ILLINOIS STATE BAR ASSOCIATION

DECEMBER 2021 VOL 68 NO. 6

Trusts & Estates

The newsletter of the Illinois State Bar Association's Section on Trusts & Estates

Creating and Construing a Trust and the Problem of the Unsigned Amendment Under the Illinois Trust Code

BY CHUCK NEWLAND

Creating a Trust

The law regarding the creation of a trust under Illinois common law and the new Illinois Trust Code, effective January 2020 ("ITC") are consistent.[1] To create an express trust under Illinois common law the requirements are: (1) intent to create a trust, shown by a declaration of trust by the settlor or by such circumstances that evidence the settlor intended to create a trust; (2) identification of the property to be held in trust; (3) beneficiaries that are ascertainable; (4) a trustee; (5) a trust purpose with instructions on how the purpose is to be carried out; and (6) the

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Primer on Spousal Lifetime Access Trusts

BY MICHELLE V. HANLON

On September 13, 2021, House Ways and Means Chairman, Richard E. Nel, released the text of the current House version of the "Build Back Better Act" containing pending tax reforms. One such reform in the bill included a reduction to the Federal estate tax exemption amount (also known as the "**basic exclusion amount**"). To the surprise of many, subsequent proposals from the House of Representatives have since omitted changes to the basic exclusion amount. Although the Build Back Better Act may leave the current basic exclusion amount untouched—at least for now—with the possibility that Congress may still reduce the basic exclusion amount in the future, this article reviews (1) the profile and financial net worth of a client who may benefit from a Spousal Lifetime Access Trust ("SLAT"), (2) considerations when drafting a SLAT, (3) the advantages and disadvantages of SLATs from a client-focused perspective, and (4) the income and gift tax reporting

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subject property of the trust delivered to the trustee.[2] The Illinois Trust Code codifies these requirements pursuant to sections 401 and 402.[3]

Significantly, unlike section 4-3 of the Illinois Probate Act pertaining to wills, there is no requirement for a trust to be formally executed and it may be incorporated into a will by reference in the will even if the trust was not executed in the same fashion.[4] Moreover, the word "trust" does not have to be used in the action creating the trust. There are no particular forms or words necessary to establish a trust.[5] "Equity looks to the substance rather than the form; if a trust was created it does not matter whether it is designated accurately, inaccurately, or not at all."[6] Accordingly, trusts have been recognized historically by Illinois common law in various situations where the trust is not written by a settlor. Illinois courts will find that an implied trust was created if it "is deducible from the nature of the transaction between the parties, or which is superimposed on the transaction by operation of law, independently of the intention of the parties."[7] Implied trusts may be further categorized into constructive and resulting trusts."[8] A resulting trust arises by operation of law and is based on the presumed intent of the parties.[9] When one person pays the consideration for property which is taken in the name of another a resulting trust may be created.[10] Generally, a constructive trust will be imposed by a court in two situations: 1) where actual or constructive fraud is considered as equitable grounds for raising the trust; and 2) where there is a fiduciary duty and a subsequent breach of that duty.[11]

Construing a Trust

The primary purpose in construing the terms of an express trust is to effectuate the settlor's intent, provided it is not contrary to public policy.[12] Ascertaining the intent of the settlor is done by examining the entire trust and giving the words used their plain and ordinary meaning.[13] Moreover, if possible, in construing a trust, no language should be considered as surplusage, insignificant, or rendered nonsensical.[14] The Illinois Supreme Court has made it clear that: "[e]very word, phrase and clause in a will should be given effect, if possible" and where one interpretation would render another part of the instrument meaningless and another interpretation would give effect to all provisions and all language, the interpretation giving effect to all provisions will be adopted.[15] The intent of the settlor is to be determined as of the time the trust was executed[16] and the settlor is presumed to have known the then-existing law concerning the disposition of his property at that time.[17]

If called upon to modify a trust, a court "is limited to establishing not what the settlor 'meant to say, but rather what was meant by what he did say.'"[18] Further, a court should not create new terms when the language of the document is clear and unambiguous, but if there is an ambiguity in dispute a trial court may rely on extrinsic evidence to aid in the construction in order to determine the settlor's intent.[19] If the language used is reasonably susceptible to more than one meaning it is ambiguous.[20] Further, language in a trust may create a latent ambiguity.[21] When some extrinsic fact or extraneous evidence creates a choice among two or more possible meanings even when the language employed is clear and suggests but a single meaning, a latent ambiguity occurs. [22] "If a petition to construe an instrument states facts that, if proven, show a latent ambiguity, only then will a hearing with extrinsic evidence be held to determine the possible existence of a latent ambiguity as alleged."[23] For example, where a settlor provided for a class of beneficiaries, his grandchildren, to take as remaindermen, but in addition, also named all of those class members individually without any instruction to include or exclude as to afterborn grandchildren, there was a latent ambiguity.[24]

Trusts & Estates

This is the newsletter of the ISBA's Section on Trusts & Estates. Section newsletters are free to section members and published at least four times per year. Section membership dues are $30 per year.

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OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
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PUBLICATIONS MANAGER
Sara Anderson
sanderson@isba.org

For the most part, these common law principles of trust creation and construction have not been materially changed by the ITC. "The common law of trusts and principles of equity supplement this code, except to the extent modified by this Code or another statute of this State."[25] The common law rules as to construction are adopted by section 112 and are to be *liberally construed* and the rule that provides for strict construction of a statute in derogation of the common law does not apply.[26]

Revoking, Amending, or Restating an Existing Trust

First, in order to revoke or amend a trust under Illinois law, a settlor must expressly reserve the right to amend or revoke in the trust agreement.[27] Further, when the method of revoking or amending is stated in the trust instrument, generally, the settlor is limited to amending the trust in that manner. [28] Section 602(a) and (c)(1) of the ITC codifies these principles.[29]

However, probate and chancery courts are courts of equity, and therefore, if the language of a trust presents an ambiguity in the method of amending, that ambiguity can only be resolved by an evidentiary hearing with extrinsic evidence to assist in effectuating the settlor's intent. In *McCarthy v. Taylor*, the trust language allowed for the settlor to amend or revoke the trust by providing "written notice to the successor trustee" but the settlor attempted to amend with unsigned handwritten language. [30] The trial court rejected the argument that a prior signed trust amendment served "as the model for subsequent amendments" and found – *after a trial* – that an unsigned handwritten amendment to a trust naming the defendant as successor trustee was valid and enforceable.[31] In affirming the trial court, the First District Appellate Court found that the trial court properly heard extrinsic evidence due to an ambiguity in the stated method of amending with another provision of the trust that instructed the trust to remain confidential, even from the successor trustee.[32]

What if the method of amendment is silent? With all of the trust forms floating out there and lay people drafting their own instruments, this is not as uncommon as you would think. Moreover, because not every state requires that the trust expressly provide for the document to be amendable or revokable, forms gathered by lay people on the internet can present a problem with ascertaining the true intent of a settlor. Surprisingly, there is no Illinois common law case directly on point that addresses a trust that allows for the settlor to amend or revoke but is completely silent as to the method of doing so. The Uniform Trust Code ("UTI") and Restatement (Third) of Trusts section 63 provide that when the method of amendment is silent in the instrument, the method used by the settlor should manifest clear and convincing evidence of the settlor's present intent.[33]

In contrast, section 602(c)(2) of the ITC states as follows:

> Revocation or amendment of revocable trust.
> …
> (c) The settlor may revoke or amend a revocable trust instrument: by substantially complying with a method provided in the trust instrument; or (2) if the trust instrument does not provide a method or the method provided in the terms is not expressly made exclusive, by a later instrument in writing other than a will, signed by the settlor and specifically referred to the trust.[34]

Section 602(c)(1) seems clear enough. However, "substantially complying" can be open to interpretation depending on the case. Further, subsection (c)(2), requiring a signed instrument when the trust does not provide a method of amending, is a departure from the UTC and Restatement (Third) which merely require the method used by the settlor should manifest clear and convincing evidence of the settlor's present intent.[35] This departure establishes a significant lack of uniformity in trust law and can result in disaster for the sloppily drafted trust and those settlors that are hindered or delayed, by no fault of their own in signing an attorney prepared document.

The Problem of the Unsigned Amendment Under the ITC if the Trust Is Silent as to the Method of Amendment

Let's face it—estate planning is one of the biggest areas of procrastination for clients. Sometimes it's hard enough to get clients in the door to do their initial estate plan let alone amend or restate their existing trusts when there is a significant change in the law or their own circumstance. In addition, because most lawyers simply can't pull an amendment or restatement of a trust out of their pocket, there is usually a gap in time before the present intent to amend is conveyed to the attorney and the date the settlor executes the amendment. The gap between the settlor expressing his intent and the date of execution could vary from a few days to a few weeks depending on scheduling issues between busy clients and attorneys and other unforeseen circumstances that cause delay even if the client is not a procrastinator. We have accepted this strict compliance in execution in the area of a wills and a testator's desire to execute a codicil for literally hundreds of years.

In the area of trusts, given that the law recognizes the creation of trusts in situations where no document is actually generated and is a function of proof, it seems rather inconsistent to require a signed writing when the document is silent as to the method of amending. Barring evidence to the contrary, clearly a settlor taking steps to meet with an attorney and advise the attorney of the specific changes that he wants, followed by that attorney drawing up a document based on that instruction, at minimum raises issues of material fact as to whether that conduct "manifests his present intent." But does that even matter under the ITC? Now, suppose the settlor dies prior to executing the amendment or restatement prepared by the attorney. If the trust allows for amendments, the first question is whether the trust provides for the method by which an amendment can be made or is the trust silent as to the method for amending? The next question is, if the method is set forth in the trust document, does it expressly make that method exclusive? If it's not made exclusive, is there leeway under Illinois law for a court to consider whether the unsigned amendment substantially complies, or is there any ambiguity in the method provided where perhaps the *McCarthy v. Taylor* case can provide some authority to survive a motion to dismiss?

If there is no ambiguity and the trust is deemed silent as to the method of amending, the ITC's departure from the UTC and Restatement (Third) could have a significant impact on the case. Let's compare a couple of cases as examples:

Example 1: In a 2013 New Hampshire case written about in Martindale by the law firm of McLane Middleton, Profession Association, the settlor, while in the hospital, advised her co-trustee that she wished to disinherit her nephews and niece.[36] The co-trustee, in turn, advised the settlor's attorney who then went to the hospital to confirm the settlor's wishes.[37] After meeting with the settlor, the attorney prepared the amendment as instructed, but upon his return to the hospital, the settlor was unable to participate in any meaningful discussion and eventually died before signing the document.[38] The subject trust in question allowed for amendments and set forth the method of amending by a signed writing of the grantor.[39] The co-trustee who was familiar with the settlor's intent petitioned for declaratory judgment to have the oral statement of the settlor's intent be declared a valid amendment.[40] In denying a motion to dismiss the trustee's declaratory judgment action, the trial court agreed with the trustee's position that the trust did not expressly state that the signed writing was the exclusive means to amend and relied on the UTC, section 602(c)(2) adopted by the New Hampshire Trust Code.[41] The court also noted that the case law and modern trend is to allow amendments as long as the amendment is established by clear and convincing evidence as the settlor's intent and the trust does not expressly provide for an exclusive method.[42]

However, given how the ITC has departed from the UTC and the Restatement (Third), it appears that an Illinois trial court does not have the same latitude in the same situation under section 602(c)(2). Moreover, even if section 602(c)(2) provides more clarity and less evidentiary issues for trial judges by the requirement of a signed writing, with all of the forms and amateur drafting of trusts out there, what might seem to be a very clear expression of the method of amendment in one situation may not be so clear in others.

Example 2: A recent Illinois case, with similar facts to the New Hampshire case referenced above, filed in early 2020, just after the effective date of the ITC, had a very different result. The settlor instructed his attorney to draw up an amendment to cut out one beneficiary, his sister and only heir at law, and replace her with his fiancé. Similar to the New Hampshire case, the instructions by the settlor were given to the attorney in the presence of his fiancé whom he had already chosen as his successor trustee under a previously fully executed amendment that he unartfully prepared himself. However, with the pending plans for marriage, the couple wanted to make sure that an attorney prepared things properly. The meeting took place just a few days prior to the settlor undergoing a very complicated surgical procedure for an advanced cancerous tumor. At the meeting, the settlor advised his attorney that he wanted to substitute his sister and only heir at law for his fiancé, whom he had already made a beneficiary of his retirement accounts.

The attorney prepared the restatement and the settlor's surgery went well, but shortly after surgery, the settlor developed an infection in the hospital and like the settlor in the New Hampshire case, could not meaningfully participate in any conversation and the settlor died before being able to meet with his attorney to sign the restatement. Similar to the New Hampshire case, the initial form trust instrument used by the settlor reserved the right to amend and revoke and the method of exercising those rights provided as follows:

> In the event that Settlor is living and competent, but is for any reason not serving as Trustee of this Trust, he or she may exercise each and every right and power retained and granted by this Section, "SETTLOR POWERS" by signed instrument delivered to the Trustee.

By a reading of the plain language, when the settlor is living and competent, but *not* serving as trustee, the power to amend by this section *may* be completed by a signed instrument delivered to the then acting trustee. Clear enough, right? Significantly, like the New Hampshire case, the method set forth does not read as the expressed exclusive method. But, as in our case, what if the settlor is living, competent and still acting as trustee? Is the method of amendment deemed to be silent for purposes of the ITC? Admittedly, the language is not ideal, but it seems clear that in one instance the method is specifically provided, although not expressed as exclusive and in another instance a specific method is not set forth. Does that make the method of amendment not provided for under 602(c)(2)?

In this writer's opinion, the answer is no. The words "*but is for any reason not serving as Trustee of this Trust*" cannot be mere surplusage because ignoring that language would eradicate the distinction between the instance of when the settlor is still acting as trustee from an instance where he is no longer serving as trustee.[43] Further, it is not unreasonable that someone might prefer more flexibility with controlling his own property in his own trust while still acting as trustee. *Expressio unius est exclusio alterius*, meaning that the expression of one thing is the implied exclusion of the other is a valid rule of construction when interpreting legal instruments.[44] In other words, in the instance of the settlor living, competent and still acting as trustee, by implication the settlor *reserved the right to amend by any other method showing his present intent*. It follows that if the primary purpose of trust construction is to ascertain the settlor's intent, ignoring the language "*but is for any reason not serving as Trustee of this Trust*" would be anathema to that principle. Further, if you determine that the absence of a prescribed method when the settlor is acting as trustee makes the trust silent or "not provided" as to a method of amendment, that is tantamount to disregarding the entire provision and the reason for the specific language used, thus allowing for the default under section 602(c)(2) to defeat the settlor's intent in providing the language in the first place.

In defending against a 2-615 motion to dismiss with prejudice, we argued that the method of amendment was not silent and allowed for the settlor, when still acting as trustee to amend by any other method. Therefore, the unsigned restatement should be considered valid, and if not valid, the court should consider modifying the trust as the settlor's oral expression of his present intent resulting in an attorney preparing the restatement. It would seem taken as true the allegations raise issues of material fact to preclude the dismissal. We also argued that the facts alleged present unanticipated circumstances and the court should modify in accordance with the settlor's probable intention.[45] Moreover, the mere fact that the other side argued that trust instrument was silent as to the method of amendment demonstrated ambiguity, thus precluding a 2-615 motion to dismiss.

To our dismay, unlike the trial judge in the New Hampshire case discussed above, the trial court in our Illinois case, harshly, agreed with the sister and deemed this trust to be silent as to the method of amendment. In addition, the judge dismissed with prejudice the declaratory judgment action by *retroactively* applying section 602(c)(2) of the ITC to a settlor that died in December of 2019.[46] The trial court did not consider: the possible ambiguity of the provision; the lack of expressed exclusivity in the stated method under facts that didn't apply; the timing of the death of the settlor; whether there was an issue of material fact as to the unanticipated circumstances alleged and argued; or whether the facts alleged, taken as true and if ultimately proven by clear and convincing evidence "manifested his present intent to amend." Unfortunately, due to the value of the trust estate, the matter settled, avoiding a very interesting appeal on the application of a new statute.

Conclusion

Historically, Illinois is a state that never mandated formal execution of a trust for a trial court to find that a trust is created. The ITC does not really change how a trust is created in Illinois and courts may find a trust exists where there is no written instrument. The right to amend or revoke a trust under the ITC is consistent with prior Illinois common law in that the right to revoke or amend must be expressed in the trust instrument. The ITC codifies Illinois common law that the method of amending chosen by the settlor is to be substantially compliant with the trust document. However, the ITC's departure from the UTC when the trust document does not provide for a method of amendment can have a profound effect on the case and defeat any examination of the facts to establish the primary purpose of trust construction—determining a settlor's intent. Practitioners should make sure that their trust documents expressly allow for the documents to be amended and revoked and set forth a clear method of amending. Practitioners should also impress upon their clients that it is important to substantially comply with the method if they want the amendment to be enforceable.■

Chuck Newland is the principal attorney of Charles T. Newland & Associates. Mr. Newland has been practicing law for over 30 years. The firm's concentration is in Probate, Guardianship and Trusts with an emphasis in fiduciary litigation in those areas, as well as business litigation in Cook, Lake, and DuPage counties. The firm's main office is centrally located in Rolling Meadows, Illinois. Chuck can be reached at (847)797-9300 or chuck@cnewlandassociates.com.

1. 760 ILCS 3/101 *et seq*.
2. *Eychaner v. Gross*, 202 Ill.2d 228, 253 (2002).
3. 760 ILCS 3/401 and 402.
4. *In re Estate of Meskimen*, 39 Ill.2d 415, 417 (1968).
5. *Golstein v. Handley*, 390 Ill. 118 at 124 (1945).
6. *Williams v. Teachers Insurance & Annuity Ass'n*, 15 Ill.App.3d 542, 546 (1st Dist. 1973).
7. 35 I.L.P. Trusts §4 at 177.
8. *Murray v. Behrendt*, 399 Ill. 22, 27 (1947).
9. *In re Estate of Wilson*, 81 Ill.2d 349, 355 (1980).
10. *Gary-Wheaton Bank v. Meyer*, 130 Ill.App.3d 87, 91 (1984).
11. *Frederickson v. Blumenthal*, 271 Ill.App.3d 738, 740 (1st Dist. 1995).
12. *First National Bank v. Canton Council of Campfire Girls, Inc.*, 85 Ill.2d 507, 513 (1981).
13. *See Feder v. Luster*, 54 Ill.2d 6, 11 (1973).
14. *Spencer v. Di Cola*, 2014 IL App (1st) 121585, ¶20.
15. *Harris Trust and Sav. Bank v. Donovan*, 145 Ill.2d 166, 172 (1991).
16. (2d Dist. 1988).
17. *Sennot v. Collet–Oser*, 36 Ill.App.3d 928, 933 (1st Dist. 1976).
18. *Kavanaugh v. Dobrowolski's Estate*, 86 Ill.App.3d 33, 41(1st Dist. 1980).
19. *Ruby v. Ruby*, 2012 IL App (1st) 103210, ¶19.
20. *Thompson v. Gordon*, 241 Ill.2d 428, 441 (2011).
21. *Koulogeorge v. Campbell*, 2012 IL App (1st) 112812, ¶24.
22. (citing *Hays v. Illinois Industrial Home for the Blind*, 12 Ill.2d 625, 628 (1958)).
23. (citing *In re Estate of Smith*, 198 Ill.App.3d 400, 402 (5th Dist. 1990)).
24. *Bank of America, N.A. v. Judevine*, 2015 IL App (1st) 14053226, ¶35.
25. 760 ILCS 3/106.
26. 760 ILCS 3/112.
27. *Williams v. Springfield Marine Bank*, 131 Ill.App.3d 417, 419 (4th Dist. 1985).
28. *McCarthy v. Taylor*, 2014 IL App (1st) 132239, ¶65.
29. 760 ILCS 3/602.
30. *McCarthy v. Taylor*, 2014 IL App (1st) 132239, ¶1.
31. *Id*. at ¶¶ 46-47; 86-87.
32. *Id*. at ¶ 89.
33. Uniform Trust Code §602(c)(2)(B); Restatement (Third) of Trusts §63.
34. 760 ILCS 3/602.
35. Uniform Trust Code §602(c)(2)(B).
36. https://www.martindale.com/trusts-estates-law/article_McLane-Middleton-Professional_2245754.htm.
37. *Id*.
38. *Id*.
39. *Id*.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Spencer v. Di Cola*, 2014 IL App (1st) 121585, ¶20 (no language should be treated as surplusage or rendered insignificant).
44. *Gekas v. Williamson*, 393 Ill.App.3d 573, 587 (4th Dist. 2009) (citing Black's Law Dictionary 602 (7th ed.1999)); *In re D.W.*, 214 Ill.2d 289, 308 (2005).
45. 760 ILCS 3/412(a).
46. 760 ILCS 3/102 states that the ITC is to apply to all express trusts with an effective date of January 1, 2020.

Primer on Spousal Lifetime Access Trusts

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requirements associated with the creation of a SLAT. Changes to the estate tax are not typically retroactive, but clients looking for certainty and hoping to take full advantage of the basic exclusion can take certain steps and implement gifting strategies to lock in the current estate tax basic exclusion.

Spousal Lifetime Access Trusts – Overview

In traditional estate planning, high-net-worth married couples can create revocable living trusts structured with marital deduction and credit shelter trust formula language to take full advantage of the basic exclusion of each spouse upon death in order to reduce state and federal estate taxes. Although this continues to be a viable planning technique, the Federal estate tax basic exclusion is a political football which for the next three and a half years will create uncertainty. With the basic exclusion at a historically high threshold, even when adjusted for inflation, and with the basic exclusion slated to "sunset" or revert back to $5 million plus inflation adjustments as of January 1, 2026, according to the 2017 Tax Cuts and Jobs Act, SLATs are an attractive option for married couples who are aware of the importance of "locking in" the current basic exclusion and do not want to part with control of the assets to the next generation.

A SLAT is an irrevocable trust which one spouse establishes for the benefit of the other spouse during both spouses' lifetimes. Either spouse, or both spouses, can establish a SLAT.[1] Assuming no prior taxable gifts, each spouse can currently gift up to $11.7 million in value ($12.060 million for 2022) to a SLAT for the benefit of the other spouse without incurring a gift tax (although a gift tax return will be required to report the gift, discussed below). These trusts can therefore take advantage of the current basic exclusion amount while still providing the "grantor-spouse" (the donor) indirect access to the assets through the "beneficiary-spouse" (the donee). A SLAT is, in some ways, akin to a pre-funding of a credit shelter trust although in this instance, the trust is funded during both spouse's lifetimes and achieves a balanced approach to leveraging the basic exclusion while also retaining access to the trust assets.

A SLAT typically permits distributions of trust income and principal to the beneficiary-spouse, which indirectly benefits the grantor-spouse and protects the assets from creditors. The SLAT can be designed as a grantor trust where the trust income is taxed to the grantor rather than at the trust income tax rate, which allows the trust assets to appreciate to the extent the beneficiary-spouse does not take distributions from the trust. Similar to the goals of many gifting techniques, ideally the assets transferred to the SLAT would be ones which would appreciate in value to remove the appreciation of such assets from future estate tax. If the value of the assets transferred to the SLAT declines significantly, the strategy will be inefficient. The primary appeal of using a SLAT as a wealth transfer technique is the assets in the trust will not be subject to Federal or State estate tax upon either spouse's death as the grantor-spouse utilized his or her basic exclusion amount by establishing the trust.

Estate planning practitioners should review the advantages and disadvantages of this strategy with clients so the client can make an informed decision. Even the most sophisticated clients may have difficulty understanding the SLAT concept, and [ideally] this type of planning should not be rushed at the midnight hour of any tax law changes imposed by Congress. It is recommended to educate clients on the mechanics of the SLAT through a well-drafted memo or letter along with estate tax projections demonstrating the estate tax savings and implications of the SLAT technique.

Advantages of SLATs

Among the various advantages of the SLAT, the most significant benefit to the client is the ability to use the client's basic exclusion before Congress reduces the basic exclusion or before it sunsets in 2026 (which of these will occur first is anyone's guess). In addition, the SLAT structure avoids future estate taxes on the assets held in the SLAT – including the appreciation of the assets held in the trust. Furthermore, the SLAT provides creditor protection of the assets held in the SLAT to the maximum extent permitted by State law.

For high net worth clients who do not wish to join the Illinois exodus, SLATs have the added benefit of planning for Illinois estate taxes. Illinois is one of few states that imposes a State estate tax. In Illinois, a resident (or non-resident with real estate in Illinois) can shelter up to $4 million from the Illinois estate tax. By funding a SLAT during the client's lifetime, a client can transfer assets in excess of the state estate tax exclusion to the SLAT and avoid state estate tax exposure on the assets at death. Illinois does not have a state gift tax, so the lifetime transfer of assets does not use the client's state estate tax exclusion available at death (however, a client who retains some assets but also funds a SLAT may still incur an Illinois estate tax, although a reduced State estate tax).

Disadvantages of SLATs and Practical Solutions

One disadvantage to the SLAT technique is that a SLAT is irrevocable and cannot easily be changed once the client established the trust (although the SLAT should have the concept of a Trust Protector built into the trust, who can modify the trust according to the provisions of the Illinois Trust Code).[2] Another disadvantage is the grantor-spouse must give up control of the assets transferred to the trust. Additionally, although the grantor-spouse will receive indirect benefits from the spouse who is the beneficiary of the SLAT, the grantor-spouse cannot directly request access to the assets in the trust or a distribution from the trust.

From an income tax perspective, the basis of the SLAT's assets will not qualify for a step-up in basis upon the death of either spouse. Therefore, clients and practitioners must carefully consider the assets contributed to the SLAT and the basis of such assets that are transferred.

One of the most significant concerns when establishing a SLAT is if the spouses divorce, the grantor-spouse may lose indirect access to the SLAT. Furthermore, suppose the beneficiary-spouse has an untimely death, in that case, the grantor-spouse will lose indirect access to the SLAT as the trust will continue for the remainder beneficiaries, such as the couple's children. Clients can mitigate some of this risk by establishing SLATs for each other. However, practitioners should take caution in establishing reciprocal SLATs (established at the same time) that are mirror images of each other as the IRS can "unwind" the transaction according to the Reciprocal Trust Doctrine resulting in estate tax inclusion of both SLATs under Internal Revenue Code §§ 2036-2038. As an additional consideration, to address potential issues upon death or divorce, spouses may consider funding a life insurance trust with a life insurance policy on the beneficiary-spouse's life to provide a source of funds for the grantor-spouse upon the beneficiary-spouse's death.

Profile of Client Who Would Benefit from a SLAT

Clients who inquire about SLATs or who may be interested in this technique are often very concerned about the political climate. However, for this technique to be effective, the gift to the SLAT should be of an amount that will be in excess of the projected change to the basic exclusion. In other words, if Congress reduces the estate tax exclusion to $5,850,000 in 2022, the client should have made a gift in excess of this amount to the SLAT in 2021.

Therefore, in advising clients, it is important to evaluate whether the client is comfortable making a large gift to his or her spouse in trust and the client's relationship with their spouse. The SLAT strategy works best for clients who are in a stable, typically long-term marriage with a low risk of divorce and also have a net worth in excess of $11.7 million (the current basic exclusion amount). Additionally, the client should be able to afford to make a substantial lifetime gift to the SLAT while also retaining a reserve to fund the client's lifestyle. If the beneficiary-spouse consistently withdraws assets from the trust and the trust depleted, the SLAT strategy would "waste" the basic exclusion used when funding the trust. In advising a client, it is important to be aware that, regardless of their high-net-worth, a client may be reluctant to make a substantial lifetime gift out of fear of needing the assets in the future; therefore, a client's financial advisor can be essential in the process to provide financial projections taking into account the client's gift to the SLAT.

Suppose a client has property or assets that have been negatively affected by the COVID-19 pandemic. In that case, the current value of the assets to be gifted to the SLAT are potentially lower now than they will be as the economy recovers, making it an ideal time to fund the SLAT with as much value as possible before the asset values recover.

Structure of the SLAT

There are numerous ways to structure a SLAT, but a few possible configurations include the following:

Trustee and Distribution Standard: A beneficiary-spouse can serve as sole trustee of the SLAT, provided that the trust is limited to distributions pursuant to an ascertainable standard (i.e., health, education, maintenance and support). To the extent a broader distribution authority is desired (such as a best interests standard), the spouse-beneficiary should act as a co-trustee or the SLAT should be drafted to provide for an independent trustee to authorize distributions for the beneficiary-spouse's best interests. The donor spouse can retain the power to replace the trustee if the trust will be structured as a grantor trust, discussed below.

Other Trust Provisions: The grantor-spouse can retain the power to substitute trust assets for assets of equal value (grantor trust language); additionally, it is highly recommended to include Trust Protector provisions. There should not be any express or implied agreement between the spouses, nor in the Trust document, that the beneficiary-spouse will use the distributions from the SLAT for the grantor-spouse's benefit. The SLAT should include spendthrift provisions but should not require mandatory distributions as such distributions would defeat the purpose of the SLAT both from an estate tax planning and creditor-protection perspective.

Powers of Appointment: It is recommended to give the beneficiary-spouse a lifetime or testamentary limited power of appointment, or both, to provide flexibility. The SLAT should not grant a general power of appointment as such would cause inclusion in the beneficiary-spouse's gross estate at death. If the grantor-spouse is concerned about losing access to the trust assets in the event of the beneficiary-spouse's untimely death, the SLAT may grant the beneficiary-spouse a limited power of appointment exercisable in favor of grantor-spouse. The beneficiary-spouse could then execute a Last Will and Testament at a later time (to avoid concerns of a step-transaction) providing that upon the beneficiary-spouse's death, the spouse exercises their power of appointment in favor of a trust for the grantor-spouse. Although the IRS may assert estate tax inclusion under IRC §§ 2036 or 2038 as to the grantor-spouse by claiming an implied agreement between the beneficiary-spouse and the grantor-spouse, provided there was no pre-arrangement between the spouses, exercising the testamentary power of appointment in the beneficiary-spouse's Will to include a trust for the benefit of the grantor-spouse as a beneficiary should not cause inclusion in the grantor-spouse's estate under IRC § 2036. However, if the grantor-spouse retains the right to the income of the trust and the beneficiary-spouse exercises the power of appointment too close in time to the establishment of the SLAT, the power of appointment may trigger IRC § 2036(a); this is a question of fact and should be analyzed and discussed with the client.

Separate Account for SLAT: The beneficiary-spouse should have a separate account to receive trust distributions and should ensure that no SLAT distributions are made to a joint account with the grantor-spouse. If SLAT distributions are made to a joint account, the IRS could assert estate tax inclusion as to the grantor-spouse under IRC § 2036. With a separate account, the beneficiary-spouse is permitted to use the SLAT distributions for the joint benefit of the couple or may use the unlimited marital deduction to make gifts from the beneficiary-spouse's account to the grantor-spouse free of gift tax.

Gift Tax Reporting Considerations

Gift Tax Reporting: A gift to a SLAT is a completed gift which removes the assets transferred to the SLAT from both spouses' taxable estates for estate tax purposes. A gift to a SLAT will require a gift tax return (IRS Form 709) filed by April 15 in the year following the year the gift was made. For example, a 2021 gift to a SLAT will require a gift tax return by or before April 15, 2022. Gifts to a SLAT should include a valuation of the assets transferred as of the date of the gift. It is imperative that the client and tax return preparer review and confirm the appropriateness of allocating the client's generation-skipping transfer tax exemption to the gifts on Form 709.

Funding the SLAT: A client should not use joint assets to fund the SLAT. A SLAT must be funded solely by the grantor-spouse, not by the beneficiary-spouse, because if the beneficiary-spouse is shown to have made contributions to the trust and is also the beneficiary of the assets contributed to the SLAT, then the portion of the trust that was contributed by the beneficiary-spouse will be considered to be owned by the beneficiary-spouse upon his or her death.

Gift Splitting: If a couple is only willing to gift the equivalent of one of their basic exclusion amounts (such as $11.7 million) to a SLAT, the couple should not split the gift; the gift should be made from only the grantor-spouse in order to fully lock in the grantor-spouse's full basic exclusion amount. For example, if a client makes a gift of $11.7 million to a SLAT in 2021, the couple does not split the gift, and Congress reduces the basic exclusion to $5 million in a future year, the beneficiary-spouse will still have available his or her basic exclusion amount, thereby allowing the couple to shelter up to $16.7 million in value from estate taxes upon the second spouse's death (assuming the same basic exclusion is in place at the survivor's death). Contrast this with splitting the gift: if the couple split the $11.7 million gift in 2021, each would be treated as making a gift of $5.85 million and the couple would have no basic exclusion remaining upon their deaths if Congress reduced the basic exclusion to $5 million. In the latter example, the SLAT strategy was not nearly as effective since the couple would have no basic exclusion remaining upon their deaths, and would therefore incur a more significant estate tax when they could have otherwise been able to shelter an additional $5 million in assets had they not split the gift.

Rights of Withdrawal: A grantor-spouse can consider leveraging the annual gift tax exclusion by including the grantor-spouse's children as beneficiaries of the SLAT with a right to withdraw the annual exclusion amount within 30 to 60 days of the contribution. Including a right to withdraw will result in a slightly reduced use of the client's estate and gift tax exemption (assuming the client makes no other gifts to their children during the tax year).

Income Tax Reporting

The SLAT is considered a separate entity and should have a separate taxpayer identification number (EIN). The SLAT assets should be kept separate in a checking or brokerage account segregated from the couple's marital assets. Assuming the SLAT is structured as a grantor trust, each year the SLAT should file a blank Form 1041 income tax return with a statement informing the IRS that the income and deductions of the SLAT are passed onto the tax return of the donor (or the married couple if they file jointly).

Note that no gift should result from the grantor's payment of the income tax liability as the trust is taxed as a grantor trust. Some clients may want the SLAT to reimburse the grantor for the extra income taxes attributable to the trust's income; however, there are potential adverse or unintended consequences if the SLAT permits the Trustee to regularly reimburse the grantor for income taxes attributable to the SLAT and paid by the grantor, so the practitioner should be cautious in this approach.[3]

Alternatives to SLATs

There are many alternatives to the SLATs that are beyond the scope of this article but for which there is a wealth of information available through the ISBA. Alternative strategies in the estate planning practitioners' toolbox may include gift trusts for descendants, irrevocable life insurance trusts, qualified personal residence trusts, grantor retained annuity trusts, to name a few common strategies. Like SLATs, each strategy has its own pros and cons, and also like families and clients – no two estate plans are exactly alike nor will the same strategy work for every family or client.■

Michelle V. Hanlon is an attorney at Goldstine, Skrodzki, Russian, Nemec and Hoff, Ltd. Her practice focuses on complex estate planning and generational wealth transfer strategies, the preparation of estate, gift, and fiduciary income tax returns, and trust and estate administration.

1. But beware of the Reciprocal Trust Doctrine. Although a discussion of this doctrine is beyond the scope of this Article, married couples who wish to establish SLATs for each other should establish SLATs at different times, and the trusts should have different trustees, powers of appointment, beneficiaries, and so forth.
2. 760 ILCS 3/808.
3. *See* Revenue Ruling 2004-64.

Part I: Survey Says! Current State of Farm and Ranch Estate and Succession Planning for Attorneys

BY CARI RINCKER, ESQ.

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When looking for farm and ranch estate and succession planning solutions with increasingly challenging farm family dynamics, it's prudent to first look at the data. Rincker Law, PLLC performed a survey sent via email and posted via social media geared for agriculture producers. This two-part series discusses the data from that survey and delves into what this might be on the state of farm and ranch estate and succession planning for attorneys.

Demographics

Role in Industry. Results from 58 survey takers were collected via Survey Monkey from July 27 to October 27, 2020. 46.55 percent of participants were farmer landowners while 1.72 percent was a tenant farmer. 17.24 percent identified as both a landlord and tenant farmer. 18.97 percent noted that they were a farmer with an off-farm job, a familiar scenario in the Rincker farm family. Four participants stated they were agri-business owners while two noted they were an agriculture employee. Remaining 5.17 percent of survey takers marked "other" for this identifying question.

Age. No questions were sought regarding sex or ethnicity. Interestingly, 46.55 percent of the survey takers were from 35 to 44, which may be the time period when farm and estate planning becomes of interest for farm and ranch heirs. Few survey takers were less than 35 (with 6.9 percent between ages 25-34 and one survey taker between ages 18-24). The second largest demographic of the survey takers were between the ages of 45 and 54 (25.86 percent), again highlighting the interest in this topic as they reach the age that their parents may soon not be able to farm. About 10 percent were between 55 to 64 with the remaining five survey takers were 65 years of age or older.

Marriage. Nearly 85 percent of survey takers said they married with 15 percent answered that they were not married. No questions were asked about the numbers of marriages, deaths of spouses or cohabitation with unmarried persons.

Children. Over one-third (i.e., over 36 percent) of survey takers said they had two children with approximately 19 percent noted they had one child. Approximately the same number of participants had three children or no children with 15.52 percent and 17.24 percent, respectively. Four participants had four children; two survey takers had five children; remaining one participate had six or more children.

Geographic Area. All participants were in the United States. The majority were from Illinois but survey takers were from coast to coast including New York to California and states in between such as Nebraska, Wyoming, Indiana, Oklahoma, Kansas, Colorado, South Dakota, Nevada, Michigan, Texas, New Mexico, Arizona, New Jersey and Virginia.

Estate Planning

The Basics

As a preliminary matter, there is overlap among the concepts of estate planning, succession planning and business planning. They are each separate ideas with overlap affecting the global picture. This article focuses on estate planning while the subsequent article focuses on business planning and succession planning.

Surprisingly, only 56.14 percent of the survey takers noted that they had an estate plan. 14 of the survey takers found their lawyer locally while an equal number of participants (also 25 percent of the total) found their estate planning lawyer from someone they know personally.

The Documents

On a positive note, 72.7 percent of survey takers had a Last Will and Testament. No questions were asked about how old the Will was or the last time it was revisited. It is positive that nearly three-fourths of the industry has at least some type of Will in place. On the other hand, 27.59 percent of the survey takers had no Last Will and Testament. Disappointingly, only 50 percent of survey takers had a Power of Attorney for Property.

Not surprisingly, only 27.9 percent of participants had a trust. This estate planning device is underutilized in agriculture. This can be particularly useful to farms that participate in federal farm programs. Nearly all farms or ranches can benefit from a revocable living trust, depending on size.

Life Insurance

It is easy to forget that life insurance is part of the estate planning puzzle. Nearly 90 percent of participated noted that they had life insurance; however, when asked whether they had ample life insurance to cover the farm, agri-business and personal debt, only 67.39 percent said they did. More education in agriculture in needed to better inform farmers and ranchers on how life insurance can be used in the larger estate planning picture.

Priorities

The interesting part of estate and succession planning is that it should be tailored and modified in according to changing goals. When asking the survey takers their #1 priority for their estate plan, survey taker had a myriad of responses:

- "Make sure it goes to the right

people" or "Transfer of assets to beneficiaries"

- "Avoid tax"
- "Family to remain united"
- "Successfully transfer farm over"
- "Avoid probate"
- "Estate to provide comfort and security"
- "Transfer of land and wealth" or "… pass on our legacy of our business"
- "Provide for my minor children" or "proper place for kids to go"
- "Be able to leave a viable business"
- "Keep the family speaking when this is all over"
- "Clear direction for the treatment of assets before death or incapacitation"
- "Wishes be carried out in the manner we desire"
- "To have repeat customers" or "breed marketable herds"
- "Ease of transition" or "easy transfer of ownership"
- "Pass [the estate] to the next generation [at] no cost"
- "Preserve family farm and business" or "keep the farm intact"
- So the "next generation can keep farming"
- "Happy kids" or "keep it all together if the kids want it"
- "Create continuity"
- "Open communications"
- "Enjoying my own money"
- "Son with a disability and [I] want to set up a special needs trust"

The goals noted here were as diverse as the survey takers and the respective estate plans that would be best for their individual family. There are no cookie-cutter farm estate plans as they should be geared towards the changing goals of the family and modified accordingly over time.

Fears

There are undoubtedly roadblocks to a multi-generational farm family from getting a solid estate plan in place. When asking participants about their biggest fear when doing estate plans, then survey takers noted the following answers:

"To make sure it is done right"

- "Trying to make everyone happy without someone feeling like they got screwed."
- "Other family feels entitled and having to pay them off."
- "That our father will never fully retire until he dies and will not have things in order."
- Fear that I will "miss something" or "forget something"
- "Cost" or "expensive and won't adequately protect my family"
- "Future in-laws not grasping the whole picture"
- "Time and focus needed to be thorough and include partners' differing views"
- "That I will mess it up and it will be a nightmare for my son. My ex-husband recently when through a nightmare with his siblings when his mother passed."
- "Arguing [and] fighting with my siblings"
- "Losing or damaging family relationships"
- "Older family members do not want to talk about unpleasant end life decisions"
- "You have to keep reviewing it to keep fresh and see if changes are needed" or "Keep up to date with changing laws"
- "There is always the potential for confrontation of a child not getting what they think is fair. Fair is not always [equal] and vice versa."
- "Taxes – still think we did it wrong"
- "As one of two kids to the first generation who built this business, I worry that the sibling not interested in the farm will feel empty-handed for inheritance"
- "Arguments between family members" or "misunderstandings"
- "Losing everything our family has worked for – for generations. Being taxed to death that will cause financial damage"
- "No one will cooperate"
- "It is sad that no one from our next generation is interested."
- "Making decisions now and possibly needing to make changes later."

To help avoid anxiety of getting it done perfectly the first time around, Rincker Law, PLLC recommends to farm and agriculture clients to get a simple estate plan in place immediately and perfect it over time. To placate fears on costs, there is an estate plan at every price point. An estate and succession plan should be something that every farm and ranch family should budget and plan for; as stated earlier, it can be done in steps to aid in affordability.

When asking participants their ideal budget for doing a farm/ranch estate plan, approximately 30 percent answered "no clue how much is a reasonable budget." Agriculture lawyers need to be more transparent on pricing with the food and agriculture industry so it is not a mystery and scary for those considering an estate plan. About 20 percent stated that $1K to $2k was a reasonable budget whereas 20 percent stated $2K to 4K. 12.5 percent noted $4K to $6K. Two and three survey takers marked $6K to $8K or $8K or more, respectively. The remaining four participants said $1k or less. The important point here is that there is an estate plan to fit within each of these budgets; it may not be perfect to fulfill the needs of the farm or ranch but it is also not permanent, leaving room for later adjustments.

Regarding the fear with changing laws, some estate planning attorneys offer subscription services or send periodic updates to clients informing them of changes in the law (such as estate tax). This is also why it is recommended that folks visit with their estate planning attorney every few years to revisit their plan.

Revisiting the Plan

Approximately 30 percent of survey takers noted that they had revised their estate plan twice. 20.69 percent of survey takers had only revised their estate plan once with 10.34 percent revisiting three times. Only four out of 57 participants admitted to revisiting their estate plan 5+ times. Rincker Law, PLLC recommends to clients to review their estate plan every three to five years, or when there is a major life event (e.g., death, divorce, marriage, birth of child). Estate plans are work in progress. Farm and ranch families should have a "starter plan" that is customized, tweaked and improved over time.

Part of reviewing an estate plan is reviewing beneficiary designations. Rincker Law, PLLC recommends to client to review beneficiary designations every two to three years, or whenever there is a major life event (e.g., death, divorce, marriage, child born). It was surprising to see that over 40 percent of participants have reviewed these designations within the last year. This is higher than expected; part of the uptick may be due to the COVID-19 pandemic, forcing people to double check their beneficiary designations or it may be due to effective education in this area. 21.05 percent checked these designations within two years while 26.32 percent checked these designations more than 2 years ago. For those people, no additional data was collected on the length of time since they last reviewed their beneficiary designations. On a positive note, only two survey takers (out of 57) "didn't know what I was talking about" but nearly 9 percent never once reviewed this.

Stay Tuned

Part II of this article will delve into the roadblocks the survey takers cited for estate planning and why those roadblocks should not deter farm and ranch families from taking action. It will also discuss the interplay with business planning, succession planning and nuptial agreements.■

For more information contact:

Cari B. Rincker, Esq.
Licensed in IL, NY, NJ, CT, DC, KY, and TX
301 N. Neil Street, 4th Floor
Champaign, IL 61820
cari@rinckerlaw.com
www.rinckerlaw.com
Phone (217) 531-2179

Cari Rincker is the principal attorney at Rincker Law, PLLC, a nationally recognized law firm focusing in food, farm and family. Cari grew up on a Simmental cattle farm in Central Illinois and presently resides on her own small farm outside of Champaign. With offices in both New York and Illinois, Rincker Law, PLLC works with farms and ranches with a myriad of agriculture law issues including estate planning, business law, property law, and family law. She has a podcast with Purdue University Extension called Ag Law Today and has co-authored a book titled FIELD MANUAL: GUIDE FOR NEW YORK FARMERS AND FOOD ENTREPRENEURS.

An Overriding Royalty Interest Is an Interest in Real Property

BY JOHN C. ROBISON, JR.

As one may surmise by the title of this article, the point of this article is to assert that an overriding royalty interest in an Illinois oil and gas lease is an interest in real property. If anyone wishes to avoid taking the time to read the entire article, it is recommended that you proceed to the last paragraph where the point attempting to be made by the article is made by a citation to a single decision of the Illinois Supreme Court.

Ramsey Herndon v. Whiteside

Through the Rule 23 Order of the fourth district appellate court and modification, *Ramsey Herndon LLC v. Whiteside,* 2016 IL App (4th) 150853U, the members of the oil-and-gas law bar have followed, with great interest and, at times, great consternation, the litigation that is the subject of the decision of the Illinois Supreme Court in *Ramsey Herndon LLC v. Whiteside,* 2017 IL 121668. For a complete statement and a thorough analysis of this case, see Kris Tuttle, "A Clear and Unambiguous 'All' Means All," MINERAL LAW NEWSLETTER v. 44, No. 3 (March 2018).

Statement of the Case

For the purposes of this article, the following brief statement of the case will suffice. Plaintiff was the lessee in oil and gas leases. Previously it had assigned 75 percent of its working interest to third parties, in which assignment plaintiff reserved an overriding royalty interest in the subject leases. Plaintiff subsequently executed a document entitled "Assignment of Leases and Bill of Sale" by which plaintiff purported to assign to defendant "all" of plaintiff's interest in the oil and gas leases and the associated personal property. The Assignment did not contain a specific reservation of the overriding royalty reserved by the plaintiff in the prior assignment to third parties. Plaintiff claimed that it retained the overriding royalty for the reason (among others) that an overriding royalty interest is an interest in personal property and would not be transferred as a part of an oil and gas lease.

Holding in *Ramsey Herndon*

The supreme court in *Ramsey Herndon* held that the overriding royalty interest was transferred to the defendant, but found that to resolve the issue before it, it was not necessary to catagorize the "instrument" before it as either a contract conveying personal property or a deed conveying real estate.[1] In fact, the "instrument" was an assignment of oil and gas leases assigning interests in oil and gas leases.

From the opinion in *Ramsey Herndon*, it might appear that the question of whether an overriding royalty interest in an oil and gas lease in Illinois is an interest in real estate or personal property is an open question. Because it is not, it is felt that a brief tutorial may be in order.

Interests in Oil and Gas Leases

Royaltiy Interests

The owner of a mineral interest has both the developmental rights, that is the right to drill for and produce oil and gas himself, and the executive rights, that is to grant to another the right to explore and drill for oil and gas, and, if found, to produce oil and gas. This grant of rights to another is accomplished by the mineral owner executing an instrument called an oil and gas lease. The owner of a mineral interest, under the royalty clause of the oil and gas lease, reserves a lessor's royalty, which is a share of gross production of oil and gas free of the costs of production.[2]

Working Interest

The customary royalty provided for in an oil and gas lease in the Illinois Basin is one-eighth. The remaining seven-eighths, belonging to the lessee is commonly referred to as the "working interest," which is the portion of the oil and gas that may be produced from the premises after the royalty for the share paid to the lessor under the lease.[3] The working interest conveyed by an oil and gas lease is an interest in real estate.[4]

Overriding Royalty Interests

In addition to a royalty and working interest, there may be created an overriding royalty, carved out of the lessee's interest, which is a share of production, free of the costs of production.[5] By definition, an overriding royalty interest has no existence apart from the working interest from which it was carved.[6]

There are at least three methods by which an overriding royalty interest may be created. First, a lessor in an oil and gas lease may reserve an overriding royalty in the oil and gas lease itself, which overriding royalty is in addition to the lessor's royalty.[7] Second, an owner of a working interest may reserve an overriding royalty in an assignment of either all or a part of his working interest.[8] Third, the owner of a working interest may assign an overriding royalty interest to a third party.

Assignments of Interests in Oil and Gas Leases

Interests in oil and gas leases are conveyed by assignments. An assignment is the transfer of some identifiable property, claim, or right from the assignor to the assignee.[9] In oil and gas law, an assignment is usually a transfer of a property interest or of a contract. The most common usage refers to the assignment of an oil and gas lease.[10]

Unaccrued and Accrued Royalties

Royalties, including overriding royalties, are either unaccrued or accrued. The right to receive royalties constitutes an interest in land, while accrued royalties are personal property.[11]

An Overriding Royalty Interest Is a Freehold Estate

In *Fry v. Farm Bureau*, the lessee in an oil and gas lease made an assignment of the oil and gas lease, in which assignment the assignor reserved an overriding royalty. A dispute arose as to the size of the reserved overriding royalty. The issue came before the Illinois Supreme Court by a direct appeal from the circuit court. The right to a direct appeal to the supreme court depended upon the status of the property interest involved being a freehold. The court observed that the working interest in an oil and gas lease had been held to be a freehold estate and that it was clear that the overriding royalty interest at issue was a freehold.[12] ■

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1. *Ramsey Herndon LLC v. Whiteside*, 2017 IL 121668 at ¶ 18.
2. *People ex rel. Hargrave v. Phillips*, 394 Ill. 119, 121, 67 N.E.2d 281, 282 (1946).
3. *Fry v. Farm Bureau Oil Co*., 3 Ill.2d 94, 95, 119 N.E.2d 749, 750 (1954); *Illinois National Oil & Gas Co. v. Sinclair*, 373 Ill. 581, 582-83, 27 N.E.2d 450, 451 (1940); *People ex rel. Harris v. Parrish Oil Production, Inc*., 249 Ill. App. 3d 664, 666-67, 622 N.E.2d 810, 813-14 (5th Dist. 1993); *Bates v. Mansfield*, 213 Ill. App. 3d 69, 73, 570 N.E.2d 549, 551 (5th Dist. 1991); *Williams v. Sohio Petroleum Co*., 18 Ill. App. 2d 194, 198, 151 N.E.2d 645, 648 (4th Dist. 1958).
4. *Greer v. Carter Oil Co*., 373 Ill. 168, 174, 25 N.E.2d 805, 808 (1940); *Transcontinental Oil Co. v. Emmerson*, 298 Ill. 394, 403, 131 N.E. 645, 649 (1921).
5. *Williams*, 18 Ill. App. 2d at 198, 151 N.E.2d at 647; BLACK'S LAW DICTIONARY 1446 (9th ed. 2009).
6. *Heman v. Jefferson*, 136 Ill. App. 3d 745, 749, 483 N.E.2d 537, 541 (4th Dist. 1985).
7. *Downen Enterprises v. Gem Oil & Gas Co*., 131 Ill. App. 3d 826, 827, 476 N.E.2d 42, 43 (5th Dist. 1985); *Bi-County Properties v. Wampler*, 61 Ill. App. 3d 799, 800, 378 N.E.2d 311, 312 (5th Dist. 1978); *Williams*, 18 Ill. App. 2d at 195, 151 N.E.2d at 646.
8. *Fry*, *supra* note 3 at 750; *Heman*, 136 Ill. App. 3d at 746, 483 N.E.2d at 539.
9. *Hassebrock v. Ceja Corp*., 2015 Il App (5th) 140037, ¶55; BLACK'S LAW DICTIONARY 136 (9th ed. 2009).
10. HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS TERMS 41 (5th ed. 1981).
11. *Ohio Oil Co. v. Wright*, 386 Ill. 206, 212, 53 N.E.2d 966, 969 (1944); *Walsh v. Guth,* 50 Ill. App. 2d 40, 50, 199 N.E.2d 428, 433 (5th Dist. 1964).
12. *Fry, supra* note 3 at 750.