

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (4th) 140293-U

NO. 4-14-0293

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 23, 2015

Carla Bender

4th District Appellate

Court, IL

In re: the Estate of BURNHAM E. NEAL,)	Appeal from
Deceased,)	Circuit Court of
CYNDI NEAL-LUNSFORD,)	Coles County
Petitioner-Appellant,)	No. 12P39
v.)	
RALPH D. GLENN,)	Honorable
Respondent-Appellee.)	Teresa K. Righter,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's judgment where the trust instrument provided the date upon which the obligation to pay petitioner the unitrust amount commenced.

¶ 2 Decedent Burnham E. Neal's will provided for the creation of a \$2.4 million charitable remainder unitrust (unitrust) that named petitioner, Cyndi Neal-Lunsford, as the beneficiary during her lifetime. A dispute arose concerning when the obligation to pay petitioner the unitrust amount, *i.e.*, a percentage of the fair-market value of the trust assets, began.

Petitioner argued in the circuit court that, pursuant to section 5(a) of the Principal and Income Act (Act) (760 ILCS 15/5(a) (West 2012)), the obligation for payment of the unitrust amount arose on the date of decedent's death. The court disagreed, finding that the trust instrument provided that the obligation to pay petitioner the unitrust amount began on the date the unitrust was fully funded. We affirm.

¶ 3

I. BACKGROUND

¶ 4

Decedent died on April 12, 2012. On April 27, 2012, decedent's will, dated November 12, 2004, and two codicils, dated September 19, 2007, and December 6, 2007, were admitted to probate and letters of office were issued to respondent, Ralph D. Glenn, as executor of decedent's estate. Petitioner is the former spouse of decedent's only child and the mother of decedent's only two grandchildren.

¶ 5

Article IX of decedent's first codicil (the trust instrument)—which replaced article IX of decedent's will—named petitioner, if living on the thirtieth day following the date of his death, as the beneficiary during her lifetime of the "Cyndi Neal-Lunsford Trust," a \$2.4 million unitrust. Upon petitioner's death, the remainder of the unitrust is to be distributed to the "Neal Foundation." In addition to being named executor of decedent's estate, respondent was also named trustee of the unitrust at issue here.

¶ 6

The trust instrument provides for the administration of the unitrust, in relevant part, as follows:

"A. In each calendar year or such portion thereof in the first or final year of the trust ("Trust Year"), my trustee shall pay to or for the benefit of [petitioner], during her life, in quarter annual installments, an amount equal to the unitrust amount set forth below ("Unitrust Amount").

B. The Unitrust Amount for the trust shall be equal to the average of the fair market values ("Average Value") of the assets of the trust as of the close of the first business day of the trust year (or the date of first funding in the first trust year) and the

two previous years (or such lessor [*sic*] number of trust years as are available for the first two years of the trust) multiplied by five percent (5%) ("Applicable Unitrust Rate). In the case of a short Trust Year, the Unitrust Amount shall be calculated as set forth in subparagraph C below. In the case of additions to or distributions from the trust, the Unitrust Amount shall be determined as set forth in subparagraph D below. Expenses which would be deducted from income if the trust were not a unitrust shall not be deducted from the payment of the unitrust amount.

C. For a short Trust Year, including the year of initial funding and the year of a beneficiary's death, the Unitrust Amount shall be based upon a prorated portion of the Unitrust Amount set forth above, comparing the number of days in the short Trust Year to the number of days in the calendar year of which the short Trust Year is a part.

* * *

F. In addition to the Unitrust Amount as determined above, the net accounting income earned in my estate or from other assets payable to this trust after my death but prior to the full funding of this [unitrust] shall be paid to my estate. The foregoing income distribution recognizes that until full funding of the [unitrust], assets awaiting distribution to the [unitrust] will not be taken into account in determining the Unitrust Amount.

H. I have created this [unitrust] for Cyndi in order to allow the trust to be invested for total return without the artificial distinction between accounting income and principal appreciation. By doing so, the trust can be invested without conflict between the interests of the current beneficiary and the remainder beneficiaries."

¶ 7 On March 26, 2013, respondent paid petitioner \$30,000, which he described as "[d]istribution of trust income" in his "first current account" as executor of decedent's estate. On December 2, 2013, respondent "acknowledge[d] receipt of \$2,400,000 being the specific bequest under Paragraph C of Article IV of the Last Will & Testament of [decedent]."

¶ 8 On January 21, 2014, petitioner filed a "Petition To Construe Trust and Direct Distribution" in the circuit court. Specifically, petitioner asserted that "[d]espite such partial distribution 'of trust income' prior to trust funding [*i.e.*, the \$30,000 payment], the [respondent] trustee has declined to distribute the balance of the Unitrust Amount due to [petitioner] as beneficiary thereof for the period following Decedent's death on 4/12/12 until the date of trust funding, namely 9 September 2013." (We note here that, according to the receipt acknowledging the bequest of \$2.4 million, the date the unitrust was funded was December 2, 2013, not September 9, 2013.) According to petitioner, section 5(a) of the Act (760 ILCS 15/5(a) (West 2012)) dictated that her right to "income" commenced on the date of the testator's death. Petitioner asserted that pursuant to the formula provided in the trust instrument, the amount due to her for the period of administration was \$139,315.07 (\$2.4 million multiplied by .05% multiplied by 515 days divided by 365 days minus \$30,000 equals \$139,315.07). Respondent

disagreed and asserted that the \$30,000 payment to petitioner "was a pre-payment of the interest due to her after the trust was funded but not before and which would be paid out of income due to her once the trust was funded, and was not a payment of income due to her from the trust prior to the trust being funded." Respondent further contended that the calculation of income due from the unitrust was governed by the trust instrument, rather than the Act. Respondent sought the dismissal of petitioner's petition with prejudice and an order that she "repay the \$30,000 advanced to her out of current or future income from said trust after the trust was funded."

¶ 9 Following a February 10, 2014, hearing on the petition to construe trust and direct distribution, the circuit court took the matter under advisement. On March 11, 2014, the court issued its decision, concluding that "[p]etitioner's requested construction of the trust [was] contrary to the plain language of the instrument." Specifically, the court found that the plain language of the trust instrument, namely paragraphs (B), (C), and (F), addressed its administration and that the Act "does not apply if the trust provides a start date." The court further noted that articles IV and IX of the will were superseded by decedent's first codicil and that "[t]he first codicil substituted new language which did not include the language that payments were to commence upon [decedent's] death."

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Before proceeding to the merits of this case, we must address petitioner's request that we "disregard" respondent's brief for failure to comply with Illinois Supreme Court Rule 341(i) (eff. Feb. 6, 2013). Specifically, petitioner notes that respondent fails to cite to the pages of the record on which he relies. While we decline to strike respondent's brief in this case—where the record is small and our review is not hindered by his failure to cite to the record—we

take this opportunity to remind the parties that the argument section of an appellee's brief, just as the argument section of an appellant's brief, must include citation to the pages of the record on which it relies. See Ill. S. Ct. R. 341(i) (eff. Feb. 6, 2013) (providing that an appellee's brief shall comply with, in relevant part, Rule 341(h)(7), which requires the argument section of a brief to cite to the pages of the record relied on); *Cottrill v. Russell*, 253 Ill. App. 3d 934, 938, 625 N.E.2d 888, 890 (1993) ("Where violations of supreme court rules are not so flagrant as to hinder or preclude review, the striking of a brief in whole or in part may be unwarranted.").

¶ 13 We now turn to the merits of petitioner's appeal. The issue on appeal is whether the obligation to pay petitioner the unitrust amount commenced on the date of decedent's death or the date the unitrust was fully funded.

¶ 14 The goal in construing a trust is to give effect to the intent of a deceased testator or settlor of a trust. *In re Estate of Feinberg*, 235 Ill. 2d 256, 268-69, 919 N.E.2d 888, 896 (2009). "The intent sought is not that presumed to have been in the testator's mind but rather that which was expressed by language in the will." *In re Estate of Laas*, 134 Ill. App. 3d 504, 509, 480 N.E.2d 1183, 1187 (1985). "The intention of the settlor is to be ascertained by examining the entire trust and by giving to the words employed their plain and ordinary [meaning]." *Harris Trust & Savings Bank v. Donovan*, 145 Ill. 2d 166, 172, 582 N.E.2d 120, 123 (1991). "If possible, the court should construe the will or trust so that no language used by the testator is treated as surplusage or rendered void or insignificant." *Id.* We review a trial court's construction of a trust instrument *de novo*. *Peck v. Froehlich*, 367 Ill. App. 3d 225, 228, 853 N.E.2d 927, 931 (2006).

¶ 15 Petitioner argues, as she did in the circuit court, that pursuant to section 5(a) of the Act, the obligation for payment of the unitrust amount commenced on the date of decedent's

death. Respondent suggests the obligation for payment was triggered on December 2, 2013, when the unitrust received a payment of \$2.4 million from decedent's estate. Section 5(a) of the Act, titled, "[w]hen right to income commences and terminates," provides as follows:

"An income beneficiary is entitled to income from the date or event specified in the instrument, or, if none is specified, from the date an asset becomes subject to the trust. In the case of an asset becoming subject to the trust by reason of a will, it becomes subject to the trust as of the date of the death of the testator even though there is an intervening period of administration of the testator's estate." 760 ILCS 15/5(a) (West 2012).

¶ 16 Applying the Act, we must determine whether the trust instrument provided a "date or event" upon which the obligation to pay petitioner the unitrust amount commenced. If it did, then the obligation for payment of the unitrust amount did not commence on the date of the testator's death, as petitioner asserts. For the reasons set forth below, we find the trust instrument sufficiently identified funding of the unitrust as the "event" marking the commencement of the obligation to pay to petitioner the unitrust amount.

¶ 17 Paragraph (B) of the trust instrument provides the method of calculating the unitrust amount. It states, in part, as follows:

"The Unitrust Amount for the trust shall be equal to the average of the fair market values ("Average Value") of the assets of the trust as of the close of the first business day of the trust year (*or the date of first funding in the first trust year*) and the two previous years (or such lessor [*sic*] number of trust years as are available for the

first two years of the trust) multiplied by five percent (5%)

("Applicable Unitrust Rate)." (Emphasis added.)

Thus, based on the language in paragraph (B) above, the unitrust amount in the first trust year "shall be equal to the average of the fair market values ("Average Value") of the assets of the trust as of *** *the date of first funding in the first trust year* [] and the two previous years (or such lessor [*sic*] number of trust years as are available for the first two years of the trust) multiplied by five percent (5%)." (Emphasis added.) On December 2, 2013, respondent, as trustee for the unitrust, received a single payment of \$2.4 million from the estate. This payment represented the "first funding" of the unitrust. According to paragraph (B), a unitrust amount could not be calculated until the unitrust received at least partial funding.

¶ 18 In addition, paragraph (F) of the trust instrument provides as follows:

"In addition to the Unitrust Amount [as determined in paragraphs (B) and (C)], the net accounting income earned in my estate or from other assets payable to this trust after my death but prior to the *full funding* of this [unitrust] shall be paid to my estate. The foregoing income distribution recognizes that until *full funding* of the TRU, assets awaiting distribution to the [unitrust] will not be taken into account in determining the Unitrust Amount."

(Emphases added.)

Based on the language in paragraph (F) above, it appears that in the event of partial funding and until "full funding" of the unitrust, unitrust amounts would be paid to the decedent's estate. As indicated previously, the unitrust was first funded on December 2, 2013, with a single payment of \$2.4 million. According to article IX of decedent's first codicil, the unitrust was to be funded

in the total amount of \$2.4 million. Therefore, this payment to the unitrust on December 2, 2013, also constituted "full funding."

¶ 19 We find that "first funding" (under paragraph (B) of article IX) and "full funding" (under paragraph (F) of article IX), both occurring on December 2, 2013, constituted an "event" pursuant to section 5(a) of the Act marking the commencement of the obligation to pay petitioner the unitrust amount. Thus, according to the language of the trust instrument, the obligation to pay petitioner the unitrust amount commenced on December 2, 2013, and not on the date of decedent's death.

¶ 20 In closing, we note that petitioner argues the act of paying the unitrust amount to decedent's estate as described in paragraph (F) (in the event of *partial* funding only of the unitrust) "would constitute self-dealing" and violate section 664(d)(2)(A) of the Internal Revenue Code (26 U.S.C.A. § 664(d)(2)(A) (2006)), which provides that the unitrust amount be paid, at least annually, to one or more persons, at least one of which is not an organization. However, we need not determine whether this argument has merit because the unitrust at issue here was never *partially* funded. Prior to the unitrust's full funding on December 2, 2013, it contained no assets for which a unitrust amount could have been calculated and subsequently paid to the estate. In other words, because no assets were distributed to the trust prior to its full funding, the payment provisions in paragraph (F) of the trust instrument were never triggered, and thus, the provisions of the Internal Revenue Code, referred to by petitioner, are not implicated.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we affirm the trial court's judgment.

¶ 23 Affirmed.