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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> ESTATE OF AUDREY A. BABER, An Alleged Disabled Person.	)	Appeal from the Circuit Court of Kane County.
	)	
	)	No. 09-P-581
	)	
(Audrey A. Baber, Respondent and Counterplaintiff-Appellee, v. Robert D. Baber, Petitioner and Counterdefendant-Appellant).	)	Honorable Joseph M. Grady, Judge, Presiding.

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JUSTICE BIRKETT delivered the judgment of the court.  
Justices Jorgensen and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court's judgment on the third amended counterclaim was not against the manifest weight of the evidence; the appellant's arguments of justification, evidentiary insufficiency, and the appellee's incapacity acting as a bar to filing the third amended counterclaim were rejected; the appellant's argument that the judgment should not have been awarded to the appellee individually was forfeited.

¶ 2 In this case, the children of respondent and counterplaintiff, Audrey A. Baber (Audrey), have waged a protracted and bitter contest over Audrey and her ability to manage her medical and financial affairs (her personal estate totaled at least \$2.3 million), and this has fueled Audrey's roughly seven-year odyssey from North Carolina to Illinois. In *In re Estate of Baber*, 2011 IL App (2d) 110436-U (*Baber I*), the precise issue of Audrey's capacity and need for a

plenary or limited guardian was adjudicated. In that case, we affirmed the trial court's judgment that Audrey required a limited guardian with authority over her financial affairs, but reserved to Audrey herself certain powers including, relevantly, the authority to institute or continue civil litigation, either then-contemplated or then-pending. *Id.* ¶ 36.

¶ 3 During the guardianship proceeding, Audrey filed a counterclaim against petitioner and counterdefendant, Robert D. Baber (Robert), seeking to recover money derived from the Roy L. Baber Trust which Audrey alleged that Robert used to pay for his expenses in the guardianship contest, and the counterclaim was thereafter amended from time to time, and the matter proceeded. In *In re Estate of Baber*, 2013 IL App (2d) 130028-U (*Baber II*), Robert sought to stay the prosecution in Illinois of Audrey's counterclaim, arguing that a duplicate action was also pending in Robert's home state of North Carolina. We held that Robert had failed to carry his burden of persuasion and affirmed the trial court, which denied Robert's attempt to stay the Illinois proceedings. *Id.* ¶ 20.

¶ 4 The matter then proceeded to a hearing on Audrey's second amended counterclaim, after which Audrey<sup>1</sup> was granted leave to file a third amended counterclaim in order to conform the

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<sup>1</sup> During the hearing on Audrey's second amended counterclaim, her attorney became concerned that her ability to understand, participate in, and maintain an action on her own behalf had become so diminished that she needed a plenary guardian. Following investigation, the court appointed the American Bank & Trust as a temporary guardian with the express power, previously personally reserved to Audrey, to institute or continue any civil litigation pending or contemplated. Subsequently, American Bank & Trust resigned as guardian and U.S. Bank, N.A. of Lisle was appointed in its stead with the same responsibilities as American Bank had held.

pleading to the proofs adduced at the hearing. The circuit court of Kane County entered a general finding in favor of Audrey on the third amended counterclaim, but did not provide verbal or written reasoning, and it awarded Audrey the sum of \$267,256.40. Robert appeals the judgment of the trial court arguing that (1) the relevant language in the trusts at issue in this case and the applicable law provided him with the justification to expend trust assets in prosecuting the guardianship proceeding; (2) Audrey did not prove the necessary elements in each count of her third amended counterclaim; (3) Audrey demonstrated that she was not competent to manage the counterclaim litigation, especially the filing of the third amended counterclaim; and (4) the trial court erred in not ordering that the judgment be awarded to the trust. We affirm.

¶ 5

#### I. BACKGROUND

¶ 6 This case comes before us for a third time; we have already extensively described the evidence adduced during the hearing regarding Audrey's capacity and her need for a guardian. Thus, we will only discuss that evidence as is necessary to provide an understanding of the issues raised in this case involving Audrey's third amended counterclaim. We will also summarize the pertinent evidence of record adduced during the hearing on Audrey's second amended counterclaim.

¶ 7 Audrey was born in 1924. She married Roy L. Baber (Roy), and the marriage produced three children: Robert, Stephen, and Janet. Robert resided in North Carolina, Stephen in Illinois, and Janet in Pennsylvania. For about 30 years preceding this action, Audrey and Roy had also resided in North Carolina, eventually finding their way in 2005 to an assisted living facility,

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We will describe these circumstances more fully below. For ease, however, we will refer to U.S. Bank as the guardian representing Audrey's interests as "Audrey."

River Landing. Audrey's faculties had been in decline. In 2006, she was diagnosed with an Alzheimer's type dementia. In 2009, Roy died.

¶ 8 Roy had carefully planned for his death and for Audrey's continued financial security if he predeceased her. Upon Roy's death, Robert became trustee of a number trusts, including the Audrey Baber Trust, with about \$2.3 million in assets. Robert and Stephen were also the beneficiaries of Roy's estate planning, each receiving about \$1 million; Janet previously had been disinherited, although the record is silent as to why. The grandchildren also received money from Roy's estate, including Janet's children.

¶ 9 Within about a week of Roy's death, Audrey had traveled to visit Janet "for the weekend." She continued, traveling to Illinois to visit with Stephen. Audrey then decided to stay in Illinois and was placed at the Alden Gardens, another assisted living facility. Robert later reported a call from Audrey, which he believed to be scripted, in which she told him of her move to Illinois. During the guardianship action, Robert asserted that Stephen had effectively kidnapped Audrey in order to financially exploit her.

¶ 10 In November 2009, Robert initiated the guardianship action in Illinois along with a guardianship action in North Carolina. Audrey filed a counterpetition for guardianship, eventually amending it to seek a limited guardian for her estate and her person, with U.S. Bank to be the guardian of her estate and Stephen to be the guardian of person. In March 2010, when Audrey answered Robert's petition, she filed a counterclaim, alleging breach of fiduciary duty and seeking damages resulting from Robert's breaches, seeking an accounting of the trusts and Robert's removal as trustee, and seeking injunctive relief against Robert as trustee. Robert moved to dismiss the counterclaim, and the trial court dismissed it in part. The trial court allowed Audrey to amend her allegations about the Audrey Baber Trust, but specified that any

amendment could be filed only after the resolution of the guardianship petitions.

¶ 11 The matter advanced to a hearing on the guardianship petitions, and this evidence is extensively covered in our disposition in *Baber I*, 2011 IL App (2d) 110436-U, ¶¶ 3-33. There was conflicting evidence regarding Audrey's mental abilities. Dr. Samuel Kelly, Audrey's physician in North Carolina, opined that Audrey was so impaired that she was unable to make financial or legal decisions. Similarly, Dr. Gregory Malo testified that Audrey was impaired to the point of requiring a guardian as well as 24-hour supervision to keep her safe. Dr. Rajeev Malhotra testified that, based on his examinations, Audrey retained the capacity to make financial, legal, personal, and health-care decisions. Dr. Laurie Deckard-Tankersley (Deckard), a clinical psychologist, testified that Audrey's impairment from Alzheimer's-type dementia was mild to moderate, and she was able to make financial, legal, personal, and health-care decisions. Dr. Kurt Warkenthian, Audrey's physician after she moved to Illinois, testified that, based on his observations, Audrey was competent to manage her finances and her personal decisions, and she was likely not subject to exploitation by Stephen or others. Robert Nelson, an attorney assisting Audrey with her estate planning testified that he believed she was competent and could make financial and health-care decisions.

¶ 12 Resolving the conflicting testimony, the trial court held that Audrey was disabled and lacked some capacity to manage her estate and ordered that American Bank & Trust be appointed the limited guardian of Audrey's estate. The trial court ordered that Audrey was to personally retain authority over, relevantly, initiating and maintaining civil litigation. We affirmed the trial court's judgment, holding that it had not been against the manifest weight of the evidence. *Id.* ¶ 61. Moreover, we held that the trial court had not abused its discretion in expressly reserving to Audrey the power to initiate and continue litigation. *Id.* ¶ 70.

¶ 13 Audrey filed an amended counterclaim, and Robert moved to dismiss it. The trial court denied the motion to dismiss the amended counterclaim. Robert then answered the amended counterclaim and filed affirmative defenses, then amended affirmative defenses, to the amended counterclaim.

¶ 14 On June 25, 2012, Audrey filed a second amended counterclaim. Her first count alleged tortious interference, using money from the Roy L. Baber Trust to support the guardianship petition. Her second count alleged a surcharge, seeking to make Robert individually liable for the expenditures. Robert moved to dismiss the surcharge count. Robert also raised five affirmative defenses to the second amended counterclaim, which Audrey moved to strike. The trial court eventually struck Robert's second, third, and fourth affirmative defenses and denied Robert's motion to dismiss the surcharge count of the second amended counterclaim.

¶ 15 Beginning on January 21, 2014, the matter advanced to a hearing on the second amended counterclaim. Robert testified that he initiated this case as a petition for guardianship for his mother, Audrey. He used over \$267,000 in assets from the Roy L. Baber Trust to cover the expenses of litigating the guardianship action. When questioned about funding the litigation, Robert repeatedly stated that he believed that the trust language and North Carolina law permitted him, in his discretion, to use funds from the trust as trustee in order to protect Audrey in any sort of legal action necessary. Robert testified that, after discussing the matter with his attorney in North Carolina, he believed that he had an obligation to act to protect Audrey.

¶ 16 Robert testified that Ron Johnson was an estate planning attorney in North Carolina who worked with Roy and Audrey to set up the trusts and other estate planning measures. Robert knew that, when Roy died, Roy's trust had over \$3 million in assets. Upon Roy's death, his trust was divided into two trusts, and Robert and Stephen received over \$1 million each from the

assets. Roy had previously expressly disinherited Janet. Robert testified that Audrey's estate plan had also disinherited Janet.

¶ 17 When questioned specifically about using trust assets to pay for the litigation, Robert again repeated his testimony that he believed the trust language gave him the discretion to use trust funds in order to "protect" his mother. Robert admitted that there was no specific language authorizing him to use trust assets to pay for litigation, but pointed to language that allowed him to apply funds on Audrey's behalf, and to provide for her support and maintenance. Robert admitted that no attorney in North Carolina had advised him that he could fund litigation with trust assets according to the language of the trust, but he also maintained that nobody had advised him that he could not do so. Robert admitted that an attorney, Rick Sharpless, had questioned distributions from trust assets, but Robert referred Sharpless to Johnson, and he did not thereafter receive any more inquiries from Sharpless.

¶ 18 Following Robert's testimony, Audrey rested her case-in-chief. Robert moved for directed findings on both counts of the second amended counterclaim. The trial court denied Robert's motion.

¶ 19 Audrey testified in Robert's case-in-chief. Audrey testified that she could not name where she was currently residing, and she believed that she still resided in North Carolina. Audrey believed that she had been well cared for during the previous few years, and she expressly acknowledged that her basic needs had been met, including her medical needs. Audrey also testified that she did not think that she made any requests for money out of her trust.

¶ 20 The questioning turned to legal matters. Audrey testified that she was unaware of any

lawsuits filed in her name since April 2011.<sup>2</sup> Audrey was unable to recall the names of any attorneys working on her behalf. She could not recall whether she had sued anyone, but allowed that it could have happened. Audrey could not recall that she filed a counterpetition in the guardianship action seeking the appointment of a guardian on her own behalf. Audrey also testified it was not her wish to bring a lawsuit against anyone or to maintain a lawsuit in her name against anyone, responding to Robert's questioning.

¶ 21 Audrey testified that she had no reason to believe that Robert had been a poor choice for Roy to have picked to be a trustee. Audrey did not recall making demands for money from Robert. Audrey also testified that she hoped she had no reason to file a lawsuit against Robert; she could not remember what the reason would be, but it could have been something that she had forgotten.

¶ 22 On examination by her own counsel, Audrey expressed displeasure at the thought that someone may have taken money from her trust and used it in order to try to have her declared incompetent. While Audrey stated that, if that scenario occurred, she would not want the money back, later in her testimony she also stated that she would want the money back, if she believed

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<sup>2</sup> Robert portrays this as a failure to remember that she was involved in a suit involving Robert. We note that the date represents the entry of the order on Robert's petition for guardianship, and, before the April 2011 order, Audrey had filed a counterclaim in the guardianship action. Technically, then, her answer appears correct: she had not filed a new legal action since April 2011, but only amended her counterclaim from time to time between April 2011 and the date of the hearing on the counterclaim. Nevertheless, Audrey presented as extremely impaired during her testimony.



the money was actually hers.

¶ 23 Robert testified that, since 1975, he had lived in North Carolina. In September 2005, his parents moved into the River Landing assisted living facility. Robert testified that Audrey's mental faculties grew worse over time, and particularly in the months before Roy's death. Robert noted that, after his father died, Audrey initially remained at River Landing, but would become confused and ask where Roy was.

¶ 24 Robert maintained that he instituted the guardianship action because he believed Audrey had been taken to Illinois under questionable circumstances. He believed that she might have been subject to exploitation because, shortly after arriving, she gave \$169,000 in gifts to her grandchildren, Stephen and his spouse, and Janet and her spouse. Robert additionally recounted an October 30, 2009, call from Audrey during which he became convinced that she was reading from a script. Robert also highlighted Stephen's loan to Audrey in which he charged Audrey an interest rate of 9.25%, as well as Stephen charging Audrey against the loan for her food when he took her out of the assisted living facility. All of these actions convinced him he needed to undertake legal action in order to protect Audrey. Robert reiterated that he was within his discretion in using trust assets to fund the guardianship and related actions.

¶ 25 Robert testified that he believed Stephen and Janet colluded to bring Audrey out of North Carolina. Robert pointed to an email that he received during discovery in which Janet suggested to Stephen that, if he should have Audrey call Robert, he should give her a script and extensively coach her before the call. Robert also recounted an email he received from Janet which questioned a \$500 expenditure on behalf of Audrey, explaining that Janet did not believe Audrey had the capacity to make the gift.

¶ 26 Robert testified that, in November 2009, he believed that Audrey had assets in her

Oppenheimer account totaling \$2.3 million and the Roy L. Baber Trust had assets totaling \$3.75 million. Robert admitted that he was concerned that, once permanently in Illinois, Audrey might change her estate plan. Robert acknowledged that, at that time, Janet was disinherited, so a change to the estate plan could definitely affect his inheritance.

¶ 27 Robert also testified about concerns he had over Stephen's conduct with Audrey. Specifically, Robert noted that Dr. Malhotra had testified in the hearing on the guardianship action that he had performed a mental status examination that indicated Audrey was significantly impaired, but Stephen had then asked Malhotra not to conduct further testing of Audrey, and to omit the results from her chart and his report.

¶ 28 According to Robert, all of these issues and a conversation with Johnson that he should act convinced Robert to take steps to protect Audrey. Robert stated that he was "concerned [Audrey] was being manipulated, not understanding the documents she was signing, and that [he] needed to get the court to approve a guardian to help her through these issues."

¶ 29 Robert's testimony during his case-in-chief spanned two days. On January 23, 2014, the final scheduled date for testimony in the hearing on Audrey's second amended counterclaim, Audrey's attorney informed the court that, the evening before, he had received a settlement overture from Robert. Based on Audrey's testimony the preceding day compared with her counsel's interaction with her even shortly before the hearing, he believed that Audrey's capacity to manage her affairs had taken a sudden downturn, and Audrey's counsel represented that he did not believe he could meaningfully discuss the settlement with Audrey at that time. Counsel suggested that he might seek the appointment of a guardian *ad litem* in order to investigate Audrey's capacity to institute and continue litigation. Nothing regarding Audrey's capacity was decided, and the parties agreed to complete Robert's testimony. At the close of Robert's

testimony, the parties rested, and Audrey moved for leave to file a third amended counterclaim in order to conform her pleadings to the proof presented throughout the hearing. On January 29, 2014, the trial court appointed a guardian *ad litem* to investigate Audrey's capacity to manage those rights specifically retained by her as granted in the April 2011 order resolving the guardianship action. The trial court also continued the matter until March to allow the guardian *ad litem* to complete his investigation and make a recommendation regarding Audrey, as well as to enter a schedule for Robert's pending motion to dismiss Audrey's second amended counterclaim, Audrey's motion for leave to again amend the second amended counterclaim to conform it to the proofs from the hearing, and to complete the final arguments on Audrey's second amended counterclaim. On February 7, 2014, Robert filed an amended motion to dismiss Audrey's second amended counterclaim.

¶ 30 On February 20, 2014, Audrey's guardian *ad litem* filed his report with the trial court, concluding that Audrey no longer retained the capacity to manage litigation on her own behalf. The guardian *ad litem* recommended that the April 2011 order be modified to reflect that Audrey could no longer institute or continue any civil litigation in her own name. In March 2014, American Bank & Trust was appointed temporary guardian with the power over litigation on Audrey's behalf.

¶ 31 On May 7, 2014, Stephen was appointed as guardian of Audrey's person. On May 28, 2014, the trial court accepted the resignation of American Bank & Trust as the guardian of Audrey's estate. On that date, the trial court appointed U.S. Bank of Lisle as the guardian of Audrey's estate (which included the power to institute or continue litigation on Audrey's behalf). The court also directed the guardian *ad litem* to continue in the matter.

¶ 32 On August 1, 2014, the court denied Robert's motion to dismiss Audrey's second

amended counterclaim. The trial court also granted leave to Audrey to file a third amended counterclaim. On that date, Audrey did in fact file her third amended counterclaim. The third amended counterclaim was in three counts: count I alleged tortious interference, count II alleged a “surcharge action,” and count III alleged that Robert breached his duty of loyalty.

¶ 33 Robert answered the third amended counterclaim and interposed affirmative defenses. Audrey moved to strike the affirmative defenses. The trial court reaffirmed the dismissal of the second, third, and fourth affirmative defenses, but ultimately denied Audrey’s motion to strike the remaining first, fifth, and sixth affirmative defenses. Robert also moved for a mistrial, or, in the alternative, for leave to reopen the proofs. The trial court denied the motion for a mistrial and refused to reopen the proofs. In January 2015, closing arguments were held, and the trial court also discharged Audrey’s guardian *ad litem*. On March 19, 2015, the trial court entered judgment in favor of Audrey and against Robert in the amount of \$267,256.40. The trial court did not include either an oral or a written explanation of its judgment. Robert timely appeals.

¶ 34

## II. ANALYSIS

¶ 35 On appeal, Robert argues that he was justified in expending trust assets instead of his own money to fund that the guardianship action. Robert also contends that Audrey failed to prove the claims in her third amended counterclaim. Robert further contends that, following the April 2011 order, Audrey did not have the capacity to manage litigation on her own behalf, so leave to file the third amended counterclaim should not have been granted. Finally, Robert argues that, if the trial court’s judgment is upheld, he should be ordered to repay the judgment to the trust and not to Audrey, personally. We consider each contention in turn.

¶ 36

### A. Justification to Use Trust Assets

¶ 37 Robert first argues that he was justified in filing the guardianship action by the terms of the Roy L. Baber Trust, by North Carolina law, by his own reasonable concerns about Audrey's mental capacity, and by the trial court's judgment in the guardianship action. In particular, Robert contends that the language of the trust granted him the authority to act in Audrey's interests and that securing the limited guardianship furthered Audrey's welfare. In addition, the trust expressly incorporated provisions of North Carolina law granting a trustee broad powers from which the authorization to use trust assets in a guardianship proceeding could be inferred. Finally, Robert additionally contends that his own reasonable concerns about Audrey's mental capacity coupled with the trial court's determination in the guardianship action showed that Audrey was in some degree mentally incapacitated and required the intervention of a guardian to provide for her personal and financial safety. According to Robert, each of these contentions individually authorized his actions, and taken together, provided an overwhelming justification for his decision to expend trust assets and pursue a guardianship for Audrey.

¶ 38 We first consider the relevant trust and statutory language highlighted by Robert. Regarding the trust, Roy created the Roy L. Baber Trust and was both the settler who funded the trust and the initial trustee. Roy also included instructions to provide how the trust would be managed if he were to predecease Audrey. In the case of Roy's death before Audrey's, as actually occurred, Robert was designated as, and became, the first successor trustee. Upon Roy's death, the trust would be divided into a Trust A and a Trust B. The division of the Roy L. Baber Trust appears to have been a device to minimize taxes; Trust A was funded with the maximum amount of assets that would avoid the imposition of federal taxes, and Trust B was funded with the remaining assets.

¶ 39 Article VII of the Roy L. Baber Trust provided for the administration of Trust A, including, pertinently:

“[T]he Trustee may pay to or apply for the benefit of [Audrey] such sums from the principal of the trust as in its sole discretion shall be deemed necessary or advisable from time to time for the medical care, education, support and maintenance in reasonable comfort of [Audrey], taking into consideration, to the extent the Trustee deems advisable, any other income or resources of [Audrey] know[n] to the Trustee.”

Upon Audrey’s death, the remaining principal of Trust A would pass into Trust B and be administered as if it had been an original part of Trust B.

¶ 40 Article VIII provided for the administration of Trust B, including, pertinently:

“If my said wife, AUDREY A. BABER, shall survive me, then commencing with the date of my death, my Trustee may pay to or apply for the benefit of [Audrey], during her lifetime, such sums from the income of Trust B as in its sole discretion shall be necessary or advisable from time to time for the medical care, education, support and maintenance in reasonable comfort of [Audrey], taking into consideration, to the extent my Trustee deems advisable, any other income or resources of [Audrey] known to my Trustee.”

Article VIII further provided, pertinently:

“If my said wife shall survive me, my Trustee may pay to or apply for the benefit of [Audrey] during her lifetime, such sums from the principal of Trust B as in its sole discretion shall be necessary or advisable from time to time for the medical care, education, support and maintenance in reasonable comfort of [Audrey], taking into

consideration, to the extent of [*sic*] my Trustee deems advisable, any other income or resources of my said wife known to my Trustee.”

¶ 41 Other provisions in the trust expressly incorporated, “[b]y way of illustration and not of limitation,” the powers and duties of a trustee granted by the relevant North Carolina statutes. The trust also included a choice-of-law provision, specifying that the trust was to be construed according to the laws of North Carolina.

¶ 42 In turn, Robert points to several statutory provisions from North Carolina which, he argues, gave him the power and discretion to use trust assets to fund the guardianship action. Section 8-815 of the North Carolina Uniform Trust Code provides:

“(a) A trustee, without authorization by the court, may exercise any of the following:

(1) Powers conferred by the terms of the trust.

(2) Except as limited by the terms of the trust:

a. All powers over the trust property that an unmarried competent owner has over individually owned property;

b. Any other powers appropriate to achieve the proper investment, management, administration, or distribution of the trust property; and

c. Any other powers conferred by this Chapter.” N.C. Gen. Stat. § 36C-8-815 (2014).

¶ 43 Section 8-816 provides a number of powers. According to Robert, section 8-816 provides:

“Without limiting the authority conferred by G.S. 36C-8-815, a trustee may:

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(21) Pay an amount distributable to a beneficiary regardless of whether the beneficiary is a minor or incompetent or whether the trustee reasonably believes the beneficiary to be incompetent, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or if the beneficiary is a minor or incompetent or a person the trustee reasonably believes to be incompetent, by:

a. Paying it to the beneficiary's general guardian or the guardian of the beneficiary's estate;

b. Paying it to a custodian under a uniform transfer to minors act or custodial trustee under a uniform custodial trust act and, for that purpose, creating a custodianship or custodial trust for the benefit of the beneficiary;

c. Paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

d. Managing it as a separate fund on the beneficiary's behalf.

A trustee making payments under this subdivision does not have any duty to see to the application of the payments so made, if the trustee exercised due care in the selection of the person, including a minor or incompetent, to whom the payments were made, and the receipt of that person shall be full acquittance to the trustee. Notwithstanding the foregoing, if a mandatory distribution is to be paid to a beneficiary who is not a minor or incompetent or a person the trustee reasonably believes to be incompetent, the distribution may be applied for the beneficiary's benefit only with the beneficiary's consent;

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(24) Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties." N.C. Gen. Stat. § 36C-8-816(21), (24) (2014).

¶ 44 We review the construction of a trust agreement *de novo*. *Bank of America, N.A. v. Judevine*, 2015 IL App (1st) 140532, ¶ 19. The paramount goal of interpreting a trust agreement is to determine the settlor's intention. *Id.* ¶ 20. We consider the entire instrument, and if the instrument is clear and unambiguous, we will not resort to the rules of construction. *Id.*

¶ 45 Similarly, the construction of a statute is reviewed *de novo*. *F.R.S. Development Co., Inc. v. American Community Bank & Trust*, 2016 IL App (2d) 150157, ¶ 44. The primary goal of statutory interpretation is to ascertain and give effect to the legislative intent, the best indicator of which is the language of the statute given its plain and ordinary meaning. *Id.* ¶¶ 41-42. If the statute is clear and unambiguous, we need not resort to interpretive aids. *Id.* ¶ 42.

¶ 46 Robert first points to Articles VII and VIII of the Roy L. Baber Trust. According to Robert, the power to "pay to or apply for the benefit of [Audrey] such sums [from the principal of Trust A or the income or principal of Trust B] as in [the trustee's] sole discretion shall be deemed necessary or advisable from time to time for the medical care, education, support and maintenance in reasonable comfort of [Audrey]" justifies his expenditure of trust assets in the guardianship action. We disagree.

¶ 47 The Roy L. Baber Trust granted to the trustee (and the successor trustee, Robert) the discretion to apply trust assets for the "medical care, education, support and maintenance in reasonable comfort" of Audrey. Robert asserts that this gives him the right to use assets of the trust in order to litigate the guardianship action. As a first pass, we note that "medical care, education, support and maintenance in reasonable comfort" are the expressed subjects for which

the trustee has discretion to use the trust assets. These expressed subjects do not explicitly include litigation or legal actions. In order for Robert's contention to succeed, then, the terms "medical care," "education," or "support and maintenance in reasonable comfort" must impliedly include litigation or other legal actions in order to effectuate them. These terms are undefined in the trust instrument. It is, however, appropriate to resort to a standard dictionary definition to determine the plain and ordinary meaning of undefined terms in contracts. *Laport v. MB Financial Bank, N.A.*, 2012 IL App (1st) 113384, ¶ 15.

¶ 48 "Medical care" is not defined as a unitary term. Nevertheless, "care," in the context suggested by the trust means: "CHARGE, SUPERVISION, MANAGEMENT : responsibility for or attention to safety and well-being." Webster's Third New International Dictionary, 338 (1993). "Medical" means: "1 : of, relating to, or concerned with physicians or with the practice of medicine often as distinguished from surgery 2 : requiring or devoted to medical treatment." *Id.* at 1402. In turn, "medicine" is defined, as is pertinent here, to be "the science and art dealing with the maintenance of health and the prevention, alleviation, or cure of disease." *Id.* Thus, the definition of "medical care" in the trust would be the responsibility for or management of the maintenance or treatment of Audrey's health and the prevention, alleviation, or cure of any disease or illness to which Audrey is or may become subject. The focus of "medical care," then, appears to be keeping Audrey as healthy as possible within the constraints of her current circumstances, including illnesses and preexisting conditions.

¶ 49 It is arguable that "medical care" could include a competency determination; certainly Audrey's mental capacity is a condition that may affect her overall health. However, a competency determination is a legal, not medical proceeding, in which a guardian is appointed to make medical decisions (and perhaps financial decisions). Thus, the competency determination

would seem to clearly stand apart from “medical care.” Indeed, the trustee is authorized to pay for medical care; medical care does not seem to include an attempt to force Audrey to relinquish her decision-making authority over her person and her estate. Accordingly, we reject any argument suggesting that a guardianship proceeding is included in the term, “medical care,” as used in the Roy L. Baber Trust.

¶ 50 Next, “education” is defined as “the act or process of providing with knowledge, skill, competence, or usu. desirable qualities of behavior or character or of being so provided esp. by a formal course of study, instruction, or training.” *Id.* at 723. While, in a sense, the act of participating in litigation could provide one with knowledge or instruction in the subject-matter of that litigation, as well as any court procedures in which one participated, this would be only incidental to the point of that litigation. Thus, Robert could not reasonably argue that, by causing Audrey to participate in the guardianship action, he was giving Audrey an “education” as that term is commonly defined and understood. Accordingly, “education” as used in the Roy L. Baber Trust does not encompass the guardianship proceeding.

¶ 51 Finally, we come to “maintenance and support in reasonable comfort.” The pertinent definition of “maintenance” refers to support: “2 a : the act of providing means of support for someone \*\*\* b : the provisions, supplies, or funds needed to live on : means of sustenance.” *Id.* at 1362. Likewise, the pertinent definition of support refers to maintenance:

“3 a : to pay the costs of : MAINTAIN \*\*\*; *also* : to supply with the means of maintenance (as lodging, food or clothing ) or to earn or furnish funds for maintaining \*\*\* b : to provide a basis for the existence of subsistence of : serve as the source of material or immaterial supply, nourishment, provender, fuel, or material, or sustenance of.” *Id.* at 2297.

In spite of the circularity of the definitions, “support and maintenance” refers to providing sufficient resources to allow Audrey to live and to keep the standard of living to which she is accustomed. By contrast, a guardianship proceeding has nothing to do with Audrey’s living arrangements and standards. Accordingly, “support and maintenance” cannot accommodate the notion of legal proceedings, and specifically, a guardianship action.

¶ 52 Robert contends that, even as there is no express authorization to allow him to prosecute a guardianship action in the terms of the trust, there is also no express prohibition. In effect, Robert is arguing that the trust has given him plenary powers to “protect” Audrey. If this were true, then the enumeration of the subjects over which the trustee’s authority extends in Articles VII and VIII would be meaningless. We cannot countenance a construction that renders terms of an instrument meaningless. *Thompson v. Gordon*, 241 Ill. 2d 428, 442 (2011). Accordingly, we hold that the trust language does not provide a justification for the use of trust assets to pay for litigation expenses such as the guardianship action.

¶ 53 Turning to Robert’s statutory authority, Robert argues that the North Carolina statutory scheme gives him the discretion to use trust assets to prosecute the guardianship proceeding. Robert first points to section 8-815 of the North Carolina Uniform Trust Code. Our reading of the section indicates that the trustee may exercise the powers conferred by the trust instrument, powers to manage the trust property, and any other powers conferred by the statute. N.C. Gen. Stat. § 36C-8-815 (2014). Robert next points to section 8-816(24) of the North Carolina Uniform Trust Code. That section empowers the trustee to prosecute or defend an action “to protect trust property.” According to Robert, the North Carolina statutes empower him to use trust assets to pay the expenses incurred in prosecuting the guardianship proceeding. We disagree.

¶ 54 In our view, the sections pointed out by Robert deal with managing the property of the trust and initiating or defending litigation to protect that property. Audrey is the beneficiary of the Roy L. Baber Trust, and as such, she does not have control over the trust property, with the exception of the financial powers personally reserved to her in *Baber I*. Instead, Robert, as trustee has the control and the discretion to use trust assets for the “medical care, education, maintenance and support in reasonable comfort” of Audrey. We cannot say that Robert’s statutory power to use trust assets extends to initiating a guardianship action, which would have no effect over the *res* of the trust.

¶ 55 We cannot say that Robert’s argument fares any better if we consider both the trust language and the statutory language together. The statutory language is designed to allow the trustee to implement the intent of the trust’s settlor and to protect the assets of the trust. The trust language specifies the purposes for which the trustee may use the assets of the trust. Robert argues that, reading them together, the trust instrument and the statutory language combine to provide him with the authority to use trust assets in prosecuting a guardianship action to protect Audrey. We disagree. We do not discern synergy between the trust instrument and the North Carolina statutes that may increase the trustee’s power beyond that afforded by the plain and unambiguous language in the trust instrument or the specified statutory provisions individually.

¶ 56 Robert also argues that he was ultimately protecting the trust, which is a proper purpose under the North Carolina statutes. Robert argues that Audrey was effectively kidnapped and then manipulated or improperly influenced into wasting the corpus of the trust by making gifts to Stephen’s and Janet’s families. According to Robert, the statutory focus on managing and protecting trust assets translates into his empowerment as trustee to protect the corpus of the trust by any means needful, including a guardianship proceeding. We disagree. Robert’s powers and

rights extend only to the *res* of the trust, which does not include either assets already distributed to Audrey or Audrey herself. Robert was attempting to extend his authority beyond that granted by the trust and the relevant laws and to protect the assets after they were distributed, by Robert as trustee, to Audrey. While Robert had the authority to protect the trust and to use assets from the trust to do so, once the assets were distributed to Audrey, Robert had no authority to use trust assets to influence or protect Audrey. Thus, once Robert's actions exited the strict confines of the trust, he could no longer rely on the trust to fund those actions, either under the language of the trust, the provisions of the law, or in light of the results in *Baber I*.

¶ 57 Robert also argues that he was justified in using assets from the trust to fund the guardianship action because he had a reasonable belief in Audrey's incompetency, and this belief was reinforced by the trial court's decision in the guardianship action, appointing limited guardians of Audrey's person and estate. Along the way, Robert revisits the trial court's ruling on Audrey's competency as well as raising here arguments protecting Audrey due to her incompetency as a means to justify his expenditure of trust assets for the legal and other expenses incurred during the guardianship action. These contentions, however, are actually directed away from the issues properly raised in this case and present red herrings in an attempt to misdirect our analysis in this case.

¶ 58 In this case, as opposed to *Baber I*, we are called on to consider whether Robert had a proper basis to use trust assets to pay for the expenses incurred in the guardianship action. Audrey's capacity has no bearing on that basis; rather, the terms of the trust and the terms of the applicable statutes supply the basis, and Audrey's capacity is only a facet of the law of the case. See *Bjork v. Draper*, 404 Ill. App. 3d 493, 501 (2010) (law-of-the-case doctrine applies to the facts and issues already decided in the same case and bars revisiting them). As we have

determined above, neither the trust nor the statutory provisions provide a basis to justify the expenditure of trust assets on the guardianship action. Robert's subjective belief is outside the proper bounds of our analysis; moreover, the reasonableness of Robert's subjective belief is significantly undercut precisely because the issues of Audrey's capacity and the necessity of a guardian of some sort are far outside of the terms of the trust and applicable statutory provisions. Additionally, the trial court's decision in the guardianship action dealt only with Audrey's capacity, and it did not consider (so it cannot support Robert's position) the issue of the propriety of using trust assets in funding Robert's prosecution of the guardianship action.

¶ 59 As a last consideration, Robert argues that, taken together, his justification contentions overwhelmingly support his use of trust assets to fund the guardianship action. We disagree. We have determined that neither the trust, North Carolina law, nor the combination of both the trust language and North Carolina law justified using trust assets to pursue the guardianship action. We have also determined that neither Robert's subjective belief nor the outcome of the guardianship action work to justify the use of trust assets. Considering all of the justifications together does not change our view. Accordingly, we hold that there was no justification in any of the sources identified by Robert for using trust assets to pursue the guardianship action.

¶ 60 B. Failure to Prove Audrey's Counterclaims

¶ 61 Robert next argues that Audrey failed to prove the necessary elements in each of her counterclaims. Robert concludes that the trial court erred by entering judgment in Audrey's favor on her third amended counterclaim.

¶ 62 Following an evidentiary hearing on Audrey's counterclaim, the trial court passed judgment, issuing a general finding in Audrey's favor. When faced with a challenge to the trial court's judgment following a bench trial, we review that judgment and will reverse it only if it is

against the manifest weight of the evidence. *Battaglia v. 736 N. Clark Corp.*, 2015 IL App (1st) 142437, ¶ 23. A judgment is against the manifest weight of the evidence only when the opposite conclusion is apparent or when the judgment is arbitrary, unreasonable, or not based on the evidence. *Id.* In other words, if the record contains evidence to support the trial court's judgment, that judgment should be affirmed. *In re Estate of Wilson*, 238 Ill. 2d 519, 570 (2010).

¶ 63

#### 1. Tortious Interference

¶ 64 Robert first contends that Audrey failed to prove the essential elements of the tort of tortious interference with a testamentary expectancy. According to Robert, this tort arises where one, tortiously and intentionally, prevents another from receiving an inheritance or gift that he or she would have otherwise received. Robert specifically argues that Audrey failed to prove the existence of an inheritance or gift, and she failed to prove that Robert's conduct was tortious. We disagree.

¶ 65 As an initial matter, we note that Audrey styled count I of her third amended counterclaim as an action for "tortious interference." She did not actually specify tortious interference of what. Our first question, then, is: what is the interest with which Robert was alleged to have interfered?

¶ 66 According to Robert, Audrey alleged the interference was with a testamentary expectancy. This is not quite correct. In the claim of tortious interference with a testamentary expectancy, the plaintiff typically complains that the defendant, by tortious means, such as by fraud or duress, prevents the plaintiff from receiving an inheritance or gift that the plaintiff would have otherwise received. See, e.g., *DeHart v. DeHart*, 2013 IL 114137, ¶¶ 3-11; *Bjork v. O'Meara*, 2013 IL 114044 ¶¶ 3-9, 17; *In re Estate of DiMatteo*, 2013 IL App (1st) 122948, ¶¶ 37-40.



¶ 67 Audrey, however, did not allege or prove that Robert interfered with Roy's estate planning, thereby cutting her out of his will. Instead, she alleged that, pursuant to Roy's trust, she was entitled to receive, from time to time, moneys for her support, maintenance and well-being, but Robert improperly used those funds for his own purposes and not for her benefit. This is clearly not the standard fact pattern for a claim of tortious interference with a testamentary expectancy.

¶ 68 In *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1021 (1997), the court considered the standard testamentary fact pattern, but under the rubric of a claim of tortious interference with an economic expectancy. There, the court noted that tortious interference with an economic expectancy has the following elements to be proved: (1) the existence of the expectancy; (2) the defendant's intentional interference with the expectancy; (3) the defendant's tortious conduct; (4) a reasonable certainty that the expectation would have been realized but for the interference; and (5) damages. *Id.* We believe that this rubric better accommodates Audrey's theory of tortious interference; further, the evidence adduced during the hearing on Audrey's counterclaim fulfilled all of the necessary elements of this claim.

¶ 69 Audrey proved that she was the beneficiary of the Roy L. Baber Trust, and the resulting Trust A and Trust B. Under the terms of the Roy L. Baber Trust, Audrey was entitled to receive, from time to time, money from the income and principal of both Trust A and Trust B. Accordingly, we hold that there was sufficient evidence adduced to establish the existence of an expectancy for purposes of Audrey's tortious-interference counterclaim.

¶ 70 Audrey proved that Robert used over \$267,000 to pay for attorney's fees and other expenses associated with the guardianship action. We believe that this fulfills the second element because, in using trust assets to pay the expenses associated with the guardianship

petition, Robert interfered with Audrey's expectancy to receive the principal and the income from the trusts.

¶ 71 Audrey also proved the amount of damages was over \$267,000. This was the amount used by Robert from the assets of the trust to pay for his expenses in the guardianship action.

¶ 72 Robert disputes two elements: the defendant's tortious conduct, and the reasonable certainty that the plaintiff would realize the expectancy. Turning to the element of tortious conduct, Robert argues that Audrey offered no proof that he committed a tortious act in connection with the guardianship proceeding. We disagree.

¶ 73 The evidence unequivocally shows that Robert used trust assets to pay for his expenses incurred in the guardianship proceeding. We have determined that there was no basis in the language of the trust or in law for Robert to make such a use of the trust's assets. Thus, Robert's use of the trust assets was not authorized and was wrongful. Robert argues that, nevertheless, there was not tortious conduct because his conduct, improperly using the trust's assets, fits no tort. Robert overlooks that, as a trustee, he was also a fiduciary, and that, by using trust assets for an improper purpose, he either breached his duties as a fiduciary or converted the funds of the trust. *E.g., Fichtel v. Board of Directors of the River Shore of Naperville Condominium Ass'n*, 389 Ill. App. 3d 951, 956 (2009) (breach of fiduciary duty sounds in tort); *Bender v. Consolidated Mink Ranch, Inc.*, 110 Ill. App. 3d 207, 213 (1982) ("[t]he essence of conversion is the wrongful deprivation of one who has a right to the immediate possession of the object unlawfully held"). Thus, Robert's conduct was tortious.

¶ 74 Robert specifically argues that his conduct does not fulfill the elements of the tort of conversion. While that may be true, we are nevertheless convinced that the evidence showed that Robert used trust assets to fund and prosecute a lawsuit that he brought and prosecuted in his

personal name, and in so doing, he, at least, breached duties imposed as trustee. We further agree with Audrey, that, “[w]hen an individual takes money that in no sense can belong to him personally, uses it for personal purposes, thereby depriving its rightful beneficiary of its use, \*\*\* that is tortious conduct.” We cannot say that the trial court’s implied judgment that Audrey presented sufficient evidence to establish Robert’s tortious conduct was against the manifest weight of the evidence.

¶ 75 Robert also challenges the reasonable-certainty element. Robert argues that Audrey’s right to receive the principal and income of the trust was not reasonably certain because it was within his sole discretion whether to disburse the assets to Audrey. Robert’s contention, however, is largely illusory.

¶ 76 The Roy L. Baber Trust names Audrey as the sole beneficiary upon Roy’s death. She is entitled to all of the principal and income of the resultant trusts, and, upon Audrey’s death, any remaining assets are to be consolidated and distributed to the children and grandchildren. Thus, it is Audrey who has the sole right to the assets of the trust during her lifetime. Robert, as trustee, has discretion over when and how much of the assets to give to Audrey, but he does not have the discretion over to whom to disburse the assets. In other words, Audrey will receive the assets of the trust, and Robert may decide when and how much of them she may receive at any given time. Further, the trust requires that certain assets drawn from income shall be paid to Audrey at least quarterly. There is no question, then, that Audrey has a reasonable certainty of receiving assets of the trust; the only question, regarding some of the assets, is the timing and amount. Accordingly, we cannot say that the trial court’s implicit judgment that Audrey sufficiently proved the reasonable-certainty element is against the manifest weight of the evidence.

¶ 77 Robert contested only two of the elements of tortious interference. We have determined that Robert's arguments on those elements are without merit. Accordingly, we cannot say that the trial court's judgment in Audrey's favor on her claim of tortious interference was against the manifest weight of the evidence.

¶ 78 2. Surcharge and Breach of Duty of Loyalty

¶ 79 We have determined that the trial court's judgment on the tortious-interference claim was not against the manifest weight of the evidence. In light of that determination, we need not consider Robert's arguments against the trial court's judgment on the claims of surcharge and breach of duty of loyalty.<sup>3</sup>

¶ 80 C. Audrey's Capacity Revisited

¶ 81 Robert next argues that the record demonstrates that Audrey was wholly incapacitated at the time she filed her counterclaim and, therefore, she was incapable of bringing the action. Robert argues that Audrey's February 2012 deposition and her testimony during the hearing on the second amended counterclaim revealed that she was unaware of the counterclaim and did not wish for any litigation to continue or to be maintained in her name. Robert also argues that

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<sup>3</sup> This is also akin to the presumption that arises after a jury returns a general verdict on multiple causes of action or counts: the verdict will be sustained where there are one or more good counts or causes of action to support it. *Great American Insurance Co. of New York v. Heneghan Wrecking & Excavating Co., Inc.*, 2015 IL App (1st) 133376, ¶ 15. The trial court here returned a general finding (and Robert did not object to the general finding) on Audrey's three-count counterclaim, and we see no good reason not to treat it similarly as we would have treated a general verdict in this case.

Audrey's testimony during the hearing on the second amended counterclaim further revealed her lack of capacity. Robert concludes that this demonstration of Audrey's incapacity means the April 2011 order reserving to Audrey personally the right or power to continue litigation in her own name was violated and that the third amended counterclaim should not have been permitted.

¶ 82 Robert's argument appears first to be an attempt to relitigate the issue of Audrey's capacity, which was the subject of the guardianship proceeding and *Baber I*. To the extent that Robert is challenging Audrey's capacity, that issue was resolved in the guardianship proceeding and culminating with the April 12, 2011, order. Audrey's capacity is the settled law of the case. *Bjork*, 404 Ill. App. 3d at 501 (the doctrine of law of the case bars the relitigation of facts already decided in the same case). In the April 2011 order, the trial court determined that Audrey was somewhat impaired, but that she retained sufficient mental capacity to manage her own financial and medical affairs with the help of a limited guardian. Relevantly, the court also expressly ordered that certain powers were reserved to Audrey until further order of the court, including the power to institute or to continue civil litigation in her own name. In March 2010, Audrey's counterclaim was initially filed and was thereafter reaffirmed and amended from time to time. As the continuation of litigation was expressly allowed by the April 2011 order, and because the April 2011 order settled the issue of Audrey's competency until further order of the court, Robert's argument, to the extent that it simply challenges the already settled issue of Audrey's historical mental capacity, is not well taken.

¶ 83 Robert also appears to argue that, because Audrey's testimony during the hearing on her second amended counterclaim showed that she lacked the mental capacity to continue to make the decisions reserved to her under the April 2011 order, the third amended counterclaim should

not have been allowed, coming, as it did, after Audrey's revealing testimony.<sup>4</sup> Robert overlooks, however, the effect of the proceedings immediately following Audrey's testimony during the hearing.

¶ 84 Audrey's counsel represented to the trial court that, following Audrey's testimony during the hearing on the second amended counterclaim, he had a reasonable concern about her capacity and her ongoing ability to make the necessary decisions regarding the current litigation. As a result, the trial court appointed a guardian *ad litem* to investigate the issue and issue a report. Following that investigation, the guardian *ad litem* recommended that the court modify the April 2011 order and appoint plenary guardians of Audrey's estate and person. The trial court did so and expressly ordered that the plenary guardian of the estate receive the power, formerly reserved to Audrey personally, to institute and continue civil litigation in Audrey's name. Thus, the power to institute or to continue civil litigation was expressly transferred from Audrey to her guardian (initially American Bank & Trust, then U.S. Bank). As a result, the third amended counterclaim was effectively ratified and filed by the guardian, who had the power and authority to do so, and we deem that the amendment to the second amended counterclaim was properly made. Accordingly, Robert's contention that the third amended counterclaim should not have been permitted is affirmatively rebutted by the record.

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<sup>4</sup> We are puzzled at how Robert can reconcile the argument that Audrey was wholly incapacitated yet we should honor her wish that no litigation be instituted or maintained against anyone, and specifically, against Robert. Audrey either is incapacitated and incapable of decision-making, or she is not, in which case her decisions should be honored. The positions do not appear to be reconcilable.

¶ 85 To sum up, to the extent that Robert is attempting to demonstrate that Audrey, after the April 2011 order, lacked the mental capacity to make legal decisions regarding the continuation of proceedings on her counterclaim, that argument is foreclosed by the law of the case. To the extent that Robert is arguing that Audrey's deterioration evidenced at the hearing on her second amended counterclaim meant that she lacked the capacity to file the third amended counterclaim, that issue was appropriately resolved by the trial court transferring Audrey's personal power over litigation in her name to her guardian. Accordingly, we reject Robert's contentions regarding Audrey's capacity.

¶ 86 D. Entity Receiving the Money Judgment

¶ 87 Robert last argues that, in the event that we affirm the trial court's judgment, we should order that the judgment be paid to the Roy L. Baber Trust and not to Audrey individually. Robert reasons that Audrey's counterclaim was premised on his improper utilization of trust funds, so it is the trust that should be made whole. We agree. In short, Robert took funds from the trust without a proper justification. Robert did not take any funds directly from Audrey, so it makes no sense, in order to make the injury whole, to require that Robert return the funds, not to the source, but to Audrey. Accordingly, we agree with Robert and modify the trial court's judgment to require that Robert return the assets to the trust from which they were derived.

¶ 88 Audrey does not argue that it was proper that the trial court order that the assets be payable directly to her; likewise, Audrey does not argue that it would be improper to order the assets be returned to the trust. Instead, Audrey argues only that Robert, by not raising this argument in the trial court, has forfeited out consideration of it on appeal. We disagree.

¶ 89 Robert consistently maintained, throughout the proceedings on Audrey's counterclaim, that his use of trust assets was proper and justified. Because this was his consistent position, we

do not believe that Robert was required to make an alternative argument, just in case the court disagreed with his consistent position, as to where the assets should be returned if he were not to prevail. As it turned out, the court did, in fact, disagree with Robert, but it ordered, in a one-sentence order, “that Judgment be and is hereby entered in favor of [Audrey] and against [Robert] in the sum of \$267,256.40.” The trial court also did not offer verbal remarks to explain its reasoning. At that point, upon the trial court’s entry of judgment, Robert was not required to file a posttrial motion in order to preserve issues for appeal. Ill. S. Ct. R. 366(b)(3)(ii) (eff. Feb. 1, 1994); *Elsener v. Brown*, 2013 IL App (2d) 120209, ¶ 53 (a posttrial motion from the trial court’s judgment in a bench trial is not necessary in order to preserve issues for appeal). While we remain cognizant of the rule that the failure to raise an issue in the trial court below will result in its forfeiture on appeal (*id.*), it is not applicable here, where Robert consistently maintained that he was allowed to use trust assets to pay the expenses incurred in the guardianship action. Accordingly, we reject Audrey’s contention that Robert forfeited this contention on appeal.

¶ 90

### III. CONCLUSION

¶ 91 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed as modified, and Robert is directed to reimburse the trust from which it was taken the sum of \$267,256.40.

¶ 92 Affirmed as modified.