74320-1

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NO. 74320-1-I

GARY P. WAY & KRISTIN KIRCHNER,

Appellants,

vs.

MARJORY E. WAY,

Respondent.

BRIEF OF RESPONDENT

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dismissal of their claims for breach of contract, fraud and specific performance where they presented no argument in support of their assignment of error?

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H. Whether Marjory Way is entitled to an award of her reasonable attorneys' fees and costs on appeal?

II. STATEMENT OF THE CASE

The case arose out of a TEDRA petition brought by Respondent Marjory Way, the widow of Peter Way, as Trustee of the Peter J. and Marjory E. Way Living Trust (hereinafter the "Trust" or the "Living Trust"). *See* Summons and Petition, CP 1562; Omitted Exhibit to Petition, CP 1556. Gary Way and Kristin Kirchner answered the Petition, denied the Marjory Way's interpretation of the Trust, and counterclaimed for breach of fiduciary duty, breach of contract, fraud and specific performance and injunction. CP 1437. They then brought a summary judgment motion seeking the immediate distribution to them of the entire estate, other than the car and the condominium. Motion for Summary Judgment, CP 1330.

Marjory Way brought a cross-motion for summary judgment. *See* Cross-Motion, CP 1050. She sought a declaration, based on the

entirety of the Living Trust provisions, that: 1) Trust A arose upon Peter's death and provided for a life estate for her; Petitioner's Cross-Motion, CP 1050-51, ll. 22-25 and 2-5; 2) that upon her death the corpus of Trust A was to be distributed to the remainder beneficiaries of Trust A, Gary Way and Kristin Kirchner; *id.*, CP 1051 at ll. 5-6; and 3) dismissing the claims of breach of fiduciary duty, breach of contract, fraud, and specific performance, *id.* at ll. 8-16, and an award of attorneys' fees and costs. *Id.* at l. 18-20.

In support of their summary judgment motion Gary and Kristin offered extrinsic evidence of Peter Way's purported intent. *See, e.g.*, Decl. of K. Kirchner, CP 1506; Respondent's Motion for Partial Summ. Judgment at Ex. 10, CP 1335 (incorporating excerpts from Dep. of Wm. Zingarelli). They contended that Peter never intended to fund Trust A. Respondents' Reply, CP 544-47; Response to Motion for Partial Summ. Judgment, CP 957, ll. 10-13.

Marjory objected to the submission of extrinsic evidence. Petitioner's Rebuttal Mem. in Support of Cross-Motion, CP 1299-1302. She did so both because the Living Trust was unambiguous, *id.*, and, as to certain testimony of the legal assistant, Kathleen Madsen, because

it contained hearsay. *Id.*, CP 1303, ll. 6-9. The trial court sustained Marjory's objection to Madsen's testimony, *see* Trans. of Oral Decision of the Honorable Thomas J. Wynne of November 20, 2015,VRP 33, ll. 6-7, but did not otherwise exclude extrinsic evidence. *Id.* at 36-38, ll. 23-25 and 1-5.

Ultimately the trial court also agreed with Marjory's position on extrinsic evidence. It held that it must determine Peter Way's intent solely by reference to the four corners of the Living Trust. *Id.* at 38, ll. 6-8. The trial court then concluded that the Living Trust resulted, upon the death of Peter, in the creation and funding of Trust A, with Marjory as the life beneficiary. Order on Summary Judgment, CP 200. Further the court determined that Gary and Kristin were entitled to distributions only as remaindermen of Trust A, following Marjory Way's death. *Id.* Gary and Kristin's claims for breach of fiduciary duty, breach of contract, fraud, specific performance and injunctive relief, were dismissed. *Id.* The court subsequently granted Marjory's motion for an award of attorneys' fees and costs. *See* Findings and Order Awarding Attorneys' Fees, CP 87.

Gary and Kristin now appeal from the order granting Marjory

Way's Cross-Motion for Summary Judgment and denying the Appellants' Motion for Summary Judgment. *Brief of App.* at 3. They also appeal from the trial court's determination that the testimony of Kathleen Madsen, the legal assistant to William Zingarelli, *see* Excerpts of Dep. of K. Madsen, Ex. 10 to Decl. of Mark Wilson, CP 886-87, ll. 1 and 1-23, was hearsay. *Brief of App.* at 3. Zingarelli was the attorney who drafted the Living Trust and Peter's Last Will and Testament. Decl. of Marjory Way In Support of Cross-Motion, CP 1038, ll. 3-25.

Gary and Kristin further ask this Court to reinstate their tort and equitable claims against Marjory Way should the decision establishing Marjory as a life beneficiary be reversed. *Brief of App.* at 23. Gary and Kristin neglected, however, to provide any argument on their claims of breach of contract and fraud, or for specific performance or injunctive relief. *Id.*

Lastly Gary and Kristin assign error to the trial court's award of attorneys' fees and costs to Marjory. *Id.* at 3. They make no argument on appeal that the trial court abused its discretion in awarding fees, or that the amount of fees awarded was unreasonable. *Brief of App.* at 23-25. Gary and Kristin do, however, request remand to the trial court for

a determination of their fee request, or, in the alternative, determination of their request by this court. *Id.* at 24.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY DETERMINED THE INTENT OF THE TRUSTOR, PETER WAY, FROM THE FOUR CORNERS OF THE LIVING TRUST DOCUMENT, AND ITS GRANT OF SUMMARY JUDGMENT ESTABLISHING MARJORY WAY AS THE LIFE BENEFICIARY AND GARY WAY AND KRISTIN KIRCHNER AS THE REMAINDER BENEFICIARIES OF TRUST A SHOULD BE UPHELD.

The standard of review on appeal from summary judgment is de novo, Mustoe v. Ma, ___ P.3d ___ (April 4, 2016, Wash. Ct. App, WL 1305219 at *1) (citing Smith v. Safeco Ins. Co., 150 Wn.2d 478, 483, 78 P.3d 1274 (2003)), and the appellate court therefore engages in the same inquiry as the trial court. City of Okanogan v. Cities Ins. Ass'n of Washington, 72 Wn. App. 697, 700, 865 P.2d 576, 578 (1994) City of Okanogan at 700 (citations omitted). That inquiry is whether there are genuine issues of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. *Id.* at 700-01, 865 P.2d 576, 578 (1994) (citing In re Estates of Hibbard, 118 Wn.2d 737, 744, 826 P.2d 690 (1992)). The trial court ultimately determined to construe the trust at issue here by reference only to the four corners of that trust,

see Trans. of Oral Decision of the Honorable Thomas Wynne, VRP 37-38, and granted summary judgment in favor of Marjory Way. *See* Order on Summary Judgment, CP 200; *see also* Trans. of Oral Decision, VRP 38, ll. 6-8.

Implicit in the court's ruling to base its decision only on the trust language was a determination that the Living Trust was unambiguous. That determination as to ambiguity also presents "a question of law subject to de novo review." Paradise Orchards General Partnership v. Fearing, 122 Wn. App. 507, 517, 94 P.3d 372 (2004) (citing Stranberg v. Lasz, 115 Wn. App. 396, 402, 63 P.3d 809 (2003)) (further citations omitted). When that review is completed here it is apparent that the Living Trust is unambiguous, and that resort to extrinsic evidence is not permitted. Further, examination of the Trust language confirms the interpretation adopted by the court as the only reasonable interpretation of that document.

The court's paramount duty in interpreting a trust is to effectuate the trustor's intent. In re Guardianship of Jensen, 187 Wn. App. 325, 331, 350 P.3d 654 (2015) (citing In re Estate of Bernard, 182 Wn. App. 692, 704, 332 P.3d 480 (2014)). "Although, in general, determining a settlor's intent is a question of fact", In re Washington Builders Ben.

Trust, 173 Wn. App. 34, 75, 293 P.3d 1206 (2013) *rev. denied sub nom* Res. For Sustainable Communities v. Bldg. Indus. Ass'n of WA, 177 Wn.2d 1018, 304 P.3d 114 (2013) (citing In re Estate of Sherry, 158 Wn. App. 69, 76, 240 P.3d 1182 (2010); Eisenbach v. Schneider, 140 Wn. App. 641, 651, 166 P.3d 858, 862 (2007)), the interpretation of an unambiguous trust is a matter of law. Paradise Orchards,122 Wn. App. at 517 (citations omitted). The court ascertains the settlor's intent only from the instrument itself, without resort to extrinsic evidence. In re Estate of Hayes, 185 Wn. App. 567, 609, 342 P.3d 1161 (2015) (citing In re Estate of Bergau, 103 Wn.2d 431, 435, 693 P.2d 703 (1985)).

A trust "provision is not ambiguous merely because the parties suggest opposing meanings." Paradise Orchards, 122 Wn. App. at 517 (quoting Stranberg, 115 Wn. App. at 402, 63 P.3d 809) (further citation omitted). Rather a trust term is ambiguous only if "the language is susceptible to more than one *reasonable* interpretation." In re Washington Builders Ben. Trust, 173 Wn. App. 34, 75, 293 P.3d 1206 (2013); (citing Waits v. Hamlin, 55 Wn. App. 193, 200, 776 P.2d 1003 1989)). [Emphasis Added.]

With respect to wills, "courts must endeavor to give effect to every part of the will being construed. . . ." In re Shaw's Estate, 69

Wn.2d 238, 242, 417 P.2d 942 (1966); In re Estate of Wright, 147 Wn. App. 674, 681, 196 P.3d 1075, 1079 (2008) (citing In re Estate of Price, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994)). Each provision must be construed in the context of the entire will. In re Estate of Sherry, 158 Wn. App. at 76, (citing In re Estate of Reimcke, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972)). These maxims are applicable here, for the principles of construction of wills apply equally to trusts. First Interstate Bank of Washington v. Lindberg, 49 Wn. App. 788, 797-98, 746 P.2d 333 (1987).

In the process of construction courts must avoid interpretations that lead to absurd results. Hartford Fire Ins. Co., v. Columbia State Bank, 183 Wn. App. 599, 608, 334 P.3d 87 (2014), *rev. denied*, 182 Wn.2d 1028, 347 P.3d 459 (2015) (interpretation of construction contract). A review of the significant provisions of the Living Trust in this case reveals that the interpretation urged by Gary and Kristin fails to give effect to every part of the Living Trust, and renders extensive portions of the Trust meaningless. Moreover that interpretation results in the absurd conclusion that Peter and Marjory adopted these extensive provisions for Trust A while knowing, *at the time of execution of the Living Trust*, that Trust A would and could never take effect. Such an

interpretation cannot support a determination of ambiguity that is the predicate to consideration of extrinsic evidence of Peter Way's intent. In re Estate of Hayes, 185 Wn. App. 567 at 609.

Courts must also, in construing trusts, "try to reconcile apparently inconsistent provisions", In re Estate of Sherry, at 76, (citing In re Estate of Bergau, 103 Wn.2d at 435). The language of the Living Trust at issue here is, when the entirety of its language is considered, susceptible of only one interpretation that reconciles any apparent inconsistency in its provisions. That interpretation is that: 1) upon Peter's prior death Marjory was to receive certain specifically identifiable real and personal property, and a life estate in, Trust A; and 2) upon Marjory's death Gary and Kristin were to receive the remainder of Trust A.

Paragraph 7 of the Living Trust provides in part that upon the death of one spouse, the surviving spouse is to "divide the entirety of the Trust Estate of The . . . Living Trust into two separate trusts, Trust A and Trust B. . . ." *See* Living Trust at ¶ 7, CP 1573. Under "*Contents of Trust A*", the Declaration then provides that all of the Living Trust property owned by the deceased spouse, including one half of the shared bank account listed in Schedule A and (given Peter's

first death), all of Schedule C, is to be transferred into Trust A, provided that the property to be transferred shall "*not* include any portion of the Trust Estate given to a specific beneficiary under the terms of Paragraph 6." *Id.* [Emphasis in the original.]

Upon the creation of Trust A, the surviving spouse becomes the life beneficiary of Trust A, *see* Living Trust at ¶ 7, subpart. (ii), CP 1573, and is entitled to "all interest or other income", *id.*, *and* to "spend the trust property in any amount for his or her . . . support and maintenance." *Id.*, CP 1573-74. Then "[u]pon the death of the Life Beneficiary, the Trustee . . . is to . . . distribute the property of Trust A to the appropriate Final Beneficiaries provided in this Paragraph 8". *Id.* at ¶ 8, "Death of Life Beneficiary", CP 1575. [Emphasis added.] Paragraph 8 identifies Gary Way and Kristin Kirchner as Peter's "Final Beneficiaries" in the event that Peter is the first to die. *Id.* at ¶ 8, "Administration of Trust A, CP 1574.

Paragraph 6 states in relevant part that

> Husband's Beneficiaries. Upon the death of PETER J. WAY, his portion of the Trust Estate, to include his share of the property listed in Schedule A, as well as any separate property listed in Schedule C, shall be distributed in accordance with the terms and to the Beneficiaries named in Schedule E, attached.

Living Trust at ¶ 6, CP 1573. Schedule E provides that

> Pursuant to Paragraph 6 of the Declaration of Trust . . . the Trust Estate property of PETER J. WAY shall be distributed to the following Specific Beneficiaries upon the following terms:
>
> *SPECIFIC BEQUESTS:*
>
> In the event Marjory Way survives Peter Way then she shall inherit the real property condominium, Parcel number 00699800111300 and the vehicle, VIN JTEEW41AD92030311. 2009 Toyota Highlander.
>
> | | | |
> |---|---|---|
> | Gary Peter Way | son | 50% of remainder; if he pre-deceases, then 50% to his wife, Elena Way, if they were still married at the time of his death. |
> | Kristin Kirchner | daughter-in-law | 50% of remainder. If she pre-deceases, then 50% to her then living children in equal shares. |

Living Trust, Schedule E, CP 1585. [Emphasis in the original.] The question then arises as to what, given all of the other provisions of the Living Trust, the "terms" of Schedule E mean.

The word "remainder" as used in Schedule E can be read to refer to the remainder of Trust A after Marjory's death. Gary and Kristin argue, however, that the reference to the "remainder" was not a

reference to the Trust A remainder following Marjory's death, but rather a reference to a specific, and thus immediate, bequest of all of Peter's Living Trust estate, other than the car and condo, to Gary and Kristin. Gary and Kristin's reading is simply untenable when viewed, as is required, in the context of the entire Declaration of Trust. In re Estate of Sherry, 158 Wn. App. at 76.

While the first line of Schedule E references "Specific Beneficiaries", the clause beneath that heading is titled "SPECIFIC *BEQUESTS*". *See* Schedule E, CP 1585. [Emphasis added.] A "specific bequest" is "[a] bequest of a specific or unique item of property, such as any real estate or a particular piece of furniture". Black's Law Dictionary, 7th Ed. (1999). Directly underneath the heading to "*Specific Bequests*" is found the only reference to specific property previously held by Peter Way. That is the bequest of the condominium and the Toyota Highlander to Marjory. *Id.*

The Schedule otherwise references Gary Way and Kristin Kirchner underneath the specific bequests to Marjory, but only as to the "remainder". *See* Schedule E, CP 1585. A gift of a "remainder" in the context of a trust, in contrast to a specific bequest, creates "[a] *future* interest arising in a third person – that is, someone other than the

creator of the estate or the creator's heirs – who is intended to take *after* the natural termination of the preceding estate". Black's Law Dictionary, *supra*. [Emphasis added.] The word "heir" as used in this context means one who inherits by will or by intestate succession. Black's Law Dictionary, 7th Ed. (1999). Neither Gary nor Kristin would inherit by intestate succession, because Peter had a will. Nor would they inherit under that will, for it "poured over" all of Peter's estate into the Trust. *See* Last Will, Art. III, CP 1558. The Living Trust was never revoked or invalidated, Declaration of M. Way in Support of Cross-Motion, CP 1039, ll. 5-6, so the residuary clause of Peter's Will never took effect. Thus the only "preceding estate" in this case would be the life estate in Marjory created under Paragraph 7 of the Living Trust.

The interpretation of the "remainder" references in Schedule E as reiterations of the interest of Gary and Kristin in the remainder of the estate after the expiration of Marjory's life estate is borne out by provisions of the Living Trust in addition to Paragraph 7. Paragraph 8 provides that the Trustee is required to file federal tax returns "on behalf of Trust A and the Final Beneficiaries shall be provided with copies of annual . . . tax returns." Living Trust at ¶ 8, CP 1574-75.

That paragraph also states that "[u]pon the death *of the Life Beneficiary*, the Trustee shall distribute the property of Trust A to the appropriate *Final Beneficiaries* provided in this paragraph 8." *Id.* at ¶ 8, Death of the Life Beneficiary", CP 1575. [Emphasis added.] Those "Final Beneficiaries" are, as to Peter, if, as here, he was the first spouse to die: 1) 50% to Gary Way, or, if Gary predeceases Peter, 50% of his share to his wife if he is married; and 2) 50% to Kristin Kirchner, or, if she predeceases Peter, 50% to her children. *Id.* at "Administration of Trust A", CP 1574.

Paragraph 11 of the Trust provides for distribution in the event of simultaneous death or presumed simultaneous death of the settlors. In such event, "[n]either spouse shall be deemed the surviving spouse, and the Trustee shall distribute the Trust Estate according to Paragraph 6 *and* Paragraph 8. . . ." *Id.* at ¶ 11, Simultaneous Death, CP 1575-76. [Emphasis added.] The settlors thus contemplated that there could be specific bequests under Paragraph 6, through Schedule E, in addition to a remainder in Trust A to be distributed to the "Final Beneficiaries" under Paragraph 8.

The provisions of Paragraphs 7, 8, 9 and 11 can thus be read consistently with the "remainder" language of Schedule E, but only if

that remainder language is construed to confirm a true remainder interest. One cannot distribute the Trust Estate pursuant to Paragraph 11, for example, under both " Paragraph 6 *and* Paragraph 8 . . .", Living Trust at ¶ 11 at Simultaneous Death, CP 1575-76, [emphasis added], unless the phrase "50% of remainder" in Schedule E is controlled by the reference to "Final Beneficiaries" in Paragraph 8.

Gary and Kristin urge the opposite analysis, *i.e.,* that Paragraph 6 requires the immediate distribution of the gifts to all beneficiaries mentioned in Schedule E. This interpretation necessarily renders all of the extensive provisions of the Declaration for the creation, content and administration of Trust A wholly superfluous. If, as Gary and Kristin argue, Paragraph 6 means that the entire trust estate of the first spouse to die is to be distributed immediately to any beneficiaries named in either Schedule D (Marjory) or Schedule E (Peter), Trust A would never, under any circumstance, be funded. If Marjory died first, her entire estate would pass immediately, and thus outside "Trust A", to her named beneficiaries, Karin and Tracey. *See* Schedule D, CP 1584. If, as happened here, Peter died first, his entire estate would pass immediately to Kristin and Gary, except for the specific bequest of the condo and car to Marjory. *See* Schedule E. CP 1585. Nothing would

ever be left with which to fund Trust A. Such an interpretation would mean that both Peter and Marjory intentionally included extensive language that they knew, *at the time of execution of the Living Trust,* would never become operative. That is an absurd result.

The court in reading trust language is charged with assigning meaning to all of its terms. In re Estate of Price, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994) (citing In re Estate of Bergau, 103 Wn.2d 431, 435-36, 693 P.2d 703 (1985)). That charge cannot be accomplished here if the Living Trust is read, based upon references in Schedule E to the remainder interests of Gary and Kristin, to necessarily invalidate, from the inception of the Living Trust, Trust A. Such a reading would necessarily render meaningless each and every one of the following express provisions of the Living Trust:

> 6. **Trust Beneficiaries.**
> . . .
>
> Remainder of Trust Estate. Upon the death of one spouse, any remaining property of the deceased spouse . . . which was not distributed to the aforementioned Beneficiaries . . . *shall be administered as part of Trust A*, as herein provided.

[Emphasis added.] CP 1573.

> 7. **Creation of Trust A and Trust B.** Upon

the death of the first spouse, the surviving spouse as Trustee, shall divide the entirety of the Trust estate of The . . . Living Trust . . . into two separate trusts, *Trust A* and Trust B. . . .

Contents of Trust A. All of the property of [T]he . . . Living Trust owned by the deceased spouse . . . shall be transferred to *Trust A*. . . .

(i) *Irrevocability of Trust A. Trust A* becomes irrevocable upon the death of the deceased spouse.

(ii) *Life Beneficiary of Trust A.* Upon the death of the deceased spouse, and the creation of *Trust A*, the surviving spouse shall become the Life Beneficiary of *Trust A*. The surviving spouse's life estate interest in *Trust A*, entitles the surviving spouse receives [*sic*] all interest or other income from the trust property, to use the property, and to spend the trust property in any amount for his or her health, education, support and maintenance, in his or her accustomed manner of living. . . .

[Emphasis added.] CP 1573-74.

8. **Administration of Trust A.**

Final Beneficiaries.
If MARJORY E. WAY is the first deceased

spouse, then the Final Beneficiaries of *Trust A* shall be:

TRACEY CUMMINGS, per capita
KARIN MARTIN, per stirpes

If MARJORY E. WAY is the first deceased spouse, then the alternate Final Beneficiaries of *Trust A* shall be:

the then living children of Karin Martin

If PETER J. WAY is the first deceased spouse, then the final Beneficiaries of *Trust A* shall be:

50% to GARY PETER WAY, per capita
50% to KRISTIN KIRCHNER, per stirpes

If PETER J. WAY is the first deceased spouse, then the alternate Final Beneficiaries of *Trust A* shall be:

50% to the children of KRISTIN KIRCHNER
50% to the wife of GARY PETER WAY, if married.

Trust Maintenance. The Trustee of *Trust A* shall spend for the benefit or pay to the surviving spouse all net income earned from the principal of *Trust A* on a quarterly basis.... The Trustee shall also spend for the benefit of the surviving spouse any amounts from the principal of *Trust A* which are necessary for the surviving spouse's health, support and maintenance....

Death of Life Beneficiary. Upon the death of the

> Life Beneficiary, the Trustee shall distribute the property of *Trust A* to the appropriate Final Beneficiaries provided in this Paragraph 8.

CP 1574-75. [Emphasis added.] Trusts must be construed so as to give meaning to all of their terms. In re Estate of Price, 73 Wn. App. at 754. The Living Trust therefore cannot reasonably be read to have created Trust A while simultaneously rendering it wholly ineffectual. The interpretation urged by Gary and Kristin is unreasonable as a matter of law.

The interpretation advanced by the Marjory Way, in contrast, does "reconcile apparently inconsistent provisions", In re Estate of Sherry, 158 Wn. App. at 76, and lend a reasonable meaning to the Living Trust. Paragraph 6 was intended to and did provide the opportunity, through Schedules D and E, respectively, for each spouse to make specific bequests of real or personal property that would pass outside the confines of Trust A. The references to "remainder[s]" in Schedule E, CP 1585, can and must, if a reasonable meaning is to be afforded the Living Trust, be construed as "terms" under Paragraph 6. CP 1573. Those terms of Schedule E distinguished the specific bequests to Marjory. They also reiterated the provisions of Paragraph

8 for Peter's "Final Beneficiaries" to take, following Marjory's death, the remainder of Trust A. Living Trust at ¶ 8, "Death of Life Beneficiary", CP 1574.

Because there is only one reasonable meaning that can be assigned to the terms of the Living Trust there is no ambiguity here, and no resort to extrinsic evidence is permitted. Guardianship of Jensen, 187 Wn. App. at 331. The trial court correctly construed the Living Trust by reference to its four corners, and its order on summary judgment establishing Marjory Way as the life beneficiary of Trust A, and Gary and Kristin as its remainder beneficiaries should stand.

B. EVEN IF RESORT TO EXTRINSIC EVIDENCE WERE NECESSARY HERE, THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING CERTAIN DEPOSITION TESTIMONY OF LEGAL ASSISTANT, KATHLEEN MADSEN, AS HEARSAY, AND THAT RULING SHOULD BE UPHELD.

Gary and Kristin appeal from a ruling by the trial court that the deposition testimony of Kathleen Madsen is hearsay. *Brief of App.* at 19-20. A trial court's evidentiary ruling to exclude or admit evidence is reviewed for abuse of discretion. State v. Thomas, 150 Wn.2d 821, 83 P.3d 970, 987 (2004), abrogated on other grounds by Crawford v.

Washington, 124 S.Ct.1354, 158 L.Ed.2d 177 (2004); State v. McWilliams, 177 Wn. App. 139, 311 P.3d 584 (2013), rev. *denied,* 179 Wn.2d 1020, 318 P.2d 279 (2014). Under that standard "the trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did." McWilliams at 147 (citing Thomas, 150 Wn.2d at 856). Even if the trial court should have considered extrinsic evidence here, Gary and Kristin have not met their burden to show abuse of discretion by the trial court in excluding the testimony of Kathleen Madsen.

Kathleen Madsen was a paralegal to William Zingarelli at the time Peter and Marjory consulted Zingarelli for estate planning. *See generally* Excerpts of Dep. of K. Madsen, Ex. 10 to Decl. of M. Wilson In Response to Cross-Motion, CP 887, ll. 9-23. She testified that she made shorthand notes following a meeting she had with Zingarelli on February 8, 2012. *Id.*, CP 886-87, l. 25 and 1-4. The meeting between Madsen and Zingarelli thus preceded the execution on February 29, 2012, of the Living Trust. *See* Living Trust signature pages, CP 1579-80. She also made a possible translation of those notes in 2015, at the request of Gary and Kristin's attorney in this case, Mark Wilson. *Id.,*

CP 885, ll. 20-22. The shorthand notes and the partial translation of those notes were made exhibits to Madsen's deposition. *See* CP 893; CP 885-86, ll. 12-25 and 1-8; CP 891.

Ms. Madsen's written translation of the shorthand notes refers to Peter's heirs as 50% to Kristin and 50% to Gary Madsen. *See* Translation, Ex. 2 to Madsen Dep. Trans., CP 891. It specifies Marjory's heirs as Karin Martin and Tracey Cummings. *Id.* The translation also indicates that all of Peter's investments already have beneficiaries, and states that "Condo, contents and car to Midge along with sufficient cash resources to cover the condo dues during Midge's lifetime". *Id.*

Both the 2012 shorthand notes of the meeting between Madsen and Zingarelli and the 2015 translation of those notes were offered by Gary and Kristin to show Peter Way's intent to leave only the condo and the car to Marjory. Respondents' Response to Cross-Motion, CP 956-57, ll. 6-26 and 1-13. Ms. Madsen never met with Peter and Marjory, however, CP. 886, ll. 16-23, and she testified that she had no personal knowledge of the intent of Peter or Marjory. *Id.*, CP 889, ll. 4-9. Nor did she have any recollection of Peter and Marjory coming in to see

Zingarelli. *Id.*, CP 886-87, ll. 25 and 1-7. She merely assumed that they had done so based upon billing statements. *Id.*, CP 887, ll. 1-8.

Ms. Madsen's notes relate, therefore, only information that Zingarelli gave to her. *Id.,* CP 887-88, ll. 15-25 and 1-3. Because the notes and translation are offered to prove the intent of Peter Way, their contents are hearsay under ER 801(c). *See* App. 1. The contents are the statements of an out-of-court declarant offered to prove the truth of the matter purportedly asserted: that Peter wanted Marjory to receive only the condo and the car.

Gary and Kristin argue that the testimony of Ms. Madsen was exempt under ER 803(a)(3) from the hearsay prohibition. Brief of App. at 19-20. That rule excepts a statement of the declarant's then existing state of mind, such as intent or plan. ER 803(a)(3) (amended 1992) . See App. 2. The declarant whose statements Ms. Madsen was documenting was Zingarelli, not Peter or Marjory.

It is true that where a will or trust is ambiguous the testimony of the drafter may be admitted to explain the ambiguity, In re Estate of Mell, 105 Wn.2d 518, 524, 716 P.2d 896 (1986); In re Estate of Hayes, 185 Wn. App. 567, 609, 342 P.3d 1161 (2015). ER 803(a)(3) excepts,

however "only statements describing the *declarant's own* intent or plans, not those of another person." Teglund, 5C Wash. Prac. Evidence Law and Practice, § 803.12. [Emphasis in the original.] Thus Kathleen Madsen could have testified to Zingarelli's statements of his own intent, had it been relevant, and Zingarelli did testify as to his understanding of Peter's intent. *See, e.g.,* Excerpts of Zingarelli Dep., Wilson Decl. at Ex. 10, CP 297, ll. 20-24. ER 803(a)(3) does not, however, allow Kathleen Madsen to testify as to the statements made by out-of-court declarant Zingarelli as to the statements of intent of Peter, "another person". Teglund, 5C at § 803.12, p. 41. Gary and Kristin thus cannot show that no reasonable person would have sustained the objection to Kathleen Madsen's testimony as hearsay. State v. Thomas, 150 Wn.2d at 856. The trial court's ruling excluding her testimony should, if this court finds that the Living Trust was ambiguous such that resort to extrinsic evidence may be had, be upheld.

C. EVEN IF REFERENCE TO EXTRINSIC EVIDENCE IS NECESSARY HERE, THE UNCONTROVERTED EVIDENCE LEADS, AS A MATTER OF LAW, TO THE CONCLUSION THAT PETER WAY INTENDED TO FUND A LIFE ESTATE IN MARJORY WITH A REMAINDER IN GARY AND KRISTIN.

Even if the court were to decide that the Living Trust is ambiguous as to Peter's intent, such that resort to extrinsic evidence is necessary, the result here is unchanged. The court "will affirm a grant of summary judgment where reasonable minds can reach only one conclusion based on the admissible facts in evidence." Gausvik v. Abbey, 126 Wn. App. 868, 879, 107 P.3d 98 (2005) (citing Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485, 78 P.3d 1274 (2003)). The inferences to be drawn from the extrinsic evidence here, if considered, may be disputed by the parties. The uncontroverted material facts, however, can only reasonably be integrated by finding that Peter intended that Marjory enjoy a life estate in Trust A, and that Gary and Kristin enjoy the remainder of that trust upon Marjory's death.

The uncontested facts asserted as material by Gary and Kristin are that: 1) Marjory and Peter filed for dissolution; 2) Marjory lied in her initial declaration as to why she and Peter initiated divorce proceedings, *Brief of App.* at 6-7; 3) had the dissolution been finaled Marjory would have received only a $15,000 equalization payment; 4) following the news of his terminal diagnosis Peter wrote to Carol's brother that he missed Carol, Declaration of Kristin Kirchner, CP 1511,

ll. 12-20, his deceased wife of 32 years, *id.* at ll.1-2, and that he would take care of his son, Gary, and step-daughter-in-law, Kristin, *id.* at ll. 16-17; and 5) that Schedule E the Trust refers to the 50% remainders in Gary and Kristin under the caption "Specific Bequests". When all of the material facts are considered here, it is apparent that Peter intended, in executing not just a will but also a living trust, to leave Marjory not only the condo and the car, but also a life estate.

It is true that Peter Way had enjoyed a long marriage to his deceased wife, Carol. Decl. of Kristin Kirchner, CP 1511, ll.1-2. After Carol's death Peter found a new partner in Marjory. Peter was 71 at the time, Petition for Dissolution, attached to Decl. of Mark Wilson, CP 1546, and Marjory was 65. *Id.* They married on September 24, 2006, Decl. of Marjory Way in Reply, CP 1417, ll. 2-3, some 15 months after Carol's death. *Id.*; *see also* CP 1416, ll. 22-23.

Peter was an exceptionally generous man. Decl. of Marjory Way in Support of Cross-Motion, CP 1039, ll. 23. For example, he gave Marjory fabulous diamonds. *Id.,* CP 1040, ll. 14-19. He also told her many times that he wanted to take care of her and that she should just put her money in savings. *Id.*, CP 1039, ll. 23-24. He made Marjory,

rather than his children, the primary beneficiary on his investment and retirement accounts. Decl. of Marjory Way in Support of Reb. Mem., CP 623-24, ll. 24-25 and 1-4. He made no changes to those designations until he and Marjory executed the Living Trust and arranged for the designations to be changed to the name of the Trust. *Id.,* CP 624, ll. 1-4.

Their marriage ultimately suffered, however. Marjory procured, and Peter joined in, a petition for dissolution. Declaration Correcting Declaration, CP 1130, ll. 11-13. Marjory, out of personal humiliation over the arrests of both spouses for domestic violence, *id.*, CP 1030, ll. 18-21, originally attributed that petition to a desire to anticipate medicaid restrictions. Decl. of Marjory Way in Reply, CP 1417 at 15-16. She later corrected her testimony to reflect the truth: that over time Peter and Marjory had begun to seriously abuse alcohol. Declaration Correcting Declaration, CP 1130-31, ll. 14-22 and 12-14. That abuse threatened their marriage. *Id.*, CP 1030, 11.20-22.

However, while the unfiled decree of dissolution contained the standard recitation that they had separated, Decl. of Mark Wilson In Support of Reply, CP 524, they did not do so. Neither of them ever

pursued the divorce, Decl. Correcting Decl., CP 1130, ll. 23-24, because the act of executing dissolution paperwork served as a "wake-up" call for them. *Id.* at ll. 24-25. They stopped abusing alcohol, *id.*, CP 1130-31, ll. 25, and were able to restore the happy marriage they had earlier enjoyed. CP 1130-31, 24-25 and 1-2. Sadly, however, they learned in December of 2011 that Peter had incurable lung cancer. *Id.*, CP 1131, ll. 2-3. It was Marjory, not Peter's children, who cared for him until his death. Decl. of Marjory Way in Reply, CP 1417, ll. 20-21. She did so in the home that she and Peter shared. *Id.*

After the diagnosis, Peter and Marjory sought estate planning advice from attorney W. Zingarelli. Decl. of Marjory Way In Support of Cross-Motion, CP 1038 at ll. 23-25. At that time Marjory remained the primary beneficiary on all of Peter's financial accounts. Decl. of Marjory Way in Support of Rebuttal Memorandum, CP 624, ll. 4-6. Mr. Zingarelli prepared the Living Trust and wills for both of them. Decl. of Marjory Way in Support, CP 1038, ll. 23-24. The Living Trust made Marjory's daughters, rather than Peter's children, the successor trustees. *Id.* at 1039, ll. 2-3. Peter's will also named Marjory's daughters, rather than his children, as his personal representatives. *Id.*

Peter and Marjory executed the Living Trust and their wills on February 29, 2012. CP 1038 at ll. 24-26.

Following the execution of the Way Trust, Marjory assisted Peter in transferring his assets into the Trust. Decl. Correcting Decl. of Marjory Way, CP 1131, ll. 6-9. That Trust contained different provisions for Marjory, if Peter were the first of the spouses to die, than did the property settlement proposed when the couple was contemplating dissolution. The property settlement agreement attached to the decree that was signed, but never filed, *Brief of App.* at 8, would have provided Marjory with only an "equalization payment" of $15,000. Decl. of M. Wilson, CP 873. The Living Trust, in contrast, gave her specific bequests of a condominium and a car, *see* Schedule E, CP 1585, and, under Marjory's interpretation of the Trust, a life estate in the balance of Peter's estate. *Id.*

Following Peter's death on June 4, 2012, Decl. of Marjory Way in Support of Cross-Motion, CP 1039, ll. 4-5, Marjory sought assistance from Mr. Zingarelli in administering the Trust. *Id.*, CP 1039, ll. 7-8. After Mr. Zingarelli helped her by obtaining an EIN number for Trust A, *id.,* Marjory began administering that Trust. *See, e.g.,* Decl.

of Marjory Way In Support of Motion to Quash, CP 1267.

William Zingarelli was deposed by Gary and Kristin, the appellants in this case. He testified that he obtained trust forms from Legal Forms, Maximilian Ventures LLC. Respondents' Introduction, CP 260, ll. 10-17. He identified the form contained in Ex. 6 to his deposition, *see* CP 453, as the form he used in drafting the Way Trust. *Id.*, CP 260, ll. 10-24. *See also* Exh. 6, CP 453.

That form, however, differs significantly from the Living Trust here. In Paragraph 6 of Exhibit 6, the form states only that the parties' beneficiaries are set forth in their respective Schedules D and E, and that "[t]here shall be no distributions until such time as both spouses are deceased ". *See* Par. 6 to Exh. 6 to Zingarelli Dep., CP 455. Thus under that form, specific bequests could be made outside of Trust A, but they would not be distributed until the death of *both* spouses. There was no provision in Paragraph 6 of that form for the remainder of Trust A. Instead Paragraph 10 of the form contained the remainder language that is found under Paragraph 6 of the Way Living Trust. *Compare* Par. 10 of Exhibit 6 to Zingarelli Deposition, CP 458, *with* Paragraph 6 of the Way Living Trust, CP 1573.

Mark Wilson, counsel to Gary and Kristin, supplied, at Zingarelli's Deposition, another form. Wilson indicated he had obtained the second form from the same on-line source that had supplied the trust form contained in Exhibit 6 to the Deposition. Excerpts from Zingarelli Dep., CP 322-323, ll. 15-25 and 1-16. That additional form was marked as Exhibit 9 to the Deposition. *Id.* Although Zingarelli testified that he didn't recognize Exhibit 9, CP 323 ll. 15-17, the contents of the form in Exhibit 9 far more closely match the provisions of Paragraph 6 of the Way Living Trust than do the provisions of Exhibit 6 to the Deposition.

Paragraph 6 of Exhibit 9 contains exactly the same content as Paragraph 6 of the Way Living Trust. *Compare* Paragraph 6 of Exh. 9 to Zingarelli Dep., CP 474-75 *with* Paragraph 6 of Way Living Trust, CP 1573. The form in Exhibit 9 also attaches forms for Schedules A, B, C, D and E to the trust. *See* Ex. 9 to Zingarelli Dep., CP 484-87. Schedules A, B and C contain exactly the same introductory language as is found in Schedules A, B and C to the Way Living Trust. *Compare* Schedules A, B, and C, to Ex. 9, CP 484-86 *with* Schedules A, B and C to the Schedules attached to the Way Living Trust, CP 1581-83.

Schedules D and E to Ex. 9 to Zingarelli's deposition also use the same introductory language as is found in Schedules D and E to the Way Living Trust. They state that "Pursuant to paragraph 6 of the Declaration of Trust, dated _____, the Trust Estate property of _____ shall be distributed to the following Specific Beneficiaries upon the following terms:. . . ." Ex. 9 to Zingarelli Dep. at Schedules D and E, CP 487-89. Schedules D and E to Exhibit 9 are different only in that they contain specific formatting for the entry of the names, addresses, and relationships of "specific Beneficiaries", and the property to be given to each. *Id.* Like the Way Living Trust the form contained in Exhibit 9 provides that all remaining property of the deceased spouse, other than that given to the beneficiaries mentioned under Paragraph 6, is to be transferred to and administered as part of, Trust A. Ex. 9, Par. 6, "Remainder of Trust Estate", CP 475. The form in Exhibit 9 also uses the same language in Paragraph 8 as does the Living Trust. The trustee is to "distribute the property of Trust A to the appropriate Final Beneficiaries listed in this Paragraph 8." CP 476. *Compare* Living Trust at ¶ 8, CP 1575, *with* Paragraph 8 of Exhibit 9, CP 476.

The Instructions to the form in Exhibit 9 state, under Paragraph 5, "Final Beneficiaries", that "[t]his is the person who will receive all trust property not designated to go to a Specific Beneficiary." CP 470. Tellingly, the Instructions define the term "specific beneficiaries" to mean beneficiaries who are to receive specific "gifts" or bequests. They also state, under Paragraph 5, "Choosing Beneficiaries" and "Specific Beneficiaries", that

> The ILRG Living Trust form allows for you to name none, as many or as few Specific Beneficiaries as you want. This means that you may designate *specific items* of property to be transferred to particular people or institutions upon your death. . . .

Ex. 9 to Zingarelli Dep., CP 470. [Emphasis added.] Consequently the language used in the form contained in Exhibit 9 equates "specific beneficiaries" with those persons who are to receive *specific* bequests, and "Final Beneficiaries" as those who are to receive the remainder following the death of the life beneficiary.

Mr. Zingarelli did not recall ever having used the form contained in Ex. 9. CP 323 ll. 11-17. The circumstantial evidence suggests nevertheless that it was such a form, rather than the form identified in Exhibit 6 to Zingarelli's Deposition, that he referred to in drafting the

Way Living Trust. Such use would explain, for example, why Schedule E to the Way Living Trust references distributions to the "following Specific *Beneficiaries*", followed by the caption "Specific *Bequests*". *See* Living Trust at Schedule E, CP 1575." The Instructions to the form in Exhibit 9 reconcile the two terms. [Emphasis added.]

The definition in the instructions to Exhibit 9 of a "specific beneficiary" as one who receives a specific item of property is also consistent with Mr. Zingarelli's final recollection and articulation of Peter and Marjory's intent for the Living Trust. While his testimony was not a model of consistency, Zingarelli testified, after several days of deposition, Excerpts of Dep. of Zingarelli, CP 322, l. 17, that the Living Trust was intended to create a life estate in Marjory. Decl. of Lorna Corrigan In Support of Rebuttal Memorandum, CP 556, ll. 2-7. The Trust provided Peter and Marjory with the opportunity, through Schedules D and E, to make specific bequests outside of Trust A. *Id.*, CP 560 at ll. 2-6. Marjory did not employ that opportunity, and Schedule D contained only remainder interests. CP 557, ll. 5-7. Schedule E did identify gifts from Peter of specifically identifiable property, but only of the condo, *id.*, ll. 15-18, and the car. *Id.* at ll. 19-

24. There were, according to Mr. Zingarelli, no other "specifically identifiable items CP 557, ll. 5-7 of property, real or personal", *id.*, CP 557-58, ll. 25 and 1-3, in Schedule E. *Id.* The designations of interests of Gary and Kristin under Schedule E were remainder interests only. *Id.*, CP 557-58, ll. 25 and 1-7.

Zingarelli's ultimate recollection on cross-examination was that he drafted these provisions with the understanding that the Ways' intent was for Marjory to have control of their assets during her lifetime, and for Peter's separate property to pass eventually to his kids, 50/50. Excerpts to Zingarelli Dep., Respondents' Introduction, CP 297 at ll. 20-24. If Peter were to die first, Marjory was to receive a life estate in portions of Peter's estate. *See* Excerpts of Zingarelli Dep., Corrigan Decl. In Support of Rebuttal Memorandum at Exh. A, CP 556, ll. 1-7.

The Last Will that Zingarelli prepared for Peter is consistent with Zingarelli's recollection. That will poured Peter's entire estate into the Living Trust. *See* Last Will at Art. III, CP 1558. Only if the Living Trust were revoked by Peter, or invalidated for some reason, would the other dispositive provisions of the will take effect. *Id.*

The behavior of attorney William Zingarelli immediately after

Peter's death was also consistent with Marjory's interpretation of the Trust and with Zingarelli's own recollection of Peter and Marjory's intent. Zingarelli assisted Marjory following Peter's death by obtaining an EIN number for Trust A. Decl. of Marjory Way in Support of Cross-Motion, CP 1039, ll. 7-8. He would have had no reason to do so had Peter's instruction to Zingarelli been that Peter's entire estate was to be distributed immediately upon Peter's death.

The trial court's construction of the Trust as having reserved to Gary and Kristin the remainder of Trust A upon Marjory's death is not impaired by the evidence cited by Gary and Kristin. The evidence that Peter, as he contemplated his own death, wrote that he missed Carol, his deceased wife, Declaration of Kristin Kirchner, CP 1511, ll. 12-17, for example, is unsurprising. He was writing to the brother of the woman he had been married to for over 32 years. *Id.*, CP 1507, ll. 7-8. Nor is it surprising that he would want to take care of his own children. That evidence does not, however, lead to the conclusion that Peter wished to largely disinherit his current wife, Marjory.

Peter declined to final the dissolution, Decl. Correcting Decl., CP 1130-31, ll. 23-24 and 1, that would have left Marjory with only

$15,000. Property Settlement Agreement at ¶ 2, Decl. of M. Wilson in Response, CP 873. Instead he executed a Living Trust with extensive provisions for a life estate in Marjory. *See, e.g.*, Living Trust at ¶ 7, CP 1573-74. He also named Marjory's daughters, rather than his children, as the successor trustees. *Id.* at ¶ 4, 1571-72. Moreover, had Peter truly intended that Marjory receive only the condo and the car, he could simply have placed the condominium and the car in the Living Trust and given, in his will, the balance of his entire estate to Gary and Kristin immediately upon his death. In the alternative, Peter could, at any time following the execution of the Living Trust, have caused the immediate distribution of the entire estate, other than the car and condo, to Gary and Kristin. He could have done so unilaterally by revoking the Trust, such that the remaining dispositive provisions of his will became effective. Last Will at Art. III, CP 1578. He did not do so. Decl. of Marjory Way In Support of Cross-Motion, CP 1039 at ll. 5-6.

The deposition testimony of Kathleen Madsen, if admitted, would also be of little use to the court. Ms. Madsen conceded in her deposition that she had no independent recollection of having taken the notes, Corrigan Decl. at Ex. B, CP 563, ll. 17-23, and only recognized

them by her handwriting. *Id.* She also testified that she might have hurried through the process of taking the shorthand notes, *id.*, CP 565, at ll. 8-12, and that her shorthand was subject to multiple interpretations. *Id.*, CP 564-65, ll. 17-25 and 1-9.

Reasonable minds can draw only one conclusion based on the facts offered in evidence here. Gausvik, 126 Wn. App. 868 at 879. As Peter faced death he missed his deceased wife of many years. He had loved Marjory, however, and had made her, rather than his children, the primary beneficiary on all of his financial accounts. Although Marjory and Peter's marriage suffered over time due to alcohol abuse, Peter wanted to take care of Marjory and his children. He did so by executing a Living Trust that had extensive provisions for a life estate for Marjory in Trust A, followed by remainders in his children.

When considered in light of the extensive language of the Living Trust for the content and operation of Trust A, the extrinsic evidence here substantiates Marjory's interpretation the Living Trust. The trial court's grant of summary judgment establishing Marjory Way as the life beneficiary of Trust A and Gary and Kristin as its remaindermen should be affirmed.

D. THE TRIAL COURT PROPERLY DISMISSED THE CLAIM OF BREACH OF FIDUCIARY DUTY BECAUSE GARY AND KRISTIN WERE TIMELY IN POSSESSION OF ALL INFORMATION NECESSARY TO THE PROTECTION OF THEIR INTERESTS AS BENEFICIARIES BUT FAILED TO ACT.

Appellants Gary and Kristin assert a claim of breach of fiduciary duty by Marjory Way based on their position that she should have immediately distributed all of Peter's estate to them, other than the condominium and Peter's car. *Brief of App.* at 22-23. The only authority they offer is the general proposition that a "trustee has a duty within a reasonable time to distribute the trust property to the persons who are entitled to it. . . ." *Brief of App.* at 23 (citing Restatement Third, Trusts, Sec. 89, Comment e). They cite no authority for the proposition that a trustee is obligated to provide beneficiaries with alternate legal interpretations of a trust. Here the only delay was that of Gary and Kristin who took no action to make their position known until the TEDRA Petition was filed by Marjory.

A trustee in Washington has a duty to inform remainder beneficiaries "fully of all facts which would aid them in protecting their interests." Cook v. Brateng, 158 Wn. App. 777, 787-88, 262 P.3d

1228, 1232 (2010) (citing Allard v. Pac. Nat'l Bank, 99 Wn.2d 394, 404, 663 P.2d 104 (1983) (further citation omitted)). Gary and Kristin were at all material times in possession of the trust document that contained Schedule E and the reference included in that Schedule to "Specific Beneficiaries", "Specific Bequests", and "Remainder[s]". Marjory provided them with copies after Peter's death. Decl. of Marjory Way In Reply to Response Declarations, CP 1418 at ll. 9-13.

Although Gary and Kristin had the same information about the Trust language that Marjory had, they did nothing to investigate possible alternate interpretations of the Trust. Indeed it was Marjory who sought instruction from the court by filing the TEDRA Petition when she understood that an alternate construction of the Trust could be offered. *See generally* TEDRA Petition, CP 1564. Gary and Kristin's inaction here serves to confirm the lack of prejudice to their interests. Cook at 791. (Lapse of over three years after remainder beneficiary had notice of trustee's conduct was indicative of a lack of prejudice to the remainder beneficiary's interests.) Where there is no prejudice from a trustee's delay there is no damage. *See, e.g.,* In re Estate of Ehlers, 80 Wn. App. 751, 758, 911 P.2d 1017 (1996) (no

prejudice demonstrated from trustee's late filing of required accounting). *Id.*

Gary and Kristin have failed to identify a breach of a duty owed them by Marjory Way. They have shown no harm. Even had they done so, they would have failed to mitigate that harm by neglecting to raise their interpretation of the Trust language as soon as they received a copy of the Trust from Marjory. They did not do so and the trial court's dismissal of the claim of breach of fiduciary duty should be upheld.

E. THE APPELLANTS HAVE FAILED TO PRESERVE ANY ERROR AS TO THE TRIAL COURT'S DISMISSAL OF THE CLAIMS OF BREACH OF CONTRACT AND FRAUD BY FAILING TO PRESENT ARGUMENT IN THEIR BRIEF.

Appellants, Gary Way and Kristin Kirchner, assign error to the trial court's dismissal, on summary judgment, of their claims, not only for breach of fiduciary duty, but also for breach of contract, fraud, and specific performance. They have failed to comply with the Rules of Appellate Procedure regarding argument and citation to authority, and any issue as to the dismissal of the claims of breach of contract, fraud, and specific performance have been waived.

RAP 10.3 provides in part that the brief of appellant should

contain "argument in support of the issues . . . together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6) (amended 2014). *See* App. 4. The Court of Appeals enforces this rule by declining to "review issues not argued, briefed, or supported with citation to authority." Christian v. Tohmeh, 191 Wn. App. 709, 727-28, 366 P.3d 16 (2015) (citing Valente v. Bailey, 74 Wn.2d 857, 858, 447 P.2d 589 (1968); Avellaneda v. State, 167 Wn. App. 474, 485 n. 5, 273 P.3d 477 (2012)); Guardianship of Cornelius, 181 Wn. App. 513, 534, 326 P.3d 718, 728 (2014). Passing treatment will not suffice to preserve an issue. Christian v. Tohmeh at 728 (Citing West v. Thurston County, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012); Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)). Nor will conclusory statements. Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 629, 285 P.3d 187 (2012), *rev. denied*, 176 Wn.2d 1021, 297 P.3d 708 (2013)). Gary and Kristin did not provide argument in support of their assignment of error in the dismissal of their remaining counterclaims.

The only reference to remaining counterclaims in the argument section of Gary and Kristin's brief is that "if this Court determines that

Marjory owed a fiduciary duty to Gary and Kristin . . . they respectfully request that all causes of action in their counterclaim be reinstated. . . ." *Brief of App.* At 23. This fleeting reference to other causes of action contains no citation to authority, and does not even rise to the level of "passing treatment". Christian v. Tohmeh, 191 Wn. App. at 727. There is simply no argument to which Marjory Way can respond. Even if this court were to reverse the trial court's ruling recognizing a life estate in Marjory, it should decline to consider any error in the trial court's dismissal of claims of breach of contract, fraud and specific performance.

F. APPELLANTS FAILED TO PRESERVEANY ISSUE AS TO THE AMOUNT OF ATTORNEYS' FEES AND COSTS AWARDED BY THE TRIAL COURT, AND HAVE SHOWN NO ABUSE OF THE TRIAL COURT'S DISCRETION IN MAKING AN AWARD UNDER RCW 11.96A.150.

The appellants, Gary Way and Kristin Kirchner, assign error to the trial court's award of $107,317.60 in attorneys' fees and costs to Marjory Way. *Brief of App.* at 3. They failed to preserve any error as to the amount of the award, however, and make no argument on appeal that the trial court abused its discretion in making the award. *See*

generally Brief of App. at 23-24. The award of fees and costs to Marjory Way should therefore be affirmed unless the grant of summary judgment is reversed on appeal.

While Gary and Kristin opposed an award of attorneys' fees and costs to Marjory at the trial court level, Findings and Order Awarding Fees at ¶ 7, CP 89, they made no objection to the amount of fees awarded. *Id.* They are therefore precluded from objecting to the amount of the award. Lunsford v. Saberhagen Holdings, Inc., 139 Wn. App. 334, 338, 160 P.3d 1089 (2007), *aff'd,* 166 Wn.2d 264, 208 P.3d 1092 (2009) ; Wilcox v. Basehore, 189 Wn. App. 63, 90, 356 P.3d 736, 750 (2015), *rev. granted,* 185 Wn.2d 1016, 368 P.3d 172 (2016)) . *See also* RAP 2.5, App. 3.

Gary and Kristin also failed to preserve any issue over the court's decision to award fees. The award here was sought under RCW 11.96A.150. Under TEDRA, an award of fees is discretionary in the trial court: "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) (amended 2007). See App. 7. The standard of review of a discretionary decision by the trial

court is abuse of discretion. Union Bank, N.A. v. Vanderhoek Associates, LLC, 191 Wn. App. 836, 842, 365 P.3d 223 (2015) (citations omitted). Abuse of discretion occurs when the trial court's "decision is based on untenable grounds or is for untenable reasons." Id. No argument is presented here that the trial court abused its discretion in awarding fees and costs to Marjory Way, and any such issue is waived. Lunsford, 139 Wn. App. at 338.

Gary and Kristin do not present any argument why this court should, if they prevail on appeal, award their fees pursuant to 11.96A.150, except to assert that Marjory Way "raises no meritorious issue on appeal. . . ." *Brief of App.* at 24. Marjory Way prevailed below, however, and had no need to appeal. Gary and Kristin also request remand to the trial court, should they prevail on appeal, so that they may move for an award of fees to them. *Id.* at 23-24. Given the trial court's discretion under RCW 11.96A.150, *see* App. 6, this court may of course direct that if an award issues, it include attorneys' fees and costs for this appeal. RAP 18.1(i). *See* App. 6. *See also* Courchaine v. Commonwealth Land Title Ins. Co., 174 Wn. App. 27, 51, 296 P.3d 913, 925 (2012) (citing Standing Rock Homeowners Ass'n

v. Misich, 106 Wn. App. 231, 247 23 P.3d 520 (2001)). Remand for consideration by the trial court would be the appropriate action should Gary and Kristin prevail on appeal.

G. MARJORY WAY RECEIVED AN AWARD OF HER ATTORNEYS' FEES AND COSTS AT THE TRIAL COURT PURSUANT TO RCW 11.96A.150, AND SHOULD HAVE A FURTHER AWARD OF HER ATTORNEY'S FEES AND COSTS ON APPEAL.

The trial court here exercised its discretion to award Marjory Way her attorney's fees and costs against the trust principal, under the authority of RCW 11.96A.150(1). Order on Summary Judgment, CP 200; Order Granting Fees, CP 97. That statute allows for a discretionary award by the court in a TEDRA action to any party from any party on any equitable bases the court deems appropriate. *See* App. 6. Where a statute or contract allows an award of attorney fees at trial, an appellate court has authority to award fees on appeal. Courchaine, 174 Wn. App. at 51. Marjory Way requests an award of her reasonable attorney's fees and costs on this appeal against the trust principal, pursuant to RCW 11.96A.150(1), *see* App. 6, and RAP 18.1(b). *See* App. 5.

V. CONCLUSION

The trial court's order granting summary judgment incorporates the only reasonable interpretation of the language of the Peter J. and Marjory E. Way Living Trust, and should be affirmed. Marjory Way should further have an award of her reasonable attorneys' fees and costs on appeal, pursuant to RCW 11.96A.150(1) and RAP 18.1(b).

Respectfully submitted this 27th of May, 2016.

NEWTON ♦ KIGHT L.L.P.

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APPENDIX 1

ER 801(c)

DEFINITIONS

The following definitions apply under this article:

. . .

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

APPENDIX 2

ER 803(a)(3)

HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

APPENDIX 3

RAP 2.5

CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

APPENDIX 4

RAP RULE 10.3(a)(6)
CONTENT OF BRIEF

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

. . .

(6) Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

APPENDIX 5

RAP 18.1(b)

ATTORNEY FEES AND EXPENSES

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

APPENDIX 6

RAP 18.1(i)

ATTORNEY FEES AND EXPENSES

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

RAP 18.1(i)

APPENDIX 7

RCW 11.96A.150(1)

(1) 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: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

APPENDIX 7

RCW 11.96A.150(1)