

**NOTICE**

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2014 IL App (4th) 130934-U

NO. 4-13-0934

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

August 8, 2014

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

|   |   |                  |
|---|---|------------------|
| In re: the Petition of FIRST FINANCIAL BANK,      | ) | Appeal from      |
| N.A., f/n/a FIRST NATIONAL BANK OF                | ) | Circuit Court of |
| DANVILLE, Successor Trustee of the PHOEBE J.      | ) | Vermilion County |
| JONES TESTAMENTARY TRUST, for Direction as        | ) | No. 07CH298      |
| to the Management and Execution of the Trust, and | ) |                  |
| JAMES M. JONES, as Predecessor Trustee of the     | ) |                  |
| PHOEBE J. JONES TESTAMENTARY TRUST,               | ) |                  |
| FIRST FINANCIAL BANK, N.A., f/n/a FIRST           | ) |                  |
| NATIONAL BANK OF DANVILLE,                        | ) |                  |
| Petitioner-Appellee,                              | ) |                  |
| v.  | ) |                  |
| GIL B. JONES and ERIC S. JONES,                   | ) |                  |
| Respondents-Appellants,                           | ) |                  |
| and   | ) | Honorable        |
| JAMES M. JONES,                                   | ) | Nancy S. Fahey,  |
| Third-Party Respondent.                           | ) | Judge Presiding. |

JUSTICE STEIGMANN delivered the judgment of the court.  
Presiding Justice Appleton and Justice Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed, concluding that the trial court did not abuse its discretion by (1) ordering certain trust assets liquidated and distributed to the trust beneficiary, and (2) appointing the trust beneficiary as managing trustee.

¶ 2 Since April 2006, petitioner, First Financial Bank, N.A. (First Financial), has served as corporate trustee of the testamentary trust (Trust) created by decedent, Phoebe J. Jones, for the benefit of her son, Jerry Jones. Respondents Gil B. Jones and Eric S. Jones, are Jerry's adult sons and vested remaindermen of the Trust. In July 2012, First Financial filed a "motion for authority," asserting that because the principal of the Trust was dwindling, and because of the

high costs of corporate trusteeship, it was necessary for the preservation of the Trust to (1) annuitize an ING annuity held by the Trust, (2) relieve First Financial as corporate trustee, and (3) appoint Jerry, Eric, and Gil as replacement cotrustees. In August 2012, without objection, the trial court granted First Financial's motion and directed First Financial to annuitize the ING Annuity and transfer the office of trustee to Jerry, Eric, and Gil.

¶ 3 In June 2013, First Financial filed a supplemental motion for authority, asserting that because Jerry, Eric, and Gil could not agree upon who should be the managing trustee, First Financial was unable to transfer trusteeship pursuant to the trial court's August 2012 order. First Financial requested that the trial court (1) allow First Financial to liquidate certain Trust assets and distribute them to Jerry, (2) appoint Jerry as managing trustee, and (3) empower Jerry to annuitize the ING Annuity. In September 2013, following a hearing, the court granted First Financial's supplemental motion for authority.

¶ 4 Eric and Gil appeal, arguing that the trial court abused its discretion by (1) ordering the Trust's cash equivalents and municipal bonds liquidated and (2) appointing Jerry as managing trustee with power to annuitize the ING Annuity on a "10-year certain plus life" payout. We affirm.

¶ 5 I. BACKGROUND

¶ 6 The following facts were gleaned from the parties' pleadings, exhibits, and other supporting documents filed with the trial court, as well as the evidence deduced at the September 2013 hearing. We review only the facts necessary to our resolution of the issues presented in this appeal.

¶ 7 Phoebe died in February 2004, leaving her estate in equal shares to her three sons: James, Charles, and Jerry. However, although James and Charles took their shares directly,

Phoebe directed that Jerry's share be placed in the Trust for Jerry's benefit, with James' serving as trustee. Specifically, Phoebe's last will and testament directed, in pertinent part, that "[u]ntil the termination of the [T]rust, the [t]rustee shall make such payments out of the income or principal as the [t]rustee determines advisable for the medical care, maintenance[,] and education of [Jerry]." Upon Jerry's death, the remaining assets of the Trust are to be paid to his sons, Eric and Gil.

¶ 8 In April 2006, James resigned as trustee, and First Financial accepted appointment as successor trustee. In December 2008, pursuant to a temporary trial court order, First Financial began paying Jerry \$5,500 in monthly maintenance payments, as well as varying monthly payments for reimbursement of Jerry's medical expenses.

¶ 9 A. First Financial's July 2012 Motion for Authority

¶ 10 In July 2012, First Financial filed a motion for authority, asserting that the principal of the Trust was dwindling, and all principal would be depleted by December 2012 except for two annuities purchased by James on behalf of the Trust in September 2005: (1) an Integrity Life annuity (Integrity Annuity) (purchase price of \$100,000) and (2) the ING Annuity (purchase price of \$150,000).

¶ 11 First Financial noted in its motion that the Integrity Annuity had been providing Jerry with monthly payments of \$662.34 since its purchase, and those payments would continue until Jerry's death. Further, the ING Annuity had a nine-year surrender period, meaning that it would not commence making monthly cash payments to Jerry until September 2014. If annuitized on a "20-year certain plus life" payout, the ING Annuity would provide Jerry with regular monthly payments of approximately \$683.68. Prior to the expiration of the surrender period, Jerry could liquidate the ING Annuity by paying a \$7,500 penalty. (We note that other pleadings

and evidence in the record suggest that (1) the Integrity Annuity will cease making monthly payments in September 2015 and (2) the ING Annuity has a 10-year surrender period instead of a 9-year surrender period, meaning cash payments would begin in September 2015. These inconsistencies do not appear to affect the issues presented in this appeal.)

¶ 12 First Financial further asserted in its motion that "in December[ 2012,] it will be impossible for [First Financial] to comply with the 'temporary' order requiring \$5,500 maintenance payments to Jerry in addition to Jerry's monthly medical draws, or cover [First Financial's] expenses associated with administering the Trust." Because of these concerns, First Financial argued that it would be necessary and prudent for the preservation of the Trust to (1) abate the regular monthly payments of \$5,500, (2) annuitize the ING Annuity on a "20-year certain plus life" payout, and (3) transfer the office of trustee to Jerry, Eric, and Gil as cotrustees.

¶ 13 In August 2012, without objection, the trial court granted First Financial's motion. In its order, the court directed First Financial to (1) cease making monthly payments of \$5,500 to Jerry, (2) revert to a payment schedule consistent with First Financial's discretionary authority under the Trust, and (3) annuitize the ING Annuity on a "20-year certain plus life" payout. The court's order provided that after the ING Annuity was annuitized, the office of trustee would transfer to Jerry, Eric, and Gil as cotrustees without further court order. However, the order also provided that "within 60 days of the transfer" of trusteeship, First Financial was to submit a final accounting to the new cotrustees, at which time First Financial "shall be relieved of all duties with respect to its position as trustee of the [Trust]."

¶ 14 B. First Financial's June 2013 Supplemental Motion for Authority

¶ 15 In June 2013, First Financial filed a supplemental motion for authority, which consisted of three parts.

¶ 16 First, First Financial identified a practical problem preventing it from carrying out the trial court's August 2012 order. First Financial asserted that since the August 2012 order, it had worked diligently to facilitate transferring the office of trustee to Jerry, Eric, and Gil. Specifically, First Financial attempted to work with the future cotrustees to designate a "managing trustee" to "hold the paper and manage the annuities." However, this could not be accomplished because Jerry, Eric, and Gil could not agree upon a managing trustee. As a result, with no one identified to execute the documents necessary to direct monthly payments from the ING Annuity to Jerry following annuitization, First Financial had yet to annuitize the ING Annuity. To break through this impasse, First Financial sought an order appointing Jerry as managing trustee.

¶ 17 Second, First Financial noted that the Trust held various cash equivalents and municipal bonds worth a total of \$58,282. First Financial advised the court that to better carry out the purposes of the Trust, the cash equivalents and municipal bonds should be liquidated to pay for Jerry's medical care and maintenance.

¶ 18 Finally, First Financial stated that in October 2012, it discovered that the ING Annuity contained a "10-year certain plus life" payout option, which was not previously known to First Financial. If this option were exercised, it would provide Jerry with monthly payments of approximately \$2,092.87. First Financial opined that this option would better further the purposes of the Trust than would the "20-year certain plus life" payout plan that the trial court directed First Financial to execute in its August 2012 order.

¶ 19 Eric and Gil filed an objection to First Financial's supplemental motion for authority, arguing that appointing Jerry as managing trustee would be contrary to Phoebe's intent, as demonstrated by her decision to place Jerry's share of her estate in trust instead of giving it directly to Jerry. Although Eric and Gil admitted that they and Jerry could not agree upon a

managing trustee, they did not propose an alternative solution to the practical problem facing First Financial—namely, its inability to transfer the office of trustee in the absence of a designated managing trustee among Jerry, Eric, and Gil.

¶ 20 C. The September 2013 Hearing

¶ 21 At a September 2013 hearing on First Financial's supplemental motion for authority, James Mulvaney, vice president of First Financial, testified that First Financial charged a minimum fee of \$2,000 per year for serving as corporate trustee. Since the trial court's August 2012 order, the Trust had not made any regular payments to Jerry. Additionally, because Jerry, Eric, and Gil could not agree upon a managing trustee, First Financial had yet to annuitize the ING Annuity, as directed by the court's August 2012 order.

¶ 22 Jerry testified that he was 77 years old and had been living in Prescott, Arizona, since 2001. Jerry retired in 2011 from full-time employment in the mortgage department of Wells Fargo bank. He underwent a kidney transplant in December 2006, and his cadaver kidney had a lifespan of only 8 to 10 years. Further, he suffered from chronic obstructive pulmonary disease (COPD), atrial fibrillation, neuropathy, and arthritis. Jerry calculated that his mortgage, insurance, taxes, food, medical care, transportation, vehicle and home upkeep, and other miscellaneous expenses totaled approximately \$5,600 per month. Jerry also had between \$25,000 and \$34,000 in credit card debt, a \$6,600 home-improvement loan, and \$23,000 in debt on a time-share that he had been trying to sell since August 2012.

¶ 23 At the time of the hearing, Jerry was receiving \$1,876 per month in Social Security income as well as varying amounts of monthly income from "oil revenue," which averaged approximately \$2,500 per month. Jerry opined that if the ING Annuity were annuitized on a "20-year certain plus life" payout, his total monthly income would not be enough to provide for

his needs. Instead, Jerry believed that the ING Annuity must be annuitized on a "10-year certain plus life" payout. Jerry testified that if he were appointed as managing trustee, he would administer the Trust in accordance with the trial court's orders.

¶ 24 Eric testified that he did not want Jerry to become managing trustee because he feared Jerry would "take all the money as soon as he can and not leave anything" for Eric and Gil. Eric, however, stated that he did not want to be the managing trustee because it would be a difficult job. However, he would be willing to serve as managing trustee if required. Eric stated that if he were appointed as managing trustee, he would administer the Trust as ordered by the trial court. (Gil did not testify at the hearing.) Following Eric's testimony, the court ordered the parties to submit written arguments.

¶ 25 In their written closing argument, Eric and Gil contended that appointing Jerry as managing trustee with power to liquidate assets and annuitize the ING Annuity at "10-year certain plus life" payout would be contrary to Phoebe's intent. Eric and Gil asserted that they and Jerry should remain cotrustees and the ING Annuity should be annuitized on a "20-year certain plus life" payout. However, Eric and Gil did not propose who, if not Jerry, should serve as managing trustee.

¶ 26 D. The Trial Court's Ruling

¶ 27 Later in September 2013, the trial court entered a written order granting First Financial's supplemental motion for authority. Specifically, the court (1) ordered First Financial to liquidate all cash equivalents and municipal bonds and to distribute the proceeds to Jerry and (2) appointed Jerry managing trustee with power to, among other things, execute whatever documents were necessary to annuitize the ING Annuity on a "10-year certain plus life" payout.

¶ 28 This appeal followed.

¶ 29

## II. ANALYSIS

¶ 30 Eric and Gil argue that the trial court abused its discretion by (1) ordering the Trust's cash equivalents and municipal bonds liquidated and (2) appointing Jerry as managing trustee with power to annuitize the ING Annuity on a "10-year certain plus life" payout. We disagree.

### ¶ 31 A. Liquidation of Cash Equivalents and Municipal Bonds

¶ 32 Initially, we note that Eric and Gil apparently misinterpret the trial court's September 2013 order as giving *Jerry* power to liquidate the Trust's cash equivalents and municipal bonds. They essentially argue that because Phoebe did not intend Jerry to have direct control over Trust assets, the court abused its discretion by empowering Jerry to liquidate the cash equivalents and municipal bonds.

¶ 33 Contrary to Eric and Gil's understanding, the trial court's order clearly directed *First Financial* to liquidate the cash equivalents and municipal bonds and distribute the proceeds to Jerry. We acknowledge, of course, that the end result is the same regardless of whether Jerry or First Financial direct the assets to be liquidated. However, Eric and Gil's abuse-of-discretion argument rests on the identity of the liquidator, not the liquidation itself. They offer no argument that the court's decision to order liquidation—in and of itself—was an abuse of discretion. They rely only upon Phoebe's alleged intent to deprive Jerry of control over the Trust. Because this testator-intent argument is based upon the misunderstanding that *Jerry* was put in charge of liquidating the cash equivalents and municipal bonds, Eric and Gil's argument as to those particular Trust assets is baseless.

### ¶ 34 B. Appointment of Jerry as Managing Trustee

¶ 35 "The appointment and removal of trustees is a matter of the trial court's discretion, and the court's judgment will not be reversed absent an abuse of that discretion." *In re Estate of Mercier*, 2011 IL App (4th) 110205, ¶ 14, 961 N.E.2d 958.

¶ 36 Eric and Gil simply argue that appointing Jerry as managing Trustee was contrary to Phoebe's intent, as demonstrated by Phoebe's decision to place Jerry's one-third share of her estate in Trust instead of leaving the share directly to Jerry. However, this argument ignores Phoebe's more basic intent—namely, that the Trust provide Jerry with payments for his maintenance and medical care during his lifetime.

¶ 37 Since August 2012, when the trial court ordered First Financial to transfer the office of trustee to Jerry, Eric, and Gil as cotrustees, Jerry had not received any payments from the Trust. The testimony of Mulvaney and Jerry established that unless action was taken to break the gridlock caused by Jerry, Eric, and Gil's inability to jointly administer the Trust, Jerry's financial needs would continue to go unmet. That result, which would have been inevitable unless someone were appointed to take over from First Financial as managing trustee, would have certainly been a greater affront to Phoebe's intent than would appointing Jerry as managing trustee.

¶ 38 Notably, the parties offered the trial court few options. Jerry testified that he wanted to be managing trustee, whereas Eric testified that he did not. Gil's personal preference is unknown. First Financial's \$2,000 annual fee prevented corporate trusteeship from being a viable option. Eric and Gil essentially conceded this point by failing to object to First Financial's July 2012 motion for authority, which took the position that corporate trusteeship was becoming economically unfeasible. Although Eric testified that he would be willing to serve as managing trustee "if need be," neither he nor Gil ever requested to be appointed as managing trustee. In their written closing argument, Eric and Gil simply contended that they and Jerry should remain

cotrustees. They never proposed an alternative to appointing Jerry as managing trustee.

¶ 39 For the first time on appeal, Eric and Gil argue that one of them should have been appointed managing trustee instead of Jerry. However, this position was never presented to the trial court. Among all of Eric and Gil's pleadings on file, none contains so much as a suggestion that Eric or Gil be appointed managing trustee. We reject Eric and Gil's argument that the court abused its discretion by failing to do something they never asked it to do. See *A. E. Staley Manufacturing Co. v. Swift & Co.*, 65 Ill. App. 3d 427, 433, 382 N.E.2d 667, 671 (1978) ("[T]he appellate court will not consider arguments or positions not raised below \*\*\*.").

¶ 40 Given the evidence of Jerry's pressing medical and financial needs, the inability of Jerry, Eric, and Gil to jointly administer the Trust, and the absence of an alternative solution to the practical problem facing First Financial, the trial court acted well within its discretion by appointing Jerry managing trustee.

¶ 41 C. The ING Annuity

¶ 42 In their brief to this court, Eric and Gil address the trial court's order empowering Jerry to annuitize the ING Annuity on a "10-year certain plus life" payout with the following argument:

"The intention of the creator of the [T]rust does not support appointing Jerry as managing trustee with the power to annuitize the ING [A]nnuity for a '10-year certain plus life' payout rather than the '20-year certain plus life' payout previously ordered by the court, simply because by doing so Jerry can maximize the payout to him in the short term at the expense of the remaindermen."

This is the entirety of Eric and Gil's argument regarding the ING Annuity. They provide no cita-

tions to statute or case law in support of their claim that the court abused its discretion by allowing Jerry to annuitize the ING Annuity on a "10-year certain plus life" payout. Because Eric and Gil have failed to present a minimally developed, reasoned argument on this issue, we decline to address it. See *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 120001, ¶ 37, 992 N.E.2d 103 ("[F]ailure to properly develop an argument and support it with citation to relevant authority results in forfeiture of that argument.").

¶ 43

### III. CONCLUSION

¶ 44

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

¶ 45

Affirmed.