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2011 IL App (3d) 100579-U

Order filed August 2, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

DANIEL CHURCHILL, Trustee of the)	Appeal from the Circuit Court
Belshause Family Trust, U/T/A)	For the 14th Judicial Circuit
dated May 28, 2003,)	Rock Island County, Illinois
)	
Plaintiff-Appellant,)	Appeal No. 3-10-0579
)	Circuit No. 10-LM-202
v.)	
)	
ELAINE BELSHAUSE,)	Honorable
)	Raymond J. Conklin,
Defendant-Appellee.)	Judge Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justice McDade specially concurred.
Justice Wright dissented.

ORDER

¶ 1 *Held:* In a forcible entry and detainer action, the trial court erred in finding a trust document equivocal on the subject of whether the settlor's spouse was to enjoy rent-free occupancy of a home owned by the trust.

¶ 2 Plaintiff trustee Daniel Churchill filed a complaint for forcible entry and detainer against defendant Elaine Belshause, seeking her removal from a home owned by the Belshause Family Trust. The trial court ruled against Churchill, finding it inappropriate for the settlor's spouse to pay rent to occupy the residence because the rental income would be attributable to her as a life beneficiary

under the terms of the trust and she would then have to pay taxes on the income. Churchill appealed the trial court's ruling. We reverse the trial court.

¶ 3

FACTS

¶ 4 Daniel Churchill, as trustee of the Belshause Family Trust, filed a complaint in forcible entry and detainer (735 ILCS 5/9-102 (West 2008)) seeking a judgment granting him possession of a property occupied by the defendant Elaine Belshause. Churchill alleged Elaine was in unlawful possession of the property in Milan, Illinois. A hearing was held and the following evidence revealed.

¶ 5 Churchill testified that he became the trustee of the Belshause Family Trust on August 24, 2008, at the death of the settlor, Marvin Belshause. Elaine is the life income beneficiary of the trust and the eight children of Elaine and Marvin are the residuary beneficiaries. The Milan property, which encompasses approximately 36.7 acres, has been in the trust since May 28, 2003. The property is not subject to a lease agreement or any other contract giving anyone other than the trustee a possessory interest. Elaine has resided in one of the houses on the property since approximately November 2008. Churchill was aware of Elaine's move to the residence. Elaine has never paid rent or signed a lease, although Churchill tendered a lease agreement to Elaine through her attorney. Churchill indicated to Elaine that he needed to obtain revenue from the property in order to defray expenses. Churchill admitted he received a letter from Elaine in which she offered to pay all expenses, taxes, insurance, ordinary repair, maintenance expenses, and capital improvement expenses.

¶ 6 Churchill testified that he drafted the Belshause Family Trust on Marvin's behalf five years before his death. The trust addressed assets Marvin had inherited from his family. Churchill also

prepared wills for Elaine and Marvin. Churchill acknowledged that after Marvin's death, Elaine was to receive "all income" from the trust. Churchill opined that the terms of the trust meant that if Elaine were to pay rent on the property she would receive "net income" after expenses. Churchill testified that administrative expenses were another expense that had to be paid from trust income. The trust also produces income from other investments. The trust also contains assets that are "readily marketable." Churchill stated his responsibility is to all the beneficiaries of the trust. The trust gives the trustee the power to make leases and grant options and to purchase, operate, maintain, improve, rehabilitate, alter, demolish, abandon, release, or dedicate any real property and to take any other action with respect to the property that an individual owner could take. Churchill admitted that any net income received by Elaine would be subject to income tax. The last proposed agreement tendered to Elaine was that she would pay \$2,000 per month to the trust, from which Churchill would pay all of the operating expenses, insurance, depreciation and insurance costs.

¶ 7 Churchill also prepared another trust for Marvin, the Marvin W. Belshause Trust, which dealt with all the property that Elaine and Marvin had acquired during their lifetime. This property included a farm in Orion, Illinois, that the couple resided on from 1973 until the date of Marvin's death. The revocable trust gave Elaine the right to continue to occupy the Orion residence free of rent upon Marvin's death.

¶ 8 Elaine Belshause also testified. She stated that the summer before he died, she and Marvin were planning to move to the Milan property. They had discussed the move with Churchill. The day Marvin died there were no furnishings or appliances in the Orion home. Elaine was not sure how long after Marvin's death she moved to the Milan property. Elaine acknowledged the Milan property was owned by the Belshause Family Trust. Elaine admitted she did not have a lease or any other

agreement with Churchill that gave her a right to possession of the property. She did not pay rent. Ron Belshause, the son of Elaine and Marvin, stated that Churchill told him that he wanted to protect the interest of all the beneficiaries and that Elaine would have no problem paying \$2,000 in rent, which he considered fair.

¶ 9 Following the hearing, the trial court issued a ruling. The trial court stated there is an “inherent” tension between the marital trust and the family trust in that “[w]hatever benefits the life estate probably is to the detriment of the residual beneficiaries and vice versa.” The trial court found that if Elaine was required to pay rent, she would receive it as income and be required to pay taxes, a situation the trial court found “inappropriate” based on the trust document in its entirety, “as well as facts and circumstances presented in court.” The trial court stated the trust did not contemplate Elaine paying rent to reside on the Milan property. The trial court considered the trust document “less than unequivocal” on the subject. The trial court denied Churchill the relief sought through his forcible entry and detainer action. Following another hearing, the trial court denied Churchill’s motion to reconsider its ruling and he follows with this appeal.

¶ 10 ANALYSIS

¶ 11 As a preliminary matter, we address Churchill’s assertion, with which we agree, that because this is a forcible entry and detainer matter, the evidence introduced by Elaine concerning the parties’ unsuccessful lease and settlement negotiations, her potential tax liability for receipt of net trust income and the terms of the Marvin W. Belshause trust are not germane to the proceedings. The purpose of a forcible entry and detainer action is to adjudicate rights to possession. *Rosewood Corp. v. Fisher*, 46 Ill. 2d 249, 255 (1970). A forcible entry and detainer action should not be burdened by matters unrelated to the issue of possession. *People ex rel. Department. of Transportation v.*

Walliser, 258 Ill. App. 3d 782, 788 (1994). Matters that are not germane to the issue of possession are not to be introduced by joinder, counterclaim or otherwise. *Rosewood Corp.*, 46 Ill. 2d at 255; 735 ILCS 5/9-106 (West 2008). Claims that are germane to the issue of possession include claims asserting a paramount right of possession; claims denying the breach of the agreement vesting possession in the plaintiff; claims challenging the validity or enforceability of the agreement on which the plaintiff bases the right to possession; and claims questioning the plaintiff's motivation for bringing the action. *Walliser*, 258 Ill. App. 3d at 788.

¶ 12 In the instant case, we consider the terms of the Belshause Family Trust are germane to the issue of possession, however, the other matters asserted by Elaine, including, for the reasons noted below, the terms of the Marvin W. Belshause trust, are collateral matters that do not directly connect with the question of possession. We also consider Elaine's argument that the doctrine of laches prevents Churchill from bringing this forcible detainer action is unavailing in this case. Elaine did not raise the defense of laches in the proceedings below and for this reason she has waived the argument. *O'Connell Home Builders, Inc. v. City of Chicago*, 99 Ill. App. 3d 1054, 1059 (1981) (defendants' attempt to raise a new issue on appeal results in waiver of the argument).

¶ 13 Turning to the issue of possession, the focus of Churchill's claim, we consider whether the trial court erred in concluding the Belshause Family Trust should be interpreted as giving Elaine the right to rent-free possession of a house on the property owned by the trust. We believe the trial court did err in its conclusion. The interpretation of a trust agreement presents a question of law which we review *de novo*. *Barasch v. Barasch*, 259 Ill. App. 3d 958, 960 (1993); *Vaughn v. Barton*, 402 Ill. App.3d 1135, 1139 (2010).

¶ 14 General rules of construction of written instruments apply to the construction of trust

instruments. *Storkan v. Ziska*, 406 Ill. 259, 262 (1950). The same rules of construction used in regard to wills are applicable to the construction of trust agreements. *Storkan*, 406 Ill. at 262. The goal is to determine the settlor's intent, which the court will effectuate if it is not contrary to law or public policy. *2416 Corp. v. First National Bank of Chicago*, 64 Ill. 2d 364, 371 (1976). In determining this intent, courts consider the plain and ordinary meaning of the words used, taking into consideration the entire document. *Citizens National Bank of Paris v. Kids Hope United Inc.*, 235 Ill.2d 565, 574 (2009). When the words of a trust instrument, used in their ordinary sense, are plain and their meaning clear, construction demands the use of the plain intention over the presumed intention. *Storkan*, 406 Ill. at 263-64. Courts are reluctant to construe the legal meaning of a written instrument by resort to surrounding circumstances, although courts have, in order to give expression to a clear intention of a settlor or testator, considered extrinsic evidence to show that an existing person was meant to be included by the language used. *Continental Illinois National Bank & Trust Co. v. Clancy*, 18 Ill.2d 124, 128 (1959).

¶ 15 In the instant case, we find no reason to look to extrinsic evidence in interpreting Marvin's intent *vis a vis* the Belshause Family Trust. It is undisputed the Belshause Family Trust includes the Milan property. It is also undisputed that according to the terms of the family trust, Elaine is to receive the income from the family trust for her lifetime and upon her death the principal passes to the other beneficiaries. There is no mention in the family trust of living accommodations for Elaine, rent-free or otherwise. Furthermore, the trust gives the trustee powers to sell any real or personal property of the trust and take other action that an individual owner could take to conserve or realize the value of the asset. To find Elaine has a right to possess the Milan property would interfere with the discretionary exercise of power given to the trustee by the terms of the trust. See *Laubner v. JP*

Morgan Chase Bank, N.A., 386 Ill. App. 3d 457, 464 (2008) (where discretion is conferred upon the trustee with respect to the exercise of power, its exercise is not subject to control by the court except to prevent an abuse of discretion). Viewing the trust instrument as a whole, the terms unequivocally give Elaine the right to receive the income from the trust for her lifetime and as much of the principal as the trustee may consider necessary for her health and maintenance. The trust also charges the trustee with conservation of the assets and gives him the power to exercise discretionary control over the assets. Finally, upon Elaine's death, the trust principal is to be distributed to the other beneficiaries, the children of Marvin and Elaine. There is nothing "less than unequivocal" about the terms of the trust when the instrument is viewed as a whole. The trust places the Milan property in the possession of the trustee and for this reason, the trial court erred in finding Churchill could not enforce his action for forcible entry and detainer.

¶ 16 CONCLUSION

¶ 17 For the foregoing reasons, the judgment of the circuit court of Rock Island County is reversed.

¶ 18 Reversed.

¶ 19 JUSTICE McDADE, specially concurring:

¶ 20 I concur in the decision to reverse the trial court's judgment against the trustee of the Belshause Family Trust, Daniel Churchill, for the reasons advanced by Justice O'Brien.

¶ 21 I write separately only to observe that the existence of the Marvin W. Belshause Trust buttresses this analysis. This second trust provides a rent-free residence in the Orion house for Elaine Belshause for the balance of her life. The settlor clearly did not contemplate her residing in

the Milan house because alternate provisions had been made. Nor had Elaine and Marvin actually moved to the Milan house prior to his death which *might*, at least arguably, have suggested a change of intention. There is no basis that I can see for believing that Marvin would have changed the terms of either trust as he lived. I find no tension between the two trusts.

¶ 22 I find no tension between the two trusts and agree that possession of the Milan house is entrusted to trustee, Daniel Churchill.

¶ 23 JUSTICE WRIGHT, dissenting:

¶ 24 I agree with the majority's conclusion that the limited issue of a forcible entry and detainer action is to adjudicate the paramount right to possession (*Rosewood Corporation v. Fisher*, 46 Ill. 2d 249, 254-55 (1970)), but unlike my respected colleagues, I conclude that both trust documents are germane to that issue and must be considered to determine who has the paramount right to possession of the property at issue. See *People ex rel. Department of Transportation v. Walliser*, 258 Ill. App. 3d 782, 788 (1994). In my view, the language of both trust instruments was correctly considered by the court because each party to the forcible entry proceedings relied on a *separate* trust agreement to establish their own possessory interest in the Milan property. For these reasons, I would affirm the trial court because the lifetime interest of the surviving spouse, who was also a designated beneficiary of the family trust, was paramount to the trustee's interest in the Milan property.

¶ 25 The additional facts set out below are relevant to my dissenting position in this case.

Churchill, acting as counsel for Marvin Belshause, prepared two trust instruments executed by Marvin in May of 2003. At that time, Marvin and defendant-appellee Elaine Belshause had enjoyed a long-term marriage and were the parents of all eight of the children listed as beneficiaries. One

trust instrument created the family trust, which included the residence in Milan, Illinois, and other Belshause assets inherited by Marvin. In the event Elaine survived Marvin, both the family trust and the revocable trust were to remain in trust under the administration of a trustee until Elaine's death. Since Elaine did survive Marvin, Elaine became the life income beneficiary of this family trust and their eight children were the residuary beneficiaries.

¶ 26 Neither trust document specifically identified the real property included in that trust by street address or city location, but the parties do not dispute that the Milan property was inherited property included under the family trust. In paragraph 5.1 of the family trust, relied upon by the majority, the document provided, "Beginning with my [Marvin's] death, the trustee shall pay *all the income* to my spouse [Elaine]." (Emphasis added.)

¶ 27 The second trust instrument, which the majority does not consider to be germane to the dispute at hand, the revocable trust created a life estate in the couple's *marital residence*, at the time of a spouse's death, for the surviving spouse. This revocable trust involved assets the couple acquired together during their marriage. Although this revocable trust document did not specifically describe the location of the real estate referred to as "property that was used by my spouse and me as a residence at the time of my death (the [marital] 'residence'), the parties do not dispute that, at the time Marvin created the trusts, Marvin and Elaine's marital residence was near Orion, Illinois, and was acquired during their marriage in 1973. The revocable trust provided that the marital residence should remain in trust and Elaine would be able to continue to reside, rent-free, at the marital residence, in the event Marvin predeceased Elaine, for the remainder of her life, as long as she paid all the taxes, assessments, insurance premiums, ordinary repairs, and other expenses necessary to protect and maintain the property.

¶ 28 Prior to Marvin's death, Elaine and Marvin met with Churchill to discuss unrelated financial matters when Marvin told Churchill that he and Elaine were moving from the Orion property to the Milan property. According to Elaine, Marvin and their sons were building shelves at the Milan property in preparation for the move. On the day Marvin died, their belongings had been removed from the Orion residence and relocated to the Milan residence, including the bedroom sets, the dining room set, the sofa, television, washer, dryer, stove, and refrigerator, and Elaine no longer resided at the Orion farmhouse.

¶ 29 Churchill, as trustee, did not demand rent from Elaine until more than a year after Marvin's death when Churchill requested Elaine to pay rent to the family trust in the amount of \$2,000 per month. According to Churchill, the family trust would charge rent and then pay the operating expenses, insurance, and depreciation with Elaine's rent payments, as well as the cost of administration of the trust. Elaine agreed to pay the operating expenses, including all the taxes, assessments, insurance premiums, ordinary repairs, and other expenses necessary to protect and maintain the property, but refused to agree to pay depreciation or the cost of administration of the family trust. Unable to reach an agreement, on April 15, 2010, Churchill filed a complaint in forcible entry and detainer against Elaine in an effort to evict her from the Milan residence.

¶ 30 This complaint alleged that the family trust, not Elaine, was entitled to the possession of the real estate located at 3606 85th Avenue West, Milan, Illinois. Elaine answered the complaint by claiming her right to possession was jointly founded in the family trust, as the life income beneficiary, in addition to being founded in the revocable trust because the Milan property became the marital residence during the late stages of Marvin's lifetime. Thus, contrary to the views of the majority, I respectfully assert that the language of both trust agreements was germane to the outcome

in the trial court.

¶ 31 Churchill conceded the revocable trust provided that Elaine could continue to use and occupy the marital “residence” for the remainder of her life, rent-free, as long as she paid all the taxes, assessments, insurance premiums, ordinary repairs, and other expenses necessary to protect and maintain the property. Churchill then clarified that the revocable trust provided that Elaine would be able to reside, rent-free, at the marital “residence” in the event Marvin predeceased Elaine, but asserted that this meant the Orion property since Orion was the location of the marital residence at the time Marvin drafted the trusts. Churchill, who drafted the documents, testified that he did not specifically name the Orion property in the revocable trust because general trust language did not usually list specific property descriptions.

¶ 32 In the event Elaine survived Marvin, both the family trust and the revocable trust were to remain in trust under the administration of a trustee until Elaine’s death. While Elaine and Marvin were relocating to the Milan home from the farm in Orion, the couple did not make any rental payments to the family trust. According to Churchill, when Elaine and Marvin discussed moving to the Milan property, Churchill did not advise the elderly couple that they should pay the family trust rent in order to move, and then, live there or that the trusts should be revised. Churchill stated that he became the trustee of the family trust when Marvin died on August 24, 2008, and filed this action against Elaine, with a notice and demand for possession of the property, dated March 31, 2010.

¶ 33 During the contested hearing, Churchill conceded that Elaine agreed to pay all the expenses for the Milan property including taxes, insurance, ordinary repairs and maintenance, and minor capital improvements. The court admitted a copy of that agreement letter, Defendant’s Exhibit 1,

over Churchill's objection.

¶ 34 Later, as an adverse witness, Churchill was directed to the family trust document, marked as Defendant's Exhibit 2. At the direction of Elaine's attorney, Churchill read paragraph 5.1 of the family trust to the court. This provision provided, "Beginning with my death, the trustee shall pay all the income to my spouse [Elaine]." Churchill explained that, if Elaine paid rent to the family trust, he would have to pay or return the "net" rent back to Elaine as family trust income. Churchill stated that the language in the family trust said "all income," but, as trustee, Churchill testified that he interpreted that clause to mean the trustee should only pay "net income" from the family trust to Elaine.

¶ 35 During his testimony as an adverse witness, Churchill also read from paragraph 10.11 of the family trust which provided, in part:

"[R]easonable reserves for depreciation, depletion, and obsolescence may be established out of the income and credited to the principal only to the extent that the trustee determines that readily marketable assets in the principal of the trust will be insufficient for renovation, major repair, improvement, or replacement of trust property that the trustee deems advisable."

Churchill stated that the Milan property, where Elaine now resided, was appraised at a value of approximately \$442,000. Churchill testified that the family trust additionally "started out with \$200,000 of marketable cash," which was invested and valued at \$223,000 at the time of trial.

¶ 36 Churchill testified that, even though the family trust had cash in the amount of \$223,000, as trustee, he had to protect the interests of the eight children who were residuary beneficiaries of the family trust. Churchill testified that he estimated the annual fees he would receive as trustee would

be about \$6,000 per year. Churchill stated that he could not predict that the investment income from the family trust assets would cover the amount of \$6,000 annually.

¶ 37 Churchill explained that the operating expenses for the family trust property totaled nearly \$24,000 annually, which included not only his trustee fees of \$6,000, but the real estate taxes of approximately \$9,000 per year, and depreciation. Churchill admitted that he originally asked for rent from Elaine in the amount of \$2,700 monthly. Churchill stated that, by having Elaine pay rent to cover the operating expenses for the entire Milan property, there would be no reduction in trust assets when the residual beneficiaries acquired the family trust assets after Elaine's death.

¶ 38 In administering the family trust, Churchill stated that he believed Elaine, as the life income beneficiary of the family trust, should receive the "net" income from the family trust assets minus the depreciation. Upon further questioning, Churchill testified that the family trust instrument provided the trust could only charge depreciation if the principal of the trust was insufficient for renovation, major improvements, or replacement of the trust property. In spite of this provision, Churchill stated that, as trustee, he determined that depreciation should be deducted based on a 30-year period of depreciation for the real estate and improvements in order to protect the rights of "not only the life income beneficiary but also those of the eight residuary beneficiaries."

¶ 39 Ron Belshause testified the he is Marvin and Elaine's son and one of the residuary beneficiaries. Ron said he had a conversation with Churchill a few weeks earlier about Churchill's decision to require Elaine to pay \$2,000 per month to the family trust in order to continue to reside at the Milan property. According to Ron, Churchill told Ron that Elaine had "plenty of money" and would not have a problem paying that amount of rent. Churchill also told Ron that Churchill wanted to protect the interest of all the beneficiaries and that \$2,000 per month was a fair rental price.

Churchill advised Ron that if Elaine would not pay this amount of rent, he would pursue eviction proceedings.

¶ 40 The court found that Marvin gave Elaine a life estate in both trusts and Elaine resided at the Milan property which was part of the family trust. The court also noted that, after Elaine's death, the remaining family trust assets would be distributed among their eight children. The court noted that Churchill, as trustee, felt that Elaine should pay rent, but Elaine offered only to pay the expenses directly associated with her tenancy while declining to pay rent.

¶ 41 The court's ruling further provided:

“A problem for plaintiff, of course, is the tension inherent in these trusts. Whatever benefits the life estate probably is to the detriment of the residual beneficiaries and vice versa.

The trust provides that all income is to be paid to [Elaine]. In addition, the trustee [Churchill] is authorized to use the principal, if necessary, for the benefit of [Elaine]. As [Elaine's] attorney points out, if [Elaine] pays rent, a good portion of that would then be given back to her as trust income, with her then required to pay taxes on the income she has now received.

It is the Court's opinion that the trust did not contemplate defendant paying rent per se to reside on this property. Admittedly, the trust document is less than unequivocal on this subject. However, considering the document in its entirety, as well as facts and circumstances presented in court, the opposite conclusion is inappropriate.

Therefore, judgment is in favor of [Elaine].”

¶ 42 On July 28, 2010, the court entered a written ruling on Churchill's motion to reconsider. In

that ruling, the court determined that germane claims to a forcible entry and detainer action “include claims asserting a paramount right to possession, and claims challenging the validity or enforceability of the agreement on which the plaintiff bases the right to possession.” The court found that the family trust specifically included the “Milan property” and assets inherited by Marvin, and the revocable trust specifically included the “Orion property” as well as other property accumulated by Marvin and Elaine during their marriage.

¶ 43 The court noted that the revocable trust allowed Elaine to occupy the marital residence, for free, for her lifetime, but the family trust was silent on that issue. The court found that it was obvious that, when both trusts were created, Marvin contemplated that Elaine would reside in Orion, but that they were moving their marital residence to the Milan property before Marvin’s death and that Marvin communicated this decision to Churchill, such that the move had become a “*fait accompli*” as of the date of Marvin’s death.

¶ 44 The judge noted that he had been told that Elaine and some, but not all, of the residual beneficiaries of these trusts had filed suit against Churchill seeking, among other things, to have him removed as trustee. The court also noted, if plaintiff paid rent rather than directly paying expenses, since she was entitled to all income from that trust, she would presumably pay taxes on her own rent money as personal income when she received that rent back as income. The court denied Churchill’s motion to reconsider.

¶ 45 In this case, I respectfully suggest that the decision whether to exclude evidence concerning the language incorporated into both trusts was solely within the discretion of the trial court and should not be subject to our *de novo* review. Rather, the decision of whether to admit or exclude evidence rests solely within the discretion of the trial court and should not be disturbed absent an

abuse of discretion. *Spaetzel V. Dillon*, 393 Ill. App. 3d 806, 812 (2009). An abuse of discretion occurs only if no reasonable person would take the view adopted by the trial court. *Spaetzel*, 393 Ill. App. 3d at 812.

¶ 46 This court has held that “[c]laims which are germane to the issue of possession generally fall into one of four categories as follows: (1) claims asserting a paramount right of possession; (2) claims denying the breach of the agreement vesting possession in the plaintiff; (3) claims challenging the validity or enforceability of the agreement on which the plaintiff bases the right to possession; or (4) claims questioning the plaintiff’s motivation for bringing the action.” *Walliser*, 258 Ill. App. 3d at 788.

¶ 47 Without an existing lease agreement, Churchill relied on the family trust instrument as the basis for his claim that Elaine, the life income beneficiary of the family trust, was entitled to *net* income from the trust but was not entitled to a possessory interest in the Milan residence without paying rent. However, when defending against the eviction proceedings, Elaine not only relied on the language of the family trust to defeat the demand for rent, but also relied upon the language of the revocable trust to establish her paramount right to possession of the Milan residence, the marital residence at the time of Marvin’s death, over all other persons including the trustee of the family trust.

¶ 48 Since each party asserted that their possessory interest in the Milan residence arose out of separate trust instruments, I conclude both trust instruments were germane to the proceedings before the court.¹ Thus, I strongly contend the trial court did not abuse its discretion by admitting and

¹ Churchill testified to and recited some of the provisions he drafted into the revocable trust during the trial. In addition, Elaine attached a copy of the revocable trust to her response to Churchill’s motion to reconsider. Moreover, both parties referred to the language of both trusts

considering the contents of both documents.

¶ 49 Furthermore, I point out that the case law provides, “It is the duty of the trial judge to interpret the [trust instrument], which presents a question of law, regardless of ambiguity; and it is the duty of a reviewing court to determine whether the trial judge's interpretation of the [trust instrument] was correct.” *Barasch v. Barasch*, 259 Ill. App. 3d 958, 961 (1993). I agree with the majority that this court reviews matters involving interpretation of the language of a trust *de novo*. *Vaughn v. Barton*, 402 Ill. App. 3d 1135, 1139 (2010); *Barasch*, 259 Ill. App. 3d at 961.

¶ 50 When construing a trust, a court's primary concern is to discover the settlor's intent, which the court will effectuate if it is not contrary to law or public policy. *First National Bank of Chicago v. Canton Council of Campfire Girls, Inc.*, 85 Ill. 2d 507, 514 (1981). In determining the settlor's intent, courts should consider the plain and ordinary meaning of the words used, while taking into consideration the entire document. *Citizens National Bank of Paris v. Kids Hope United, Inc.*, 235 Ill. 2d 565, 574 (2009); *Campfire Girls*, 85 Ill. 2d at 514. The court may also consider the surrounding circumstances at the time the instrument was executed, if it aids the court in determining the settlor's intention in using certain language. *Campfire Girls*, 85 Ill. 2d at 514.

¶ 51 In the instant case, although the Milan property was held by the family trust, the life income beneficiary of the family trust (Elaine) was in possession of the family trust's Milan property at the time of Marvin's death. In addition, as long as the family trust had sufficient assets, the trustee of the family trust had an obligation to insure that Elaine received *all* income that the family trust derived from its real property and other assets until Elaine's death or the trust was otherwise terminated.

throughout the trial and the hearing on the motion to reconsider.

¶ 52 Since the trustee of the family trust was required to pay Elaine *all* income generated from the assets of the family trust, including rent she paid to the trust as a tenant of the Milan property, the court had to determine whether Elaine was entitled to continue to occupy this residence, rent-free, as an income beneficiary for life, under the language of the family trust. When making this determination, the court found that the Milan property was, in fact, the marital residence of Marvin and Elaine at the time of Marvin's death, and was the residence provided for in the revocable trust, where Elaine could continue to reside without paying any rent. The court construed the language of the family trust in conjunction with the provisions of the revocable trust, both created simultaneously by Marvin in 2003.

¶ 53 The trial judge, in his findings, noted that, if Elaine paid rent, that rent would be given to Elaine as trust income, but she would be then required to pay taxes on that income which would not be to her benefit. In its ruling entered on May 27, 2010, the trial court found that "the [family] trust did not contemplate defendant paying rent per se to reside on this property." Based upon the record, the court concluded that Marvin intended for both trusts to provide for Elaine during her lifetime and to allow her to possess and reside at their marital residence, rent-free, after Marvin died.

¶ 54 In this case, we note Marvin specifically included a provision in Article 13 of the revocable trust that required that *any* interest in property used by Marvin and Elaine as a residence at the time of Marvin's death is "allocated to a trust created under this instrument." Marvin authorized the trustee of the revocable trust to retain the marital residence for Elaine's life and also allowed Elaine to continue to use and occupy the marital residence, rent-free, provided that Elaine paid all taxes, assessments, insurance premiums, ordinary repair bills, and other expenses of protecting and maintaining the residence. Elaine agreed to pay those very expenses for the Milan property.

¶ 55 When considering the entirety of evidence and the trust instruments, I conclude that the trial court exercised a commendable degree of both common sense and practical restraint when applying legal principles to first consider and then judiciously enforce the language of each trust agreement approved by Marvin in 2003. The court's decision correctly interpreted the trust agreements individually but, in doing so, honored Marvin's intent to provide both a rent-free, lifetime residence for his spouse in addition to providing a lifetime source of income for her, while allowing his eight children to acquire the residual assets of the family trust, if any, following their mother's death.

¶ 56 While Churchill contends that the trial court's ruling effectively amended the trust and took away his trustee's power to enter into leases or other contracts with respect to the Milan residence owned by the family trust, I disagree. Our supreme court has held that a defendant in a forcible entry action may raise equitable defenses and be given equitable relief if a defense can be established. *Rosewood*, 46 Ill. 2d at 257.

¶ 57 Here, neither party disputed that the revocable trust provided Elaine with the certainty and security of a life estate in the marital residence beginning on the date of Marvin's death. In this case, after considering the testimony, the court first made the factual determination that, at the time of Marvin's death, Marvin and Elaine's marital residence was the Milan residence. This is a factual determination which we review using a deferential standard of review. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 154 (2005).

¶ 58 After finding the Milan property had become the marital residence, the trial court simply held that eviction proceedings were not in order because Elaine's right to possession was not contingent upon the payment of rent. I cannot disagree with the logic of this ruling, even when exclusively considering the language of the family trust instrument without reference to the intent expressed in

the revocable trust instrument executed on the same date.

¶ 59 According to the plain language of the provisions of the family trust instrument, if Elaine had agreed to pay \$2,000 per month in rent to the trustee of the family trust, the trustee would then have been compelled by the same family trust instrument to return all rental payments as trust income back to Elaine as the named life income beneficiary of the family trust income.

¶ 60 In effect, the trial court simply rejected the *trustee's* attempt to amend the family trust instrument after Marvin's death by giving Elaine only the "net" rental income after reducing the rental income by expenses, which included his own fees, and depreciation. I conclude that the trial court did not amend the terms of the family trust by judicial decision as the trustee contends, but instead judiciously enforced the plain language of that clause with other clauses of the family trust which required the trustee to remit *all* income received by the family trust to Elaine as the only designated life income beneficiary of that family trust under the circumstances that existed in April 2010.

¶ 61 For these reasons, I would have affirmed the trial court's ruling and respectfully file this dissent.