

FOURTH DIVISION
December 6, 2012

No. 1-12-0025

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> ESTATE OF EPA WEST, a disabled person,)	
)	
(DEVON BANK, Guardian of the Estate of)	Appeal from the
Epa West,)	Circuit Court of
)	Cook County.
Petitioner-Appellee,)	
)	10 P 2091
v.)	
)	The Honorable
BONNIE DREWS,)	John J. Fleming,
)	Judge Presiding.
Respondent-Appellant.))	
)	

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

HELD: (1) The trustee of a trust established for a disabled person forfeited her argument that the circuit court could not enter its order without first finding an abuse of discretion of the trustee by not raising it below and, instead, raising it for the first time on appeal.

(2) The trustee's argument that the circuit court lacked subject matter jurisdiction was found to be without merit because, after the 1964 amendments to the judicial article of the Illinois Constitution, all circuit courts have subject matter jurisdiction of all justiciable matters, and where the Illinois Probate Act of 1975 explicitly grants estate guardians the right to institute an action on behalf of a ward against the trustee of any trust for the benefit of the ward. 755 ILCS 5/11a-18(d) (West 2010). (3) The circuit court did not violate the terms of a trust agreement established for the benefit of the disabled person in ordering the distribution of quarterly amounts for the disabled person's support without distinction between principal and income where the trust agreement provisions specifically allowed distribution of principal for her support and specified that her support shall take priority over the preservation of principal.

¶ 1

BACKGROUND

¶ 2 Appellant Bonnie Drews is trustee of a trust established for Epa West, a disabled person.

West is an eighty-two-year-old woman with advanced Alzheimer's disease who is the sole beneficiary of the Epa West Trust, executed by her late husband Raymond West to provide for her support. Devon Bank is the guardian of Epa West's estate.

¶ 3 Prior to his death, Raymond executed the Raymond West Trust, which provided that upon his death the entire trust estate was to be set aside as a separate trust for the benefit of West, to be known as the "Epa West Trust" (the trust). At the time Raymond executed the trust, West was already suffering from advanced Alzheimer's disease.

¶ 4 Article 8.1 of Raymond's trust concerned income and provided, in relevant part, that commencing with his death, "the trustee shall pay the income of the Epa West Trust in convenient installments, at least quarterly," to West during her lifetime.

¶ 5 Article 8.2 of Raymond's trust concerned principal and provided the following:

"Commencing with my death, the trustee shall also pay to my spouse such amounts from the principal of the Epa West Trust as the trustee deems advisable from

1-12-0025

time to time for my spouse's support. It is my intent that the support of my spouse be given priority over conservation of principal."

¶ 6 Article 9.1 further provided:

"In determining the appropriate amount of income and/or principal to distribute or apply for the support of a beneficiary, or the best interests, comfortable support and welfare of a beneficiary, the trustee shall consider other resources known to the trustee to be available to or for the benefit of the beneficiary."

¶ 7 The trust provided that Raymond would act as trustee, and that upon his resignation or death Drews would become the successor trustee. Drews was a close friend of the Wests for over 20 years. Article 8.3 of the trust agreement provides that upon West's death, the real estate property located at 4309 Avers, Chicago, Illinois, shall be retained in trust for his sister-in-law, Elvira Tan, and 50% of the trust shall be distributed to his brother-in-law Benito Onate. The remaining 50% of the trust would be distributed to Drews.

¶ 8 In 2009, West was moved into an assisted care facility, Brighton Gardens, which specializes in the treatment of Alzheimer's patients. Raymond died on March 16, 2010, at which point Drews became acting trustee of the trust. In addition, from March 16, 2010, until July 6, 2010, Drews also assumed responsibility as guardian of West's estate. On July 6, 2010, Devon Bank was appointed guardian of West's estate.

¶ 9 According to Drews, as stated in her brief on appeal before us, "[t]he relationship between [Drews] and Devon Bank soured almost from the very beginning due to what [Drews] perceived as being sloppiness in the Bank's treatment of Trust bank accounts." Drews states that,

1-12-0025

as a result, she "began moving a substantial portion of the Trust's accounts from Devon Bank to Hoffman Estates Community Bank within three weeks of Devon Bank's appointment as Epa West's Estate Guardian." Drews had determined that only \$2,272 should be distributed to West's estate in 2010, and that no distribution should be made in 2011.

¶ 10 In February 2011, Devon Bank requested an accounting from the Trustee. Drews informed Devon Bank that the trust's accountant was preparing the trust's tax returns and that an accounting would be delayed. On May 17, 2011, Drews provided Devon Bank with voluminous documents ostensibly showing receipts and disbursements and including checking account ledgers and monthly account statements from the various financial holdings of the trust and stock portfolio accounts, with account numbers redacted.

¶ 11 Devon Bank objected to the form of the accounting and filed the instant lawsuit on July 11, 2011, for a petition for an accounting and distribution of trust income or, in the alternative, a petition for issuance of a citation to recover assets. Devon Bank obtained a court order that Drews provide an accounting in an acceptable format and without redactions. Devon Bank also sought an order that Drews distribute income owed to West.

¶ 12 On August 23, 2011, the circuit court ordered Devon Bank to produce an accounting of West's estate by September 15, 2011, and for Drews to produce an accounting of the trust principal by September 23, 2011. Both parties complied. Devon Bank's accounting indicated that, as of July 31, 2011, West had assets of \$679,372.47, exclusive of the assets in the trust. Drews' accounting indicated that, as of August 25, 2011, the trust had assets of \$486,036, plus real estate owned by the trust. During the period of accounting from Drews' appointment as

1-12-0025

trustee on March 16, 2010, until August 25, 2011, the trust had receipts of \$59,845 and disbursements of \$66,006.

¶ 13 The receipts included: dividends from a government life insurance policy of \$431; unrealized gains on individual stock investments of \$18,182; monthly annuity payments in *lieu* of a lump-sum payment of an annuity of \$34,000; and the proceeds of an insurance claim for property stolen from West's home in the amount of \$2,500. Drews claims this total of \$55,113 should be accounted for as principal, and not income, thus leaving gross income in the amount of only \$4,732. The trust disbursed payments totaling \$2,271 in 2010 to Devon Bank as guardian of West's estate. Drews received compensation of \$7,116 in 2010 as trustee. Drews also claimed attorney fees for the trust in the amount of \$32,037 for the accounting period of March 2010 to August 2011.

¶ 14 In October 2011, Devon Bank petitioned the court to order a distribution of the trust income, arguing that the entirety of the trust's receipts of \$59,845 constituted income. Devon Bank also questioned the amount of legal fees for the trust. Devon Bank argued that Raymond's trust provides for the mandatory distribution of income from West's trust to West, Drews did not distribute any 2011 income to West or her estate guardian, despite written requests. Drews responded that there is no income to distribute to West because any income that has been earned was offset by trust expenses, including her trustee's fees, and that other funds were available. In its reply, Devon Bank alleged that West's actual annual expenses totaled approximately \$90,000. Devon Bank acknowledged that other funds were available to West's estate and asked that only one third of her total living expenses be provided by the trust, which amounted to \$30,000, and

1-12-0025

that the remaining two thirds would be provided by her estate.

¶ 15 On December 8, 2011, the circuit court entered an order ordering Drews to distribute to Devon Bank, as guardian of West's estate, \$30,000 annually in quarterly installments. The order explicitly provided that "[s]aid payments do not distinguish between principal and interest."

Drews filed a notice of appeal on January 3, 2012.

¶ 16 ANALYSIS

¶ 17 I. Forfeiture

¶ 18 On appeal, Drews argues the following: (1) the circuit court lacked subject matter jurisdiction; and (2) the circuit court violated the provisions of the trust; and (3) the circuit court erred in substituting its judgment for that of the trustee and in entering an order ordering the distribution where it did not first explicitly find an abuse of discretion by the trustee.

¶ 19 Devon Bank argues that Drews did not previously raise these arguments before below in the circuit court and that she has therefore waived these arguments. We agree as to the first and third arguments. Drews did not raise the arguments that the circuit court lacked subject matter jurisdiction, or that the circuit court could not determine matters concerning the trust unless it found an abuse of discretion of the trustee, in either her initial response to Devon Bank's petition, nor in her amended response. Drews' third argument that the court could not enter an order ordering the distribution without a finding of abuse of discretion of the trustee is forfeited, as she did not previously raise this argument before the circuit court. See *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430-31 (2006) (issues raised for the first time on appeal and not before the circuit court below are forfeited). See also *In re Trusts of Strange ex rel. Whitney*, 324 Ill. App.

1-12-0025

3d 37, 44 (2001) (by failing to raise issue of *quantum meruit* in the trial court on their petition for attorney fees related to the administration and preservation of two trusts, attorneys waived the issue on appeal). Accordingly, we do not review this issue.

¶ 20 However, we cannot find forfeiture for Drews' first argument that the circuit court lacked subject matter jurisdiction, as subject matter jurisdiction is a matter which cannot be waived or forfeited and may be raised at any time. See *People v. M.W.*, 232 Ill. 2d 408, 417 (2009).

Therefore, we proceed to review whether the circuit court had subject matter jurisdiction.

¶ 21 II. Subject Matter Jurisdiction to Order the Trustee to Distribute Trust Assets

¶ 22 Drews first argues that unless the guardian proves an abuse of discretion by the trustee, he or she has no authority to petition the circuit court to order the trustee to distribute the trust's assets to the guardian's ward, and the circuit court has no authority to order the distribution.

According to Drews, absent a finding of an abuse of discretion by the trustee, the circuit court lacked subject matter jurisdiction to order the trustee to make any distribution of trust assets.

¶ 23 Drews' argument that the court lacks subject matter jurisdiction is without merit. The Illinois Probate Act of 1975 specifically provides for actions such as the instant one by guardians and gives the court authority in such cases. Section 11a-18(a-5) provides authority to the court:

"(a-5) The probate court, upon petition of a guardian, other than the guardian of a minor, and after notice to all other persons interested as the court directs, may authorize the guardian to exercise any or all powers over the estate and business affairs of the ward that the ward could exercise if present and not under disability." 755 ILCS 5/11a-18(a-5) (West 2010).

¶ 24 Section 11a-18(d) further provides that the guardian may bring an action precisely like the one brought in this case:

"If the trustee of any trust for the benefit of the ward has discretionary power to apply income or principal for the ward's benefit, the trustee shall not be required to distribute any of the income or principal to the guardian of the ward's estate, but the guardian may bring an action on behalf of the ward to compel the trustee to exercise the trustee's discretion or to seek relief from an abuse of discretion." 755 ILCS 5/11a-18(d) (West 2010).

¶ 25 Drews's argument that her action was not an abuse of discretion under section 11a-18(d) of the Probate Act does not defeat the circuit court's subject matter jurisdiction to hear and enter orders in this case. In fact, section 11a-18(d) specifically allows the guardian of an estate to bring an action like the present one.

¶ 26 Also, the Illinois Constitution provides that subject matter jurisdiction is conferred on the circuit courts as to all justiciable matters except for limited matters relating to the governor and redistricting over which the Illinois Supreme Court has original jurisdiction. Illinois Const. (1970), Art. VI, § 9. As Devon Bank argues, the Probate Act does not limit the jurisdiction of the court. Circuit courts have jurisdiction to enter orders in probate cases. See *First of America Trust Co. v. First Illini Bancorp, Inc.*, 289 Ill. App. 3d 276, 285 (1997) (holding that the circuit court had subject matter jurisdiction over a claim relating to management of an estate);

¶ 27 Drews nevertheless relies on *In re Estate of Gebis*, 186 Ill. 2d 188, 192-94 (1999), in arguing that the circuit court had no jurisdiction to hear the petition or order the distribution in its

1-12-0025

December 8, 2011, order. In *Gebis*, the Illinois Supreme Court held that the trial court had no jurisdiction to determine any claim against the guardianship estate after the ward died because the ward then became a decedent, and claims could then only be made against the decedent's estate. The Illinois Supreme Court relied on the clear language of the Probate Act providing that "the office of the representative of a ward terminates *** when the ward dies." *In re Estate of Gebis*, 186 Ill. 2d at 193 (quoting 755 ILCS 5/24-12 (West 1996)).

¶ 28 First, we find *Gebis* has no application to the present case before us. The decision in *Gebis* rested on the fact that, in that case, the claim for relief would have to be pursued against the deceased ward's estate because the ward died and the guardianship had terminated. Here West is still alive, and thus there is no issue in this case concerning representation of West in the guardianship estate. Devon Bank as guardian is statutorily authorized to bring claims on West's behalf as her guardian in the court supervising the guardianship estate. See 755 ILCS 5/11a-18(d) (West 2010).

¶ 29 Second, the jurisdictional holding of *Gebis* has indeed been overruled. Drews nevertheless contends that Devon Bank's cited authority, *In re Estate of Pellico*, 394 Ill. App. 3d 1052 (2009), where the Second District held that the circuit court erred in concluding it did not have jurisdiction pursuant to section 11a-18(d) of the Probate Act and rejected *Gebis*, as an "outlier." We disagree. The court in *Pellico* held that in that case both the court and the parties erroneously attempted to determine whether the circuit court had subject matter jurisdiction by looking to section 11a-18(d) of the Probate Act, when "neither that statute's section nor any other statute restrict[] the circuit court's jurisdictional authority." *Pellico*, 394 Ill. App. 3d at 1065.

Pellico is part of the plethora of cases recognizing that after the 1964 amendments to the judicial article of the Illinois constitution, the legislature's role in determining the jurisdiction of the circuit court was radically changed, and all circuit courts became courts of general jurisdiction of all justiciable matters. See *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 337 (2002) (citing *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 529-30 (2001) (discussing the change, under the 1964 amendments, from courts of limited jurisdiction to courts of general jurisdiction in a single integrated system)). Effective January 1, 1964, the amendment to article VI replaced limited jurisdiction and provided that " 'Circuit Courts shall have unlimited original jurisdiction of all justiciable matters.' " *Steinbrecher*, 197 Ill. 2d at 529-30 (quoting Ill. Const. 1870, art. VI, § 9 (amended 1964)).

¶ 30 The court in *Pellico* noted that "*Gebis* relied on *In re M.M.*, 156 Ill. 2d 53 *** (1993), which was overruled regarding its subject matter jurisdiction holding by three subsequent supreme court cases, *People ex. rel. Graf v. Village of Lake Bluff*, 206 Ill. 2d 541, 552-54 *** (2003), *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 337 *** (2002), and *Steinbrecher*, 197 Ill. 2d at 529-30 (the *Belleville* trio)." *Pellico*, 394 Ill. App. 3d at 1065.

¶ 31 Notwithstanding, *Drews* cites to *In re M.P.*, 401 Ill. App. 3d 742 (2010), for the same proposition that the circuit court here lacked subject matter jurisdiction. In *In re M.P.*, the Third District Appellate Court held that "[c]ourts do not have original jurisdiction over the removal of a child from his parents based upon abuse, neglect, or dependency because the issue was not known at common law." *In re M.P.*, 401 Ill. App. 3d at 746-47. The Juvenile Court Act,

however, confers limited jurisdiction over such matters on the circuit courts. *Id.* at 747. Because the court's powers are purely statutory, any action taken by the circuit court that exceeds its jurisdiction is void and may be attacked at any time. *Id.* However, *M.P.* relied on *In re A.H.*, 195 Ill. 2d 408 (2001) for this proposition. *In re A.H.* held that "[r]emoval of a child from his parents' care based on a finding of abuse, neglect, or dependency was not known to common law or equity *** and, therefore, was not a justiciable matter over which the courts had original jurisdiction ***. Through the Juvenile Court Act, however, the legislature conferred jurisdiction on the circuit court over such a matter and thereby created a 'justiciable matter.'" (quoting 705 ILCS 405/2-1 (West 1998)). However, this holding has been questioned by our courts, which have since explained that complying with statutory requirements is not necessary to vest a circuit court with subject matter jurisdiction. See *In re K.D.*, 407 Ill. App. 3d 395, 406 (2011) (holding that *A.H.* does not stand for the proposition that the statutory requirement of filing a neglect petition must be fulfilled to vest a court with subject matter jurisdiction in a guardianship proceeding under the Juvenile Court Act). Our supreme court has explained:

"Our discussion in *A.H.* reveals our recognition that the question of subject matter jurisdiction is a matter of the justiciability of the class of cases to which the instant case belongs. Error or irregularity in the proceeding, while it may require reversal of the court's judgment on appeal, does not oust subject matter jurisdiction once it is acquired." *In re M.W.*, 232 Ill. 2d 408, 423 (2009).

¶ 32 Our supreme court's discussion of subject matter jurisdiction in *Belleville Toyota* provides perhaps the best guidance: "[w]ith the exception of the circuit court's power to review

administrative action, which is conferred by statute, a circuit court's subject matter jurisdiction is conferred entirely by our state constitution." *Belleville Toyota*, 199 Ill. 2d at 334 (citing Ill. Const. 1970, art. VI, §9). "Thus, subject matter jurisdiction exists as a matter of law if the matter brought before the court by the plaintiff or petitioner is 'justiciable.'" *In re M.W.*, 232 Ill. 2d at 424. "Generally, a 'justiciable matter' is 'a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests.'" *Id.* (quoting *Belleville Toyota*, 199 Ill. 2d at 335). "[O]nce a circuit court obtains jurisdiction, an order will not be rendered void merely because the court makes an error of law in rendering its judgment." *Pellico*, 394 Ill. App. 3d at 1064 (citing *People v. Davis*, 156 Ill. 2d 149, 157 (1993)). "'Accordingly, a court may not lose jurisdiction because it makes a mistake in determining either the facts, the law[,] or both.'" *Pellico*, 394 Ill. App. 3d at 1065 (quoting *Davis*, 156 Ill. 2d at 157).

¶ 33 Drews points out that courts continue to cite to *Gebis* for the proposition that justiciability requires that the circuit court have the authority to grant the relief requested. However, although courts have continued to cite *Gebis* for the general proposition that justiciability requires that the circuit court have the authority to grant the relief requested, clearly the holding regarding lack of subject matter jurisdiction has been abrogated. Before the 1964 amendments, in cases involving purely statutory causes of action, unless the statutory requirements were satisfied, a court lacked jurisdiction to grant the relief requested. *Belleville Toyota*, 199 Ill. 2d at 336-37. After the 1964 amendments, a failure to meet statutory requirements is not a jurisdictional defect but, rather, an error which may be urged as a basis for reversal on appeal. Drews' argument that because the

1-12-0025

statutory requirement of a showing of "abuse of discretion" was not met under section 11a-18(d) of the Probate Act the court lacked jurisdiction is not a viable argument after the 1964 amendment to our Constitution.

¶ 34 At best, Drews' argument is that the statutory requirement of an abuse of discretion was not met and that, therefore, the circuit court erred in determining the facts or the law under the statute. Therefore, Drews' argument lacks merit as a jurisdictional challenge. The circuit court had subject matter jurisdiction as a matter of law.

¶ 35 III. Whether the Circuit Court's Order Violated the Terms of the Trust

¶ 36 Drews next argues that the circuit court violated three provisions of the trust in the following: (1) failing to recognize the trust's distinction between distributions of income and principal and ordering the distribution of \$30,000 annually regardless of the fact that virtually the entirety of the distribution would come from principal; (2) failing to consider whether the amount ordered for distribution was necessary for West's welfare; and (3) ignoring the trust's explicit direction that, in distributing income or principal, the trustee must consider the other assets available for West's welfare. We consider the difference between principal and income and the requirements under the trust agreement in this case. Our review of a trial court's construction of a trust instrument is *de novo*. *Peck v. Froehlich*, 367 Ill. App. 3d 225, 228 (2006) (citing *Brown v. Ryan*, 338 Ill. App. 3d 864, 871 (2003)); *Brown*, 338 Ill. App. 3d at 871 (citing *Stein v. Scott*, 252 Ill. App. 3d 611, 615 (1993)).

¶ 37 Article 8.1 of the trust agreement provides that distributions from income are to be made no less than quarterly, and Article 8.2 provides that distributions of principal are to be made

1-12-0025

"from time to time" "as the Trustee deems advisable" to provide for West's support. Drews argues that the court ignored the trust's distinction between income and principal in ordering an annual distribution of \$30,000, as the entirety of that distribution will come from principal. Drews argues that the court "swallowed the Bank's argument" that the trust had receipts in the amount of \$59,845 during the period of March 16, 2010, to August 25, 2011, but under the accounting principles of the Principal and Income Act (760 ILCS 15/1 *et seq.* (West 2010)), the trust actually has only \$4,732 in income before the deduction of expenses. Drews argues that the largest item in the receipt period of 2010-2011 was a one-time set of annuity distributions totaling \$34,000 from the Aviva annuity, which was a principal asset of the trust. Drews argues the payment received was merely a change in the form of the asset from a lump-sum settlement to a set of monthly payments, and therefore should not have been treated as income but, rather, as principal.

¶ 38 The Principal and Income Act defines both principal and income as follows:

“ Sec. 4. Income and Principal Defined. (a) Income is the return in money or property derived from the use of principal, including return received as:

(1) rent of real or personal property, including sums received for cancellation or renewal of a lease;

(2) interest received, including sums received as consideration for the privilege of prepayment of principal except as provided in Section 8 [760 ILCS 15/8] on premium and discount;

(3) income earned during administration of a decedent's estate, as provided

in Section 6 [760 ILCS 15/6];

(4) corporate distributions, as provided in Section 7 [760 ILCS 15/7];

(5) accrued increment on bonds or other obligations issued at discount, as provided in Section 8 [760 ILCS 15/8];

(6) receipts from business and farming operations, as provided in Section 9 [760 ILCS 15/9];

(7) receipts from disposition of natural resources, as provided in Sections 10 and 11 [760 ILCS 15/10 and 760 ILCS 15/11].

(b) Principal is the property which has been set aside by the owner or the person legally empowered so that it is held in trust eventually to be delivered to a remainderman, while the income is in the meantime taken or received by or held for accumulation for an income beneficiary. Principal includes:

(1) consideration received by the trustee on the sale or other transfer of principal or on repayment of a loan or as a refund or replacement or change in the form of principal;

(2) proceeds of property taken on eminent domain proceedings;

(3) proceeds of insurance upon property forming part of the principal except proceeds of insurance upon a separate interest of an income beneficiary;

(4) stock dividends, receipts on liquidation of a corporation and other corporate distributions, as provided in Section 7 [760 ILCS 15/7];

(5) receipts from the disposition of bonds or other obligations, as provided

in Section 8 [760 ILCS 15/8];

(6) receipts from disposition of natural resources, as provided in Sections 10 and 11 [760 ILCS 15/10 and 760 ILCS 15/11];

(7) receipts from other principal subject to depletion, as provided in Section 12 [760 ILCS 15/12];

(8) any profit resulting from any change in the form of principal;

(9) any allowances for depreciation established under Section 9 [760 ILCS 15/9]; and paragraph (2) of subsection (a) of Section 14 [760 ILCS 15/14];

(10) receipts from the granting of options.

(c) After determining income and principal in accordance with the terms of the instrument or this Act, the trustee shall charge to income or principal expenses and other charges as provided in Section 14 [760 ILCS 15/14].” 760 ILCS 15/4 (West 2010).

¶ 39 We find that the bulk of the amounts Drews claims constituted principal are properly classified as principal, but that the distinction between income and principal does not change the result under the terms of the trust in this case, as Raymond made clear that the support of West be given priority over the preservation of principal.

¶ 40 Here, the amounts received during the accounting period can properly be allocated to principal. The bulk of the receipts was the lump-sum annuity payment of \$34,000 constituting the settlement of Raymond's personal injury lawsuit, which is principal. "An annuity is a fixed sum, granted or bequeathed, payable periodically." *Jones v. Heritage Pullman Bank & Trust Co.*, 164 Ill. App. 3d 596, 603 (1988). Further, a judgment is principal, while any interest earned on

1-12-0025

the judgment is income. See *Herget National Bank v. Lampitt*, 148 Ill. App. 3d 874, 876 (1986) (holding that a \$170,400 judgment was principal to be added to the trust corpus, but the interest earned on the judgment constituted income payable to the income beneficiary). Here, the annuity payment was from an *inter vivos* settlement of Raymond's personal injury lawsuit, and thus is principal.

¶ 41 The government life insurance dividends of \$430.80 and the insurance proceeds of \$2,500 are also properly classified as principal. See 760 ILCS 15/4(b)(3) (West 2010) ("proceeds of insurance upon property forming part of the principal"). The stock dividends of \$1,611.79 and the unrealized gains in the amount of \$18,181.66 in stock also constitute principal pursuant to section 4(b)(4) of the Principal and Income Act. See 760 ILCS 15/4(b)(4) (West 2010).

¶ 42 However, the Principal and Income Act also provides that "[a] person establishing a trust may make provision in the instrument for the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee to do so and such provision, where not otherwise contrary to law, shall control notwithstanding this Act." 760 ILCS 15/3(a) (West 2010). The Trusts and Trustees Act also provides that "[a] person establishing a trust may specify in the instrument the rights, powers, duties, limitations and immunities applicable to the trustee, beneficiary and others and those provisions where not otherwise contrary to law shall control, notwithstanding this Act." 760 ILCS 5/3(1) (West 2010). Thus, the provisions of the trust agreement, if not contrary to some other law, trump both the Income and Principal Act and the Trusts and Trustees Act.

¶ 43 "It is well settled that the primary principle of trust and will construction is to determine

1-12-0025

the settlor's or testator's intention and that the court is to give effect to that intention if it is not in conflict with an established rule of law or of public policy." *Duvall v. La Salle National Bank*, 177 Ill. App. 3d 770, 771-72 (1988) (citing *In re Estate of Steward*, 134 Ill. App. 3d 412 (1985), *In re Estate of Cancik*, 121 Ill. App. 3d 113 (1984)). "Further, the determination of the settlor's or testator's intent is to be derived from a consideration of the instrument as an integrated document as opposed to the interpretation of particular phrases, clauses or sentences." *Duvall*, 177 Ill. App. 3d at 772 (citing *First National Bank v. Canton Council of Campfire Girls, Inc.*, 85 Ill. 2d 507 (1981), *Carr v. Hermann*, 16 Ill. 2d 624 (1959)).

¶ 44 The trustee must administer the trust in accordance with the provisions of the trust. " "[A] trustee owes a fiduciary duty to a trust's beneficiaries and is obligated to carry out the trust according to its terms and to act with the highest degrees of fidelity and utmost good faith." " *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1009 (2010) (quoting *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 615 (2007), quoting *In re Estate of Muppavarapu*, 359 Ill. App. 3d 925, 929 (2005)). "The trustee must be mindful of the beneficiaries' interests, and the trustee cannot act inconsistently with the beneficiaries' interests, irrespective of the trustee's good or bad faith." *Laubner v. JP Morgan Chase Bank, N.A.*, 386 Ill. App. 3d 457, 464 (2008) (citing *Rennacker v. Rennacker*, 156 Ill. App. 3d 712, 715 (1987)).

¶ 45 "That being said, a court should not interfere with a trustee's exercise of discretion given to him or her by the trust instrument so long as the trustee does not act in a wholly unreasonable and arbitrary manner." *Laubner*, 386 Ill. App. 3d at 464 (citing *Chicago Title & Trust Co. v. Chief Wash Co.*, 368 Ill. 146, 155 (1938)). "Where discretion is conferred upon the trustee with

respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." *Laubner*, 386 Ill. App. 3d at 464 (quoting Restatement (Second) of Trusts § 187, at 402 (1959)).

¶ 46 However, " '[w]hat may constitute an abuse of discretion by the trustee[] depend[s] on the terms of the discretion, including the proper construction of any accompanying standards, *and on the settlor's purposes* in granting the discretionary power and in creating the trust.' " (Emphasis in original.) *Peck v. Froehlich*, 367 Ill. App. 3d 225, 231 (2006) (quoting Restatement (Third) of Trusts § 50(2), at 258 (2003)). "When a trustee fails to administer a trust according to its terms, a breach of trust results." *Northwestern Mutual Life Ins. Co. v. Wiemer*, 96 Ill. App. 3d 549, 552 (1981) (citing *White v. Macqueen*, 360 Ill. 236, 248 (1935)). Also, the trustee's discretion " 'is not an arbitrary one and one which would permit the trustee to provide no support whatever for [the beneficiary].' " *In re Estate of McInerny*, 289 Ill. App. 3d 589, 600 (1997) (quoting *Department of Mental Health and Developmental Disabilities v. First National Bank of Chicago*, 104 Ill. App. 3d 461, 465 (1982)). Moreover, "[a] disabled person is viewed as 'a favored person in the eyes of the law' and is entitled to vigilant protection." *In re Mark W.*, 228 Ill. 2d 365, 374-75 (2008) (quoting *In re Estate of Wellman*, 174 Ill. 2d 335, 348 (1996)).

¶ 47 In *Peck*, the trustee of one trust brought an action against the trustee of an Arizona trust, seeking reimbursement for one-half of the amounts paid for the settlor's extraordinary caretaking expenses, which the Arizona trustee had declined to pay, claiming it had discretion under the trust. The circuit court found in favor of the defendant Arizona trust trustee, but on appeal the Fourth District reversed and remanded. The Fourth District looked to the trust language and

concluded that the specific provision granting discretion to "use the income and principal of this Trust to provide [the settlor] with those benefits and services, and only those benefits and services that, in Trustee's judgment, are not otherwise available to [the settlor] from other sources" only applied when public sources of funds were involved. *Peck*, 367 Ill. App. 3d at 228. As the court in *Peck* held, "[t]he purposes of the trust and the powers of the trustee must be read together. When the settlor has a particular purpose in mind, it would be improper for us to ignore that purpose by concluding that the trustee could do whatever he wanted." *Peck*, 367 Ill. App. 3d at 231.

¶ 48 Similarly here, we are presented with clear language in the trust which defeats Drews' argument that she properly denied distribution to West from assets that were allegedly principal. Drews' argument that the court erred because it did not distinguish between principal and income lacks merit, as the trust provisions themselves do not limit disbursement for support to only income but, rather, expressly allow disbursement from principal. Drews' alleged discretion is in fact very limited, and Drews was required, at all times, to distribute funds for West's support. Article 8.2 of the trust directs that the trustee "shall" pay to West "such amounts from the principal of the Epa West Trust as the trustee deems advisable from time to time for [West's] support." Thus, the trust specifically directs disbursement from principal for West's support. Further, Article 8.2 specifically provides: "It is [Raymond's] intent that the support of my spouse be given priority over conservation of principal." The trust provisions are clear that Raymond's intent in settling the trust was that the principal be available for West's support, and that West's support was his primary concern. No distinction between income and principal was necessary.

1-12-0025

The stated intent from the plain language of the trust agreement itself was that the amount necessary for West's support would take priority over the preservation of principal. See *State Bank of Havana v. Cordes*, 168 Ill. App. 3d 525, 533 (1988) (holding that the beneficiaries of a testamentary trust were entitled to funds from the *corpus* of the trust when trust's income alone was not sufficient to meet their needs because decedent intended to provide for beneficiaries before distribution to remainderman). Cf *Laubner*, 386 Ill. App. 3d at 464-65 (holding that the cotrustees did not breach their fiduciary duty or act in a "wholly unreasonable and arbitrary" manner because they sought to protect the principal of a trust where they continued to distribute a substantial sum monthly to each plaintiff beneficiary, and where the cotrustees' decision to preserve the principal and distribute only from the income of the trust was in keeping with the settlor's stated intent). For Drews to determine that only \$2,272 should be distributed to West's estate in 2010 and that no distribution should be made in 2011 for West's support was arbitrary, unreasonable and an abuse of discretion amounting to a breach of trust.

¶ 49 Drews argues that the court erred because it did not find that this amount was necessary for West's support as the one-page order does not explicitly state as such. However, by its order the circuit court implicitly made this finding. A court order is not interpreted in a vacuum. "The orders of the trial court must be interpreted from the entire context in which they were entered, with reference to other parts of the record including the pleadings, motions and issues before the court and the arguments of counsel." *Kiefer v. Rust-Oleum Corp.*, 394 Ill. App. 3d 485, 494 (2009) (citing *Dewan v. Ford Motor Co.*, 343 Ill. App. 3d 1062, 1069 (2003), *P & A Floor Co. v. Burch*, 289 Ill. App. 3d 81, 88 (1997)). "Orders must be construed in a reasonable manner so as

1-12-0025

to give effect to the apparent intention of the trial court." *Kiefer*, 394 Ill. App. 3d at 494 (citing *Dewan*, 343 Ill. App. 3d at 1069, *P & A Floor Co.*, 289 Ill. App. 3d at 88–89).

¶ 50 We note that Drews argues the court did not make certain findings but offers no explanation for her failure to include a report of proceedings for the hearing when the court heard argument on Devon Bank's petition for distribution. We continue to adhere to the well-established rule in *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984), that "[a]ny doubts arising from the inadequacy of the record will be resolved against the defendant." *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 155 (2005), quoting *Weaver v. Midwest Towing, Inc.*, 116 Ill. 2d 279, 285 (1987), citing *Foutch*, 99 Ill. 2d at 391-92. "[A]s the appellant, defendant has the burden of showing error; any doubt arising from incompleteness of the record will be resolved against the appellant." *People v. Kirkpatrick*, 240 Ill. App. 3d 401, 406 (1992).

¶ 51 Where the record is incomplete, the reviewing court will indulge every reasonable presumption favorable to the judgment order, or ruling from which the appeal is taken. *In re Marriage of Cepek*, 230 Ill. App. 3d 1045, 1046 (1992). Moreover, it will be presumed that the trial court heard sufficient evidence and argument to support its decision. *In re Marriage of Cepek*, 230 Ill. App. 3d at 1046. See also *Corral v. Mervis Industries*, 217 Ill. 2d 144, 156 (2005) (supreme court affirmed the trial court's denial of a motion to transfer venue where there was no transcript of the hearing, and thus the supreme court could not know what evidence or arguments were presented at that hearing, nor what the circuit court's findings of fact or its reasoning in denying defendant's motion were); *In re Stephanie P.*, 341 Ill. App. 3d 887, 892 (2003) (because the respondent-appellant failed to provide a transcript or other record of the

1-12-0025

hearing at which the court granted DCFS' petitions to be discharged as guardian over the respondent's children, we presumed that the trial court's order terminating DCFS' guardianship had a sufficient factual basis and followed the law, thus resolving the issue against her). Thus, we presume the circuit court's decision was supported by the evidence.

¶ 52 Not only do we properly make this presumption, we conclude the record before us supports the circuit court's decision. The record reveals that Devon Bank argued distribution to West was necessary for her support. On August 26, 2010, Devon Bank petitioned the court for leave to expend up to \$8,000 per month for West's residency at Brighton Gardens, and attached a monthly statement showing a balance due of \$20,314.20. Devon Bank alleged the monthly cost at Brighton Gardens will be at least \$7,445.69. The court entered an order on August 26, 2010 authorizing Devon Bank to pay the outstanding Brighton Gardens bill and to expend \$8,000 on a monthly basis for West's continued care at Brighton Gardens. In its reply in briefing on its petition for accounting and distribution, Devon Bank acknowledged the fact that other funds were available to West's estate and asked that only one third of her total living expenses be provided by the trust, which amounted to \$30,000. The court's December 8, 2011, order was in accordance with Devon Bank's argument and ordered payment of \$30,000 to Devon Bank as West's guardian per year in quarterly installments. Drews' statement that "the record is utterly devoid of any evidence at all upon which the Circuit Court would have based such a determination" is untrue. In the context of the record of the proceedings that is before us, including the court's prior orders, as well as briefing on Devon Bank's petition for accounting and distribution, it is clear that the court's order directing Drews to distribute \$30,000 annually

evinced a belief that the distribution was necessary for West's support.

¶ 53 We note also that the court's order was in compliance with Article 9.1 of the trust, which required that "[i]n determining the appropriate amount of income and/or principal to distribute or apply for the support of a beneficiary, or the best interests, comfortable support and welfare of a beneficiary, the trustee shall consider other resources known to the trustee to be available to or for the benefit of the beneficiary." Here, the record supports Devon Bank's argument that the court indeed considered other sources of income. In its reply in briefing on its petition for accounting and distribution, Devon Bank alleged that West's actual annual expenses totaled approximately \$90,000, and acknowledged the fact that other funds were available to West's estate. Devon Bank proposed that only one third of her total living expenses be provided by the trust, which amounted to \$30,000 per year. The court's December 8, 2011, order was in accordance with Devon Bank's argument and ordered payment of only \$30,000 annually from the trust, thus taking into account the other funds available to West's estate.

¶ 54 Drews also takes issue with the fact that the payments were ordered in perpetuity. However, there is every indication in the record that, given West's condition, she is expected to remain at Brighton Gardens. There is no evidence in the record that she would be moved to another residence or facility, nor does Drews even argue that there that there would be any change in West's needs for support. On the other hand, Drews as appellant has not shown that this amount is not necessary for West's support.

¶ 55 Further, to the extent that Drews' argument that the court cannot "substitute its own judgment for that of the [t]rustee" violated the terms of the trust, Illinois law is well-settled that a

1-12-0025

beneficiary has right to petition the court to compel a trustee to act where it fails to act to effectuate the purpose of the trust. "[T]he failure of the trustee to act in a reasonable time gives the beneficiaries the right to petition the court for action or a new trustee." *Heritage County Bank & Trust Co. v. State Bank of Hammond*, 198 Ill. App. 3d 1092, 1097 (1990). See *Heritage County Bank & Trust*, 198 Ill. App. 3d at 1095 (holding that the beneficiaries had a right to petition the court for distribution where a trust did not specify a termination point but directed that the *res* should be sold and the proceeds distributed after a certain time and the distribution did not occur); *Smith v. Kelley*, 387 Ill. 213, 226 (1944) ("[u]pon [a trustee's] failure to carry out and perform his duties as a trustee, a court of equity will, upon proper application by those entitled to relief, take charge of the trust and the trustee and compel a winding up of the trust and a distribution to those entitled thereto."); *Myers v. Trustees of Schools*, 21 Ill. App. 223, 227 (1886) (recognizing that a court of equity has "the power and duty to take charge of a trust and administer it whenever necessary to effectuate the object in view").

¶ 56 In this case, it is clear from the trust agreement settled by West's late husband that his prime concern was for the care and well-being of his ailing wife. The court did not err in ordering an amount paid out annually from the trust, whether income or principal, for West's support. The trust itself provided for distribution of principal for West's support and unequivocally required that West's support be given priority over the preservation of principal. Devon Bank provided evidence that distribution was necessary for West's support, while Drews provided no contrary evidence. Drews' action in refusing to distribute any money from the trust for West's support, whether principal or income, amounted to an abuse of her good faith as

1-12-0025

trustee. The court did not err in entering its December 8, 2011 order.

¶ 57

CONCLUSION

¶ 58 We determine Drews forfeited her argument that the court could not enter its order without first finding an abuse of discretion of the trustee by not raising it below and, instead, raising it for the first time on appeal. Drews' argument that the circuit court lacked subject matter jurisdiction is without merit because, after the 1964 amendments to the Illinois Constitution, all circuit courts have subject matter jurisdiction of all justiciable matters. Finally, the circuit court did not violate the terms of the trust agreement in ordering the distribution of quarterly amounts without distinction between principal and income where the trust agreement provisions specifically allowed distribution of principal for West's support and specified that West's support shall take priority over the preservation of principal.

¶ 59 Affirmed.