Trust income, along with potential discretionary principal distributions, if necessary for his health, maintenance and support. The Petition did not reference RCW 11.98.039(1), which governs appointment of trustees and provides: "The successor trustee named in the

Northern Trust and Mr. Del Sesto opposed the Petition, arguing, among other things, that: (a) Mr. Halligan's best interests would be served by preserving his and his wife's specific appointment of Northern Trust and Mr. Del Sesto as trustees; (b) Victoria Halligan could not meet her burden to show that it was in Mr. Halligan's best interests to remove the Co-Trustees; (c) the Trust instrument did not authorize a guardian to exercise Mr. Halligan's personal authority to remove trustees; and (d) Victoria Halligan lacked good cause under RCW 11.98.039(4) to remove the Co-Trustees. CP 126-131.

On January 26, 2015, following oral argument, the trial court noted that the standard was whether a change of trustee was in Mr. Halligan's best interests and concluded that there was no "reason here to change the Trustee from what [Mr. Halligan] chose." 1/26/15 VRP at 17. In determining that Victoria Halligan had not met her burden, the trial court considered declarations and attached exhibits from eight witnesses: Victoria Halligan (CP 304-349, CP 159-217), Mr. Del Sesto (CP 85-116), Denisia K. Halligan, a Halligan daughter (CP 277-79), Susan J. Merritt of Northern Trust (CP 67-84), Mark A. Hardtke of Northern Trust (CP 270-276), Paul A. Cantor of Whittier Trust Company of Nevada (CP 144-149),

governing instrument . . . is entitled to act as trustee except for good cause or disqualification." Nor did the Petition reference the Trust and Estate Dispute Resolution Act, Chapter 11.96A RCW ("TEDRA"), which provides the procedures for a petition to remove a trustee. CP 353.

Charles Adams, III of Whittier Trust Company of Nevada (CP 135-138), and Christopher Halligan, a Halligan son (CP 139-143).

Victoria Halligan then moved for reconsideration under CR 59(a)(7) and CR 59(a)(9), supported by her counsel's declaration. CP 044-53; 056-66. Victoria Halligan focused her reconsideration argument on an unsupported claim that, in 2008, Mr. Halligan lacked capacity to choose his trustees. CP 045, 050. Although Victoria Halligan has never provided any medical report to the Co-Trustees, this argument was plainly available to her when she filed her Petition, yet she failed to make the argument in a timely fashion and did not provide any evidence in support of it to the trial court.

Northern Trust and Mr. Del Sesto opposed the Motion for Reconsideration, arguing that Victoria Halligan had failed to raise her new "capacity argument" in a timely fashion and, in any event, Victoria Halligan lacked clear, cogent, and convincing evidence to overcome the presumption of Mr. Halligan's capacity in 2008. CP 016-18. The trial court denied the Motion following oral argument, noting that Mr. and Mrs. Halligan "determined, while they had capacity – how they wanted this to work. . . . the parties, while they had capacity, made their decision." The trial court concluded that it saw "no new information" and "no new argument" that would change its prior ruling. 2/23/15 VRP at 14.

IV. ARGUMENT

A. Summary of Argument.

Victoria Halligan's Petition implicates both Washington guardianship law and the law of trusts. Victoria Halligan acknowledges that: (i) a guardian's authority is limited to the authority granted to the guardian by the court; and (ii) the "North Star" for the court's decision is Mr. Halligan's "best interests." CP 352-53. In essence, Victoria Halligan submitted that potential "cost savings" was the sole factor that the court should consider in determining what course of action would be in Mr. Halligan's best interests. In doing so, Victoria Halligan is asking the court to remove the Co-Trustees of a Washington trust, who were selected by the trustors in their trust document. RCW 11.98.039(1) provides: ". . . The successor trustee named in the governing instrument . . . is entitled to act as trustee except for good cause or disqualification." Longstanding Washington case law is consistent: courts can only remove trustees for good cause, and a "trial court's decision in a trustee removal case will seldom be reversed absent a manifest abuse of discretion." *In re Estate of Ehlers*, 80 Wn. App. 751, 761, 911 P.2d 1017 (1996) (citing *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 716, 732 P.2d 974 (1987)).

Here, the trial court evaluated all of the evidence before it and found that Mr. Halligan's best interests are served by retaining Northern Trust and Mr. Del Sesto as Co-Trustees of the Halligan Trust. The trial court's decision on this issue must be reviewed for abuse of discretion. *In re Guardianship of Johnson*, 112 Wn. App. 384, 387-88, 48 P.3d 1029 (2002) (“An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court”) (citing *Hope v. Larry's Markets*, 108 Wn. App. 185, 187, 29 P.3d 1268 (2001))). Here, the trial court did not abuse its discretion under either the “best interests” standard applicable to the court's supervision of guardians or the “good cause” standard for removal under Washington trust law. This Court should affirm the trial court's decision.

Victoria Halligan argues that, because the Halligan Trust empowered Mr. Halligan to remove the Co-Trustees, she should be allowed to do so without a court's determination that removal of the Co-Trustees will be in Mr. Halligan's best interests. However, as a *guardian* (and, a guardian that Mr. Halligan did not select), her actions are always subject to the court's supervision and control under RCW 11.92.010 and the court's determination of what is in the best interests of her ward. There can be no dispute that a court cannot permit a guardian to act contrary to the best interests of an incapacitated person. The trial court's

oral ruling indicates that it based its decision on the best interests of Mr. Halligan and this decision is supported by overwhelming evidence.

B. The Trial Court Did Not Abuse its Discretion in Denying Victoria Halligan’s Request for Authority to Remove Northern Trust and Mr. Del Sesto as Co-Trustees Because the Evidence Supports the Trial Court’s Conclusion that Retaining the Current Co-Trustees Was in Mr. Halligan’s Best Interests.

RCW 11.92.010 provides that guardians “shall at all times be under the general direction and control of the court.” “The guardianship court ‘is said to be the superior guardian of the ward,’ and the guardian is an agent of the guardianship court.” *In re Guardianship of Knutson*, 160 Wn. App. 854, 864, 250 P.3d 1072 (2011) (quoting *Seattle-First Nat’l Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977)); *see also In re Guardianship of Cornelius*, 181 Wn. App. 513, 523, 326 P.3d 718 (2014). A superior court’s management of a guardianship is reviewed for abuse of discretion. *Cornelius*, 181 Wn. App. at 528. It is axiomatic that every action of the guardian must be in the ward’s best interests. *See generally, Matter of Guardianship of Hamlin*, 102 Wn.2d 810, 815, 689 P.2d 1372 (1984).

Victoria Halligan’s Petition sought the trial court’s permission to exercise an extraordinary power – to change the trustees of the Halligan Trust, who had been chosen by both her parents more than six years earlier. She presented evidence that another corporate trustee had offered

to provide trustee services at a lower cost, but she ignored the fact that her proposed corporate trustee did not meet the specific requirements of Article VIII, Paragraph A of the Halligan Trust, requiring that any new corporate trustee have “funds under management of not less than eighty percent (80.0%) of the funds under management of the current corporate fiduciary. . . .” CP 328. Victoria Halligan’s evidence did not persuade the court, which also had before it the following evidence:

- descriptions of the complex and substantial assets of the Trust (CP 086-87; 068);
- Mr. Del Sesto’s longstanding relationship with Mr. and Mrs. Halligan and his decades-long experience with and management of the Trust assets (CP 086-88);
- Mr. and Mrs. Halligan’s specific selection of Mr. Del Sesto and Northern Trust to be their trustees (CP 086, 089);
- Northern Trust’s investment into learning and understanding the complex trust assets (CP 068, 070; 271);
- the ongoing activity of the Co-Trustees, including handling debt obligations and obtaining formal appraisals (CP 068, 070);
- the immediate and time-sensitive matters facing the Halligan Trust, including preparing and filing tax returns and responding to third party interest in acquisition of various assets (CP 221);
- testimony from Victoria Halligan’s sister, Denisia, that Mr. Del Sesto was completely trusted by her parents, that he managed her parents’ property “quite profitably,” that Victoria Halligan had never been involved in any of their parents’ business affairs, and that their parents “vehemently opposed” any control by Victoria Halligan over their property (CP 277-278);

- evidence within the Trust instrument itself that showed the high degree of confidence that Mr. and Mrs. Halligan had in Mr. Del Sesto and Northern Trust, such as granting Mr. Del Sesto authority to appoint a successor corporate trustee and instructing Northern Trust to continue as sole trustee in the absence of Mr. Del Sesto (CP 328); and
- a thorough refutation of Victoria Halligan’s argument that the trustee fees would amount to 160 basis points (CP 090-91; 069).¹²

The trial court had *overwhelming* evidence that maintaining Northern Trust and Mr. Del Sesto as Co-Trustees was in Mr. Halligan’s best interests. The trial court did not abuse its discretion in denying Victoria Halligan’s Petition.

C. The Trial Court Did Not Abuse its Discretion in Denying Victoria Halligan’s Request for Authority to Remove Northern Trust and Mr. Del Sesto as Co-Trustees Because Victoria Halligan Failed to Produce Evidence of “Good Cause” to Remove the Co-Trustees.

Judicial removal of trustees has a statutory basis and a well-developed jurisprudence. RCW 11.98.039(1) provides:

Where a vacancy occurs in the office of the trustee and there is a successor trustee who is willing to serve as trustee and [] is named in the governing instrument as successor trustee . . . The successor trustee named in the governing instrument . . . **is entitled to act as trustee except for good cause or disqualification.**

¹² Victoria Halligan’s Appellate Brief incorrectly suggests that Northern Trust and Mr. Del Sesto intended to charge (and/or are currently charging) a combined fee of 1.60% (160 basis points) of the estimated gross value of the Halligan Trust assets. This is false. The compensation arrangements provided for .94% (94 basis points) during the first year. CP 083. Victoria Halligan offered absolutely no evidence that the fees would increase thereafter.

(Emphasis added).

Good cause may arise when a trustee breaches his or her fiduciary duties, when a trustee takes action under a conflict of interest, when a trustee generates bad will in litigation, and when a trustee harms trust beneficiaries. *See, e.g., In re Estate of Ehlers*, 80 Wn. App. 751, 760-61, 911 P.2d 1017 (1996) (referring to each of these actions by a trustee as potential cause for removal). Judicial removal of a trustee “must be necessary to save the trust.” *Bartlett v. Betlach*, 136 Wn. App. 8, 20, 146 P.3d 1235 (2006) (citing *Ehlers*, 80 Wn. App. at 761).

Finding that someone else may be a less expensive trustee, in the absence of any breaches of duty, is *not* in itself cause for a court to remove a trustee. *In re Trust Estate of Powell*, 68 Wn.2d 38, 39, 411 P.2d 162 (1966). In *Powell*, the Washington Supreme Court analyzed the situation where a trust beneficiary sought to remove the trustee of a testamentary trust, who was the nephew of the testator, and replace him with a corporate trustee on the grounds that a corporate trustee “would receive a lower fee and would do the work better.” *Id.* The Supreme Court’s analysis is concise, and its conclusion is unequivocal:

This suggestion, that the trustee be changed, seems to us sheer effrontery. Mary A. Powell had as much right to choose her trustee as she did her beneficiaries. If she had wanted a corporate trustee, she could have named one; instead, she

named her nephew, Charles O. Powell an elementary school principal, in whom she obviously place[sic] confidence. There is not the slightest suggestion of any lack of fidelity to this trust or incompetence in the performance of it. The lone objector says, in effect, that a corporate trustee would do it ‘cheaper and better.’ If that be true, the fact remains that Mary A. Powell had the unquestioned right to select an individual to be the trustee, even if an individual administration of the estate would be more expensive and less efficient than an administration by a corporate trustee. The request for a change of the trustee was properly denied.

Powell, 68 Wn.2d at 40.

Here, this Court should be guided by the reasoning and result in *Powell*. Victoria Halligan wishes to remove the trustees specifically named by the trustors exclusively on the basis that a different trustee might charge lower trustee fees. And the conclusion is the same: a less expensive alternative alone is insufficient to force removal. Victoria Halligan presented no evidence of any other cause to remove Northern Trust and Mr. Del Sesto as trustees, much less “good” cause. Conversely, Northern Trust and Mr. Del Sesto presented ample evidence to demonstrate why they were selected by Mr. and Mrs. Halligan, how they are in the best position to serve as trustees, how they are affirmatively satisfying their fiduciary duties, and how their combined fees are less than what Northern Trust’s standard fee would have been, given the estimated value of the Halligan Trust during the first year following Mrs. Halligan’s

death. *See, e.g.*, CP 085-92; 067-71; 271. The trial court did not abuse its discretion in refusing to remove the Co-Trustees.

D. The Trial Court's Decision was Consistent with the Unambiguous Language of the Halligan Trust.

The trial court's oral ruling on January 26, 2015 indicated that the trial court correctly considered the central issue to be the best interests of Mr. Halligan, and had determined that Mr. Halligan's best interests are served by not authorizing Victoria Halligan to remove the Co-Trustees. 1/26/15 VRP at 17. Northern Trust and Mr. Del Sesto agree with Victoria Halligan's assertion that a court's paramount duty in construing a trust is to give effect to the maker's intent, which is determined from the instrument as a whole. *In re Estate of Bernard*, 182 Wn. App. 692, 693-94, 332 P.3d 480 (2014); *see also* RCW 11.97.020. However, in relying solely on Mr. Halligan's *personal* right to remove a trustee, Victoria Halligan ignores the Halligan Trust's other provisions, which, taken as a whole, demonstrate that the trial court correctly denied her Petition.

First, Article VIII, Paragraph A of the Halligan Trust specifically provides *Mr. Del Sesto* with the power to remove and replace the corporate trustee with one that has at least 80% of the amount of funds under management by Northern Trust. CP 328. This is a significant expression of Mr. and Mrs. Halligan's trust and confidence in Mr. Del

Sesto and Northern Trust, which has been ignored by Victoria Halligan in her “nomination” of a replacement corporate fiduciary that cannot meet the requirement of having “not less than eighty percent (80%) of the funds under management of the current corporate fiduciary.” CP 328. Selection of the corporate trustee proposed by Victoria Halligan would plainly violate the minimum requirements that Mr. and Mrs. Halligan established for replacement by someone other than themselves of the corporate trustee. Thus, even if Victoria Halligan, as guardian, had unsupervised authority to change trustees, the unambiguous language of the Trust would prohibit her nominee from serving in that capacity.

Second, the Trust specifically provides Mr. Del Sesto with authority that is independent of his role as trustee; that is, even if Mr. Del Sesto is not a trustee, he still has the authority to remove and replace the corporate trustee. *Id.* The authority granted to Mr. Del Sesto is similar to that of a “trust protector” or “statutory trust advisor” as it is now termed in RCW 11.98A.030(1)(h) (recognizing the designation of a person in a trust who has authority to appoint a successor trustee).¹³ Mr. Del Sesto testified:

. . . The Halligans included this provision to ensure that I could serve as a “watchdog” for the family and ensure that the corporate fiduciary was acting in the family’s best interests.

¹³ RCW 11.98A.030 is among the provisions of the Washington Directed Trust Act, which became effective in Washington on July 24, 2015.

CP 089. Additionally, in the same paragraph, Mr. and Mrs. Halligan provided that Northern Trust should remain in place as the sole trustee in the event that Mr. Del Sesto is no longer serving. CP 328. In sum, multiple provisions of the Trust serve to articulate Mr. and Mrs. Halligan's intent that Northern Trust and Mr. Del Sesto continue their service.

Third, in contrast to Article VII, Paragraph C of the Halligan Trust, which allows a guardian, with court approval, to seek amendment or revocation of the Survivor's Trust (in this case, applicable only to Mr. Halligan's Survivor's Trust, but not to the Decedent's or Marital Trusts, which became irrevocable upon Mrs. Halligan's death), the Halligan Trust has no language that empowers a guardian to exercise the trustor's power *to remove a trustee*. CP 328. This indicates that Mr. and Mrs. Halligan were very satisfied with their choice of successor trustees and wanted to "lock in" their choice to the very best of their ability.

Fourth, Mr. and Mrs. Halligan's intention that their children not have control over any aspect of the Halligan Trust is evident in the testimony of their daughter Denisia Halligan (CP 277-278), and Mr. Del Sesto (CP 086), both of whom emphasize that Mr. and Mrs. Halligan did not want their children making decisions for them or about their property.

Victoria Halligan misplaces her reliance on *In re Guardianship of Lamb*, 173 Wn.2d 173, 265 P.3d 876 (2011), which she incorrectly cites

for the proposition that a guardian has the power to exercise all of the rights of the ward with only limited exceptions. The question of a ward's rights in *Lamb* arose in a constitutional context, with the guardian asserting a right to compensation for political advocacy performed generally on behalf of the ward. *Lamb*, 173 Wn.2d at 195-196. Contrary to Victoria Halligan's discussion of this case, the *Lamb* decision declined to recognize a broad grant of authority for guardians to exercise their ward's rights, even constitutional rights. *Id.* As stated by the *Lamb* court in its opinion:

The guardian's opinion as to the ward's best interest is not dispositive — where there is a conflict . . . the superior court must resolve the conflict. *Hamlin*, 102 Wash.2d at 820–21, 689 P.2d 1372; *see also In re Guardianship of Ingram*, 102 Wash.2d 827, 842, 689 P.2d 1363 (1984) (“[T]he court need not place on any party any particular burden of proof or persuasion, nor give any presumption of validity to the petition of the guardian or guardian ad litem.”). Thus, while the guardian has the authority to “assert the incapacitated person's rights and best interests,” RCW 11.92.043(4), it remains at all times the responsibility of the court to make the decision as to the ward's best interest. *Ingram*, 102 Wash.2d at 842, 689 P.2d 1363. ***The goal of a guardianship is to do what the ward would do, if the ward were competent to make the decision in question.*** *Id.* at 838, 689 P.2d 1363.

Lamb, 173 Wn.2d at 191, n. 13 (emphasis added). *Lamb* is clear that a guardian ***is not*** entitled to exercise every right that her ward may have; that the court, not the guardian, is the ultimate decision-maker about what

is in the best interests of the ward; and that the guardian's opinion is not entitled to any presumption of correctness.

Here, we know "what the ward would do, if the ward were competent to make the decision in question," *see Ingram*, 102 Wn.2d at 842, *Lamb*, 173 Wn.2d at 191, n. 13, because we know what Mr. Halligan's trust instrument provides with regard to his selection of successor Co-Trustees and his selection of those empowered to remove trustees, with full knowledge that trustee fees would be charged by both Co-Trustees. CP 328-29.

The trial court's conclusion that Mr. Halligan's best interests are not served by removing Northern Trust and Mr. Del Sesto as Co-Trustees is consistent with *Lamb*. Further, because all evidence regarding Mr. and Mrs. Halligan's intent as trustors reflects their desire that: (a) Northern Trust and Mr. Del Sesto remain as Co-Trustees; and (b) their children not have control over any aspect of the Halligan Trust, the trial court did not abuse its discretion in denying Victoria Halligan's Petition to Authorize Guardian's Change of Trustee.

E. Because Victoria Halligan Failed to Overcome the Presumption of Capacity with Clear, Cogent, and Convincing Evidence, the Trial Court Properly Rejected Her Untimely Assertion that Mr. Halligan Lacked Capacity in 2008.

The trial court was right to reject Victoria Halligan's new "capacity" argument, because it was untimely and unsupported by admissible evidence. CR 59 is not designed as a vehicle for new theories or a second try at a failed petition. Under CR 59(a)(4), reconsideration is warranted only if the moving party presents new and material evidence that could not have been discovered with reasonable diligence prior to the court's ruling. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999). If the evidence was available but not offered, the party is not entitled to submit the evidence on reconsideration. *Id.* at 907; *see also Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) ("CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision."). In her initial Petition, Victoria Halligan could have, but did not, raise her argument regarding legal capacity. Under CR 59, the trial court was entitled to decline consideration of this new theory. *Wilcox*, 130 Wn. App. at 241.

Even if the argument of alleged "incapacity to select a trustee" had been timely, the determination of whether someone has capacity to

execute estate planning documents is a legal determination, not a medical decision. *See* RCW 11.88.010(1)(c) (“A determination of incapacity is a legal not a medical decision...”). Under Washington law, capacity is presumed, unless lack of capacity is shown by clear, cogent and convincing evidence. As the Washington Supreme Court held in *Page v. Prudential Life Ins. Co. of Am.*, 12 Wn.2d 101, 120 P.2d 527 (1942):

... to avoid a contract it is insufficient to show merely that the party was of unsound mind or insane when it was made, but it must also be shown that this unsoundness or insanity was of such a character that he had no reasonable perception or understanding of the nature and terms of the contract. The extent or degree of intellect generally is not an issue, but merely the mental capacity to know the nature and terms of the contract. . . everyone is presumed sane; and ...this presumption is overcome only by clear, cogent and convincing evidence.

Page, 12 Wn.2d at 109, citing and quoting 17 C.J.S., Contracts, p. 479, § 133. Accordingly, this Court should reject Victoria Halligan’s suggestion that Northern Trust and Mr. Del Sesto bear any burden at all with regard to Mr. Halligan’s capacity in 2008.

Finally, Victoria Halligan’s argument based on a sealed medical report finding that Mr. Halligan suffered from “severe frontal lobe dementia” in 2014, combined with the conclusory phrase “present since at least 2008,” is insufficient to constitute clear, cogent and convincing

evidence that Mr. Halligan lacked capacity to select a trustee in 2008.¹⁴ The trial court's finding that Mr. Halligan had capacity in 2008 when he selected Northern Trust and Mr. Del Sesto as successor Co-Trustees was consistent with Washington law and should be affirmed by this Court.

V. CONCLUSION

The trial court's decision to deny Victoria Halligan's request for authority to remove Northern Trust and Mr. Del Sesto as Co-Trustees of the Halligan Trust is supported by overwhelming evidence that removal is not in Mr. Halligan's best interests and is exactly consistent with Mr. Halligan's expressed intentions when he was competent. Thus, the trial court's decision was not an abuse of discretion and it should not be disturbed.

¹⁴ Victoria Halligan has filed a Supplemental Designation of Clerk's Papers with regard to certain "Sealed Personal Health Care Records," which are believed by Respondents to contain an August 2014 medical report. However, she has failed, both at the trial court level and on appeal, to provide a copy of this sealed document to Respondents. Because of her attempt to rely on "evidence" that has never been subject to cross-examination, this Court should disregard the contents of CP 367-370. Even if this Court does consider this document, which contains hearsay and conclusions about Mr. Halligan's alleged capacity in 2008 (more than six years prior to the report), that cannot possibly amount to clear, cogent and convincing evidence that would overcome the presumption of capacity.

RESPECTFULLY SUBMITTED this 30th day of November,
2015.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the United States and the State of Washington, that on November 10, 2015, I served a copy of the foregoing document on all counsel of record as indicated below:

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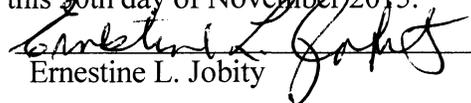
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