IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

IN THE MATTER OF THE ESTATE OF,	)	**No. 27861-1-III**
LEE C. JACKSON,	)	
	)	**Division Three**
Deceased.	)	
	)	
BRYAN L. JACKSON, Personal Representative of The Estate of LEE C. JACKSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
DIANE LOER, Individually, as Beneficiary, and as Successor Trustee of The James C. Jackson and Jacqueline C. Jackson Revocable Living Trust,	)	**UNPUBLISHED OPINION**
	)	
Respondents.	)	

Brown, J. ─ Diane Loer, individually and as beneficiary and successor trustee of the James C. and Jacqueline C. Jackson Revocable Living Trust (Trust), appeals the trial court's summary order requiring her to distribute Trust assets to Bryan Jackson, as

personal representative of Lee C. Jackson's estate. Ms. Loer and Lee Jackson were the surviving Trust beneficiaries. After James and Jacqueline Jackson died, but before Lee Jackson's share of the trust was distributed to him, Lee Jackson died. His personal representative, Bryan Jackson, Lee Jackson's sole child, requested distribution of the trust assets to Lee Jackson's estate. Ms. Loer refused, arguing the full proceeds from the Trust went to her because Lee Jackson passed away before distribution. After considering cross-motions for summary judgment, including the declarations of the parents' attorney, the trial court rejected Ms. Loer's arguments and ruled for Bryan Jackson. Ms. Loer contends (1) the court erred in construing the Trust not to require the trust beneficiary to survive the distribution of assets, (2) the court abused its discretion by considering a declaration by the parents' attorney, and (3) the court erred by awarding Bryan Jackson his attorney fees. We affirm.

FACTS

James and Jacqueline Jackson executed the Trust in 1996. Upon the death of both Jacksons, the assets were to be distributed equally to their children, Ms. Loer and Lee Jackson. The Trust partly states:

> c) If any beneficiary under this Trust dies within ninety (90) days after the Surviving Trustor's death, all the provisions in this Trust for the benefit of such persons shall lapse and this Trust shall be construed as if such person had predeceased the Surviving Trustor. Therefore, no distributions shall be made for at least ninety (90) days after the Surviving Trustor's death.

Clerk's Papers (CP) at 106. Further, "If LEE C. JACKSON or DIANE L. LOER should fail *to survive the above distribution*, then the Trustee shall distribute the balance of their share of the Trust to the survivor." CP at 106-07 (emphasis added).

James Jackson died in May 2005 and Jacqueline Jackson died in March 2006. Ms. Loer became the Trust's successor trustee. Lee Jackson died 19 months after Jacqueline Jackson. When Lee Jackson died, the majority of Trust assets had not been distributed. Bryan Jackson, petitioned for distribution of Lee Jackson's share of Trust assets and for an accounting under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW. Ms. Loer argued that since Lee Jackson did not survive distribution, she was the Trust's sole beneficiary.

Both parties requested summary judgment. Bryan Jackson submitted two declarations from Thomas D. Lofton, the attorney who drafted the Trust. The first declaration was attached to Bryan Jackson's reply memorandum to his motion for summary judgment. Ms. Loer objected to the declaration, arguing Mr. Lofton did not declare the intent of James and Jacqueline Jackson in drafting the trust. Mr. Lofton filed a supplemental declaration, declaring that the Jacksons intended each child to receive one-half share of the proceeds of the Trust if they survived the death of the last trustor by 90 days. Ms. Loer did not object to the supplemental declaration.

The court granted Bryan Jackson's summary judgment motion, ordering one-half of the Trust to the Lee Jackson Estate and awarding Bryan Jackson $22,052.50 in

attorney fees from the Trust. Ms. Loer appealed.

ANALYSIS

A. Summary Judgment

The issue is whether the trial court erred in granting summary judgment to Bryan Jackson. Ms. Loer contends the Trust terms require a beneficiary to be alive at the time of distribution.

We review a trial court's summary judgment grant de novo, engaging in the same inquiry as the trial court. *Lybbert v. Grant County,* 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is proper if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R.,* 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). When considering a summary judgment motion, we must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert,* 141 Wn.2d at 34. "[T]he moving party bears the burden of showing the absence of a material issue of fact." *Swinehart v. City of Spokane,* 145 Wn. App. 836, 844, 187 P.3d 345 (2008) (citing *Redding v. Virginia*

Mason Med. Ctr., 75 Wn. App. 424, 426, 878 P.2d 483 (1994)). Further, "[q]uestions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion." *Id.* (citing *Alexander v. County of Walla Walla,* 84 Wn. App. 687, 692, 929 P.2d 1182 (1997)).

Preliminarily, Ms. Loer argues the trial court wrongly considered Mr. Lofton's declarations because they were untimely. We review "evidentiary rulings made for summary judgments de novo." *Seybold v. Neu,* 105 Wn. App. 666, 678, 19 P.3d 1068 (2001). De novo review does not extend to considering arguments not made below, except in limited situations that are not involved here. Ms. Loer objected to Mr. Lofton's first declaration as not establishing James and Jacqueline Jackson's intent. Mr. Lofton corrected the declaration and there was no further objection. Therefore, Ms. Loer's timeliness argument regarding the declarations is waived.

We determine an individual's "intent in a trust document by construing the document as a whole." *Bartlett v. Betlach*, 136 Wn. App. 8, 19, 146 P.3d 1235 (2006) (citing *Old Nat'l Bank & Union Trust Co. v. Hughes*, 16 Wn.2d 584, 587, 134 P.2d 63 (1943)). "Where the meaning of an instrument evidencing a trust is unambiguous, the instrument is not one requiring judicial construction or interpretation." *Templeton v. Peoples Nat'l Bank of Wash.*, 106 Wn.2d 304, 309, 722 P.2d 63 (1986). "A trust is ambiguous if it is susceptible of more than one meaning; ambiguity is a question of law." *Waits v. Hamlin*, 55 Wn. App. 193, 200, 776 P.2d 1003 (1989) (citing *Millican of*

Wash., Inc. v. Wienker Carpet Serv., Inc., 44 Wn. App. 409, 415-16, 722 P.2d 861 (1986)). Further, "if the intention may be gathered from [the trust] language without reference to rules of construction, there is no occasion to use such rules, and the actual intent may not be changed by construction." *Templeton*, 106 Wn.2d at 309. Accordingly, extrinsic evidence should not be considered where "intent can be derived solely from the four corners of the trust document." *Id*.

Here, the Trust contains a 90-day provision, requiring beneficiaries to survive the trustor's death by 90 days, but, then, the Trust states, "If LEE C. JACKSON or DIANE L. LOER should fail *to survive the above distribution*, then the Trustee shall distribute the balance of their share of the Trust to the survivor." CP at 106-07 (emphasis added). This creates an ambiguity: does the beneficiary need to survive the last trustor by 90 days or until final distribution? Thus, extrinsic evidence is needed.

Mr. Lofton, the attorney who drafted the Trust, declared that James and Jacqueline Jackson intended each child to receive one-half share of the proceeds of the Trust if they survived the death of the last trustor by 90 days. "In construing a will or trust, testamentary intent controls." *Eisenbach v. Schneider*, 140 Wn. App. 641, 651, 166 P.3d 858 (2007) (citing *In re Estate of Griffen*, 86 Wn.2d 223, 226, 543 P.2d 245 (1975)). "Testamentary intent is a question of fact." *Id*. (citing *In re Estate of Soesbe*, 58 Wn.2d 634, 636, 364 P.2d 507 (1961)). But, "[q]uestions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one

conclusion." *Swinehart*, 145 Wn. App. at 844.

Based on the extrinsic evidence in the record, reasonable minds could reach but one conclusion; that James and Jacqueline Jackson intended both of their children to receive one-half share of the Trust's proceeds if they survived them by 90 days. In sum, the trial court did not err in granting summary judgment to Bryan Jackson.

B. Attorney Fees Award

The issue is whether the trial court erred by abusing its discretion in awarding attorney fees to Bryan Jackson. Ms. Loer contends the trial court erred in awarding costs and attorney fees because it failed to support the award with findings of fact and conclusions of law. Bryan Jackson responds that since Ms. Loer's counsel approved the order "as to form," the issue is waived. CP at 17.

An attorney fees award under RCW 11.96A.150 is discretionary. *In re Estate of Black,* 116 Wn. App. 476, 489, 66 P.3d 670 (2003). We need an adequate record to exercise our supervisory role to ensure discretion is exercised on articulable grounds. *Mahler v. Szucs,* 135 Wn.2d 398, 435, 957 P.2d 632 (1998). The trial court must enter findings of fact and conclusions of law supporting an award of attorney fees. *Id.*

The trial court did not enter findings of fact and conclusions of law to support its decision to award attorney fees. The record does not indicate that the trial court found the services of the attorneys were reasonable or essential to the outcome, whether there were any duplicative or unnecessary services, or if the hourly rates were

reasonable. *See Mahler,* 135 Wn.2d at 435. Further, we do not know whether the litigation benefits the estate or trust involved. RCW 11.96A.150(1). Remand is necessary because on this record we are unable to review the trial court's decision to award attorney fees. *Mahler,* 135 Wn.2d at 435. Ms. Loer did not waive this issue by her counsel's approval, as to form, of the attorney fee order. The order is separate from the findings of fact and conclusions of law. Further, approval as to form does not waive later substantive challenges. Therefore, we vacate the fee award and remand for entry of findings of fact and conclusions of law.

C. Attorney Fees on Appeal

Both parties request attorney fees on appeal under RCW 11.96A.150. Under this statute, "Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party." RCW 11.96A.150(1). In light of our disposition, Bryan Jackson's request is granted and Ms. Loer's request is denied. Further, like the trial court's award, fees should be awarded from the assets of the Trust. RCW 11.96A.150(1)(b).

Affirmed, and remanded for action consistent with this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Brown, J.

WE CONCUR:

_____
Kulik, A.C.J.

_____
Korsmo, J.