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ARTICLES

TRANSFER ON DEATH DESIGNATIONS AND TITLE TO REAL ESTATE

Various methods exist to transfer property outside probate upon one's death. Typically, nonprobate transfers take three basic forms: (1) a contract with a third party that directs the third party to distribute the asset to a designated beneficiary on the death of the owner; (2) a title that contains a right of survivorship and also gives the beneficiary current property rights when the owner adds the beneficiary to the title; and (3) a trust. Susan N. Gary, *Transfer on Death Deeds: The Nonprobate Revolution Continues*, 41 Real Prop. Prob. & Tr. J. 529, 534 (2006). One such tool, developed for use with bank accounts, involves a pay-on-death (POD) designation. *Id.* In 1969, the Uniform Probate Code (UPC) adopted provisions permitting POD bank accounts. *Id.* Another tool, developed for use with securities, involves a transfer-on-death (TOD) designation and was adopted by the UPC in 1989. *Id.*

One benefit of using POD and TOD designations is that, unlike joint tenancy, a POD or TOD beneficiary designation does not affect ownership until the owner's death. Under the Illinois Trust and Payable on Death Accounts Act (ITPDAA), "[a]ny holder during his or her lifetime may change any of the designated persons to own the account at death of the last surviving holder without the knowledge or consent of any other holder or the designated persons." 205 ILCS 625/4(a). Likewise, under the Uniform TOD Security Registration Act (UTSRA), "a registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary." 815 ILCS 10/6. The ITPDAA applies to bank, savings and loan, and credit union accounts. 205 ILCS 625/2. The UTSRA applies to securities and security accounts. 815 ILCS 10/1.

Although the statutes do not expressly include the conveyance of real property, some people believe that it is possible under the UTSRA. The UTSRA's implementing language states that, "[a] security may be registered in beneficiary form if the form is authorized by this or a

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similar statute of the state of organization of the issuer." 815 ILCS 10/3. "Security" is defined as, "a share, participation, or other interest in property," 815 ILCS 10/1(9), and "property" includes "both real and personal property or any interest therein and means anything that may be the subject of ownership." 815 ILCS 10/1(6). Therefore, some conclude that if the statute applies to securities, "property" is included in the definition of "security," and "real property" is included in the definition of "property," then the statute applies to real property.

However, the process for creating a TOD beneficiary under the UTSRA requires registration, which the statute says means "to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities." 815 ILCS 10/1(7). Real property is not a certificated security and it is not held through an account, so this definition does not make sense when applied to real property. Further, real property does not have certificates of ownership issued for it-the evidence of title is found in county recorder's offices around the state and insured by title insurance policies. Because the definition of registration does not include the process of conveying and recording conveyances of real property, required by Illinois case law and statute, 765 ILCS 5/1, the UTSRA does not provide a process for creating a TOD designation for real property.

Additional evidence that the above statutes are not intended to include the conveyance of real property stems from the fact that a specific tool, called a TOD deed, or beneficiary deed, has been created to do just that. "A… TOD deed…allows the owner of real property to execute a deed that names the beneficiary who will succeed to ownership at the owner's death." 41 Real Prop. Prob. & Tr. J. 532. Much like the POD and TOD beneficiary designations above, the execution of a TOD deed creates no current interest in the beneficiary and the owner can revoke the designation at any time. *Id.* Missouri enacted the first TOD deed statute in 1989 and eight other states have since enacted similar statutes, while other states are considering legislation. *Id.* As an example, Wisconsin's TOD deed statute, Wisconsin Statutes Section 705.15, is separate from the sections creating a TOD designation for securities, and was later added to supplement the TOD securities law. Illinois does not yet have a TOD deed statute.

In fact, although the notes to the UTSRA indicate that designers wanted to include security interests in real property, they did not intend to create a new interest in real property. The prefatory note to the UTSRA alludes to the blending of real property and securities in stating, "even the line between real estate and bank accounts is becoming indistinct, as the 'home equity line of credit' creates a check-writing conduit to real estate values." Uniform TOD Security Registration Act, prefatory note, U.P.C. § 6-3 (1989). However, the designers noted the distinction, stating, "even though new forms of contract have rendered the boundaries between securities and bank accounts less firm, the distinction seems intuitively correct for statutory default rules." *Id.* Finally, the designers expressly provide the intended use of this statute by stating, "[i]n the securities field…we start with unambiguous lifetime ownership rules. The sole purpose of the present statute is to facilitate a nonprobate TOD mechanism as an option for those owners." *Id.* Therefore, although some may use the statute's definitions to determine that real property is included under "securities," the designers intended the statute to be used for securities in the traditional sense of the word.

Until Illinois enacts a statute to provide for beneficiary, or TOD deeds, prudent attorneys and title companies will be unwilling to promote or insure title to real property that purports to create a TOD designation through the UTSRA statute. Instead, use of the UTSRA for real property will be limited to TOD designations on securities held in such vehicles as Real Estate Investment Trusts, the intended purpose for this legislation.

CASENOTES

Casenotes includes short case summaries broken down by state and topic. In this manner, we hope to report recent developments more fully and more promptly. A summary marked with ➲ designates a case of particular importance.

ILLINOIS:

Decedents' Estates

In re Phelan, 375 Ill App 3d 875, 874 NE2d 185, 314 Ill Dec 275 (1st D 2007).

Facts: John Phelan (Phelan) died on November 27, 2000, survived by his wife, Karen Phelan, their two minor sons, Joseph and Ryan, and two adult daughters from previous marriages, plaintiffs Nora Phelan Clifford (Clifford) and Nellie Phelan Wilson (Wilson).

Phelan established two separate trusts to provide for his surviving family. The first trust, the MJRNN Irrevocable Trust (MJRNN Trust), prepared in 1999, was to be funded with life insurance proceeds of $1.3 million and it named, among others, Clifford and Wilson as beneficiaries.

Section 2035 of the Internal Revenue Code provides that if an individual owns or has incidence of ownership in an existing life insurance policy and gives the policy away within three years of his death, the proceeds of the policy will be included in the estate. This is true regardless of whether he transfers ownership to another individual or to a trust.

Therefore, the MJRNN Trust provided that if Phelan died within three years of giving up incidence of ownership of the insurance policies that formed the corpus of the trust, the proceeds of those policies would be distributed to the personal representative of the Phelan estate, not the trustee of the MJRNN Trust. Because Phelan died less than three years after the transfer of the insurance policies to the MJRNN Trust, the proceeds of the trust were distributed to the personal representative of Phelan's estate and none of the beneficiaries under the MJRNN Trust received a distribution.

In May or June 2000, Phelan asked Alan Bruggeman to review the MJRNN Trust and prepare a will and trust (Revocable Trust) for him. The trustee of the Revocable Trust was the residuary beneficiary of Phelan's estate pursuant to the pourover clause of his will. Bruggeman testified that he believed that the Revocable Trust was funded on the date it was signed. The will and Revocable Trust were signed in the presence of witnesses.

Phelan's will was admitted to probate on January 8, 2001 and Jimmie Baskin was appointed supervised executor of the estate. On July 6, 2001, Clifford filed a petition to contest the will and trusts and Wilson filed a will contest, alleging that the Revocable Trust was a forgery. Baskin moved to dismiss both actions and the trial court granted the motion in part, allowing Clifford and Wilson to amend their complaints. On September 3, 2002, Clifford filed her first amended complaint, requesting reformation and construction of the MJRNN Trust. She also filed her amended petition regarding the Revocable Trust and the will, consisting of five counts: (1) reformation of the Revocable Trust; (2) lack of funding of the Revocable Trust; (3) forgery of the Revocable Trust; (4) declaratory judgment concerning the pourover clause of the will; and (5) construction of the Revocable Trust. Wilson also filed an amended contest, alleging forgery of the Revocable Trust. The trial court dismissed Wilson's will contest and count (3) of Clifford's amended petition. On February 14, 2006, the court held that the reformation or construction of the MJRNN Trust was not appropriate or possible because the trust had no funds. The court also granted the motion as to count (1) of the amended petition concerning reformation of the Revocable Trust.

Following trial, on May 7, 2006, the trial court held as follows: (1) the Revocable Trust was not in existence at the time of the execution of the will and, therefore, failed as a valid *inter vivos* trust; (2) because the Revocable Trust was not in existence, it could not be incorporated by reference into the will and could not be considered a testamentary trust; (3) because the residuary portion of the will consisted of the pourover clause in favor of the Revocable Trust, that clause also failed; and (4) the residuary portion of the estate was meant to pass through the will, but because the Revocable Trust was not in existence, the residue of the estate thereunder would pass according to the laws of descent and distribution as if the estate were intestate. The court's decision concerning count (4) disposed of counts (2) and (5). Clifford appealed.

Holding: Affirmed in part, reversed in part, and remanded. The court of appeals was to determine three key issues: (1) whether the MJRNN Trust was subject to reformation; (2) whether Phelan was under mistaken belief that he provided for adult daughters in his estate plan by trust funded with insurance policies; and (3) whether the Revocable Trust was "in existence" for purposes of incorporating the trust into the pourover will by reference.

Regarding the first issue, Clifford moved for the reformation of the MJRNN Trust. The court of appeals noted that, "Illinois courts have long held that a will cannot be reformed to conform to any intention of the testator expressed in it, no matter how clearly a different intention may be proved by extrinsic evidence." Although this reasoning does not apply completely to will substitutes, this court determined that the effect of allowing the reformation of a will substitute is similar to that of allowing the reformation of a will: to enable a stranger to the original proceeding to make a will substitute for the decedent. Additionally, even if reformation was proper here, because the trust had no funds, no reformation was possible.

Regarding the second issue, Clifford argued that Phelan signed the Revocable Trust only because he was mistaken in his belief that he had provided for his daughters in the MJRNN Trust. However, the court of appeals determined that the evidence was clear and ample that Phelan knew and understood that the MJRNN Trust would fail if he died within three years of establishing the trust. Because Phelan was informed of, and understood the implications of, the three-year rule specifically provided in a provision of the MJRNN Trust, there was no evidence in the record of a mistaken belief on Phelan's part regarding providing for his daughters in either trust.

Regarding the third issue, in their cross-appeal, the defendants argued that the trial court erred in finding the Revocable Trust not "in existence" at the time of the execution of the will. It has long been established that so long as certain requirements are met, a will may incorporate by reference other documents, including trusts, even where these documents were not executed with the formality required for the execution of a will. The court of appeals determined that the real issue was whether the Revocable Trust, for purposes of incorporation, had to be signed by Phelan to be "in existence" prior to the execution of the will. The court determined that a trust need not be signed to be "in existence." The Revocable Trust and the will were sent to the testator at the same time, the testator treated each as part of his total estate plan, and each was notarized by the same attorney on the same date. Therefore, the Revocable Trust was "in existence" at the time the pourover will was executed and this court reversed the trial court's order that the Revocable Trust and the pourover clause of the will failed.

Tax Deeds; Condominiums

In re Application of the County Treasurer, 373 Ill App 3d 679, 869 NE2d 1065, 312 Ill Dec 74 (2nd D 2007).

Facts: On February 11, 2003, the circuit court of Carroll County issued tax deed orders (orders) to AAM/US Bank LLC (bank) for various properties in a condominium complex run by the Lake Carroll Association (association). Each order required the Carroll County Clerk (clerk) to deliver a tax deed to the Bank upon receiving a Certificate of Purchase for the applicable property. The clerk delivered all deeds to the Bank between July 3, 2003 and November 4, 2003. The bank recorded each deed on the day it received it.

The association had recorded a declaration governing the condominium complex in 1972. One provision in a covenant in that declaration authorized the association to levy assessments against all lots in the complex. Another provision in the same covenant stated that unpaid assessments would become a lien on the applicable property after the association recorded notice of the amount due. A different section of the declaration stated that all of the declaration's provisions were enforceable for an initial period of twenty-two years and seven months. A third section of the declaration contained a severability clause.

The bank petitioned the circuit court to declare that it was not liable for any assessments authorized by the covenant on the condominium properties it purchased for the following reasons: (1) all assessments were eliminated when the deeds were issued; (2) the bank did not assert its right to the assessments during the tax deed proceedings, thus, it either waived or was estopped from collecting those assessments; and (3) the covenant was void because it violated the rule against perpetuities by creating a future interest in the association to create liens on the condominium properties that could vest after 21 years.

Alternatively, the bank asked the court to declare that the bank was responsible only for assessments levied against a property after it recorded the deed for that property. The association contended that the bank was required to pay fees levied against all fifteen condominium properties beginning on February 11, 2003, when the court entered the orders.

The circuit court granted summary judgment in favor of the association, finding that the bank was responsible for assessments levied against all fifteen properties beginning on the date the court entered the orders.

Holding: Affirmed in part and reversed in part. The bank was responsible only for assessments levied against a property after it received the deed for that property.

The bank was not obligated to pay assessments levied against the properties after the circuit court issued the orders but before the clerk delivered the deeds. Assessments are binding on only title holders. According to the plain language of applicable Illinois statutes, the bank did not hold title to any condominium property until the redemption period for the property expired and the clerk delivered the property deed to the bank. Because the bank recorded each deed the day it received it, the effect of recording dates was not discussed.

However, the bank was liable for assessments levied against each property after the bank received the deed to that property.

First, the assessments were not eliminated when the deeds were issued. Although the deeds granted independent title free from most prior liens, 35 ILCS 200/22-70 provides that a tax deed purchased at a judicial sale does not extinguish any pre-existing covenant running with the land. Before the judicial sale, the assessment fees were covenants running with the land. This is because the declaration demonstrated that the original grantor and grantee intended such fees to run with the land; the fees touched and concerned the land because they affected the use, enjoyment, and value of the property; and privity of estate existed between the original and previous owners.

Second, the association did not waive, nor was it estopped from collecting, assessments. It did not voluntarily and intentionally relinquish its right to the assessments by failing to assert that right at the tax deed proceedings. Furthermore, the association had no duty to assert the right at the proceedings. This is because the assessments survived the sale under 35 ILCS 200/22-70 regardless of the association's actions. Moreover, the association recorded the covenant of assessments long before the bank purchased the properties. Therefore, the bank could not demonstrate that it relied on the association's failure to disclose the fees when making the purchases.

Third, the covenant of assessments did not violate the rule against perpetuities (Rule). The Illinois Supreme Court has held that a covenant running with the land does not violate the Rule if it runs longer than 21 years. In addition, the rule applies only to future interests, and the covenant was a present right in the land. This is because it imposed a burden for the benefit of other land. Furthermore, a lien that could have arisen pursuant to the covenant was distinct from the covenant as a whole. Thus, whether a lien itself violated the rule was not considered. Finally, even if the declaration's lien provision was void, its severability clause would have allowed the assessments provision to remain in effect.

INDIANA:

Covenants

Beineke v Chemical Waste Management of Indiana, LLC, 868 NE2d 534 (Ind Ct App 2007).

Facts: In July 1974, the Allen County Plan Commission refused to issue an improvement location permit (ILP) to Amon Brooks, who wished to construct a landfill. Brooks appealed the decision to the Allen County Board of Zoning Appeals (Board of Appeals). After a hearing before the Board of Appeals, Brooks submitted a list of "recommended restrictions and requirements" for the proposed landfill, including a requirement that the landfill "be entirely fenced in" such that "no portion of the landfill operation will be visible from the ground level of any existing residence." Subsequently, the Board of Appeals granted the ILP and ordered the above restriction be included in a deed as a covenant running with the land as long as the property is used as a sanitary landfill.

Later, Chemical Waste Management of Indiana, LLC (Chemical Waste) took over operation of the landfill. In 1981, Robert and Joan Beineke (Beinekes) purchased a home in close proximity to the landfill and contended that in 1985 or 1986, they were able to see some of the landfill operations from the first floor of their residence, in violation of the above fencing covenant. In 1993, the City of New Haven sued Chemical Waste, with the Beinekes intervening, alleging that Chemical Waste had improperly expanded use of the landfill. The trial court found that the issue of whether Chemical Waste was in compliance with the covenants was not properly before the court unless Allen County zoning authorities found that to be the case.

In 1995, two more lawsuits were filed concerning the landfill. The Beinekes did not intervene. Subsequently, Chemical Waste, the Board of Appeals, and the Zoning Administrator settled all of their outstanding claims. New Haven, the Beinekes, and other landowners challenged the settlement and sought to preclude an agreed judgment, but the trial court dismissed this separate action.

In 2004, the Beinekes filed a new cause of action against Chemical Waste, alleging breach of the 1974 covenants. The trial court granted summary judgment in favor of Chemical Waste, because the Beinekes' complaint was barred by applicable statutes of limitation and by *laches*. The Beinekes appealed.

Holding: Affirmed. Chemical Waste argued that either one of two statutes apply here. First is a two-year limitations period to bring an action based upon an alleged violation of an ordinance. Second is a "catch-all" ten-year limitations period for actions arising after September 1, 1982, which are not governed by any other statute of limitations. The Beinekes, however, argue that only a 20-year statute of limitations governing claims based on written contracts entered into before September 1, 1982, applies. However, restrictive covenants are contracts between private parties, and the Beinekes did not identify any private party that was a first party to any alleged contract with Brooks.

Rather than a contract, the covenant was more of a zoning "commitment" or "condition" and the 20-year statute of limitations does not apply. Therefore, the Beinekes filed their complaint past the applicable statute of limitations and failed to present evidence or argument that would avoid the statute. Chemical Waste was entitled to judgment as a matter of law.

Licenses

Hay v Baumgartner, 870 NE2d 568 (Ind Ct App 2007).

Facts: In 2000, Stephen Hay (Hay) became the sole fee simple owner of property located in Syracuse, Indiana. The Hay property was originally owned by George and Ella Hay, Hay's grandparents, and had remained in the Hay family since that time. In 2001, Ronald and Gloria Baumgartner (the Baumgartners) purchased the real estate immediately to the east of the Hay property. William and Barbara Beemer owned the Baumgartner property from about May 1961 until 2000, when they sold the property to Jackie McDonald, who in turn sold the property to the Baumgartners. A shared driveway existed along the western boundary of the Baumgartner property and the eastern boundary of the Hay property. The driveway was used by the owners of both properties and the costs of paving and sealing had also been shared.

In recent years, both Hay and the Baumgartners built new residences and garages on their properties. The

Baumgartners' construction included a new driveway linking their garage to the street, eliminating the need to use the original driveway. As a result, the Baumgartners removed that portion of the driveway located on their property. On June 26, 2006, Hay filed a complaint for permanent injunction, seeking to restrain and enjoin the Baumgartners from interfering with Hay's use and enjoyment of the driveway.

The trial court found that Hay and his predecessors' use of the driveway was by permission of the Baumgartners and their predecessors and that Hay had a license to use the driveway. Additionally, the court held that consideration was not paid to make the license irrevocable, the license was revoked, and Hay was not entitled to damages. Hay appealed.

Holding: Affirmed. On appeal, the issue was whether the trial court erred when it found that a driveway shared between two properties was subject to a revocable license instead of an irrevocable. In the context of real estate, a license "merely confers a personal privilege to do some act or acts on land without conveying an estate in the land." It is also revocable and unassignable. An irrevocable license, which Hay claimed existed here, is no different than an easement. In order for Hay to prevail, he must have established that he was granted a privilege having the characteristics of a license and either that he, or his predecessors in interest, expended money or labor in reliance upon the license being perpetual or that the license was given for valuable consideration.

No evidence existed establishing that Hay, or his predecessors in interest, gave valuable consideration for the claimed license. The court found that the fact that Hay's predecessors contributed to the labor and material costs of paving and sealing the driveway was insufficient. The court further found that Hay's use was merely permissive. Finally, since no evidence was presented regarding the amount expended on paving and sealing the driveway, and no evidence appeared to exist, the court held that Hay cold not recover damages from the Baumgartners.

Real Estate Contracts

Hastetter v Fetter Properties, LLC, 873 NE2d 679 (Ind Ct App 2007).

Facts: Monte Fetter, the managing member of Fetter Properties, signed a real estate contract to purchase from Lisa K. Hastetter certain commercial real estate and improvements in Evansville, Indiana. The contract included a provision requiring Hastetter, seller, to maintain the property in its present condition until possession was delivered to Fetter Properties, buyer. The contract also provided that if any damage or destruction was not fully repaired prior to the closing, Fetter Properties had the option of terminating the deal. Additionally, certain provisions stated that the contract was the entire agreement and that any party who was the prevailing party in a legal or equitable proceeding was entitled to court costs and reasonable attorney fees.

About ten days after the contract was signed, but prior to the closing, a storm damaged the fabric awning covering the front of the building. Fetter Properties informed Hastetter's broker about the incident and Hastetter instructed Fetter Properties to retain Siemers, a local company, to repair the damage. However, Siemers was unable to complete the project prior to the closing. At the closing, Hastetter's broker told Fetter to send the repair bills to him for reimbursement by Hastetter and Hastetter did not object. However, after Fetter Properties submitted the invoice for reimbursement, Hastetter refused to pay, even after the insurance company paid the claim to her.

Fetter Properties sent Hastetter a demand letter, which went ignored, so Fetter Properties filed a claim against Hastetter seeking $1,925 in damages for breach of contract and reasonable attorneys' fees. The trial court entered judgment in favor of Fetter Properties in the amount of $1,925 in damages and $1,336 in attorneys' fees and costs. Hastetter appealed.

Holding: Affirmed and remanded. There were three key issues to be determined by the court of appeals: (1) whether the agreement regarding reimbursement for any costs to repair merged into the deed; (2) whether Fetter Properties waived its right to be reimbursed; and (3) whether Fetter Properties was entitled to trial and appellate attorneys' fees.

Regarding the first issue, Hastetter contended that the discussions regarding the repair of the awning were separate and apart from the execution of the contract. Therefore, she argued that any agreement regarding reimbursement for repair costs was not merged into the deed and, therefore, not enforceable. The court of appeals agreed that the parties did not intend for the promises that were made concerning the damaged awning to merge with the deed at closing. However, the parties' intentions were determined from their actions, because Fetter requested confirmation that Hastetter would reimburse his company for the awning repairs and Hastetter did not object.

Additionally, approximately one week prior to the closing, Fetter Properties and Hastetter agreed to continue with the scheduled closing as long as reimbursement for the repairs would be made after the closing. Therefore, Hastetter's claim failed because it was clear that the parties' intention was that the obligations pertaining to the repair and repayment of the repair costs would survive the merger of the contract into the deed.

Regarding the second issue, Hastetter argued that Fetter Properties waived all of its claims for reimbursement for repair costs to the awning, because it "chose to proceed and not terminate the contract…or require an assignment of insurance proceeds." However, the court determined

that it was apparent that the confirmation and demand letter sent by Fetter Properties placed Hastetter on notice that Fetter Properties was exercising its contractual rights. Hastetter received the insurance proceeds and had sufficient time to reimburse Fetter Properties as they had previously agreed. Therefore, there was no reason to hold that Fetter Properties waived any right to be reimbursed for the repair costs.

Regarding the third issue, Hastetter argued that the trial court erred in awarding Fetter Properties attorneys' fees and that she should have been awarded attorneys' fees because of the "groundless, unreasonable, and frivolous claim of Fetter Properties." However, the contract provided for attorneys' fees for a prevailing party and the court of appeals, like the trial court, determined Fetter Properties to be the prevailing party here. In general, one is entitled to attorneys' fees when provided for by statute or contract. Therefore, it was clear that Fetter Properties was entitled to the fees, because its action for the damage reimbursement related to the contract, such that the award of attorneys' fees was proper.

WISCONSIN:

Prescriptive Easements

➲ *Williams v American Transmission Company, LLC*, Appeal No. 2007AP52 (Wis Ct App 2007).

Facts: The property in question was previously owned by CMC Heartland Partners (CMC) for operation of a railroad. In 1969, CMC and American Transmission (formerly Wisconsin Power and Light Company) entered into a "Pole and Wire Agreement," which permitted American Transmission to construct and maintain electrical poles and transmission lines on CMC's property. The agreement was revocable, by either party, upon thirty days' written notice.

In February 2003, CMC sold the property to David Williams, who subsequently requested that American Transmission remove the poles and transmission lines from the property. American Transmission ignored the request and Williams petitioned for inverse condemnation. American Transmission counterclaimed, asserting that, under Wis. Stat. § 893.28(2), it had a prescriptive right to continue its use of Williams' property. The statute requires "continuous use of rights in real estate of another for at least ten years" by a utility.

The circuit court concluded that the statute did not apply, reasoning that the agreement between American Transmission and CMC was nothing more than a license that did not "create rights in real estate of another." The court issued an order allowing Williams to proceed with his inverse condemnation claim and American Transmission appealed.

Holding: Reversed and remanded. The question in dispute here was whether the construction and maintenance of American Transmission's electrical poles and transmission lines, pursuant to the Pole and Wire Agreement, constituted "use of rights in real estate of another" within the meaning of the statute. The court of appeals agreed with Williams that the agreement was nothing but a license, the rights granted by the agreement were revocable, and, thus, the agreement did not grant an interest in land.

However, the court found no reason why exercising a revocable privilege to do something on another's land does not constitute "use of rights in real estate of another" and concluded that "use of rights" encompassed the use at issue here. Additionally, through statutory interpretation, the court found that by omitting any requirement that the use under the statute be "adverse," the legislature brought permissive uses within the meaning of the statute. Therefore, the court concluded that the construction and maintenance of electrical poles and transmission lines on Williams' property, under the Pole and Wire Agreement, constituted "use of rights in real estate of another" under Wis. Stat. § 893.28(2).

Williams argued that this interpretation of the statute is illogical and detrimental to public policy because a landowner permitting a utility to use rights in his or her property is left with only two options: demand that a utility remove equipment from the property before ten years elapses or lose his or her property rights without compensation. As a result, many area residents would lose phone and electrical service. However, the court concluded that the legislature determined that, even if the statute deters some property owners from granting utilities permissive use of their property, alternative options, including condemnation when available, are sufficient.

Williams also argued that, even accepting the court's interpretation of the statute, the statute does not or should not apply to his situation because American Transmission's use of his property began when the property was owned by a railroad. However, the court rejected this argument, because the statute does not make any distinction between a railroad owner and another other landowner.

Finally, the court concluded that its holding that American Transmission has a prescriptive right to continue its use of Williams' property necessarily precludes Williams' inverse condemnation claim against American Transmission. It was determined that American Transmission has the right to occupy Williams' property and such claims require that the defending party occupy the claimant's property "without having the right to do so."

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APRIL

12 ATG Legal Education Program: Navigating a Real Estate Transaction: A Seminar for Law Students and New Attorneys; Marquette University Law School, Milwaukee, Wis.
CLE Credit: 6.50 hours (includes 1.00 Ethics)

19 ATG Legal Education Program: Navigating a Real Estate Transaction: A Seminar for Law Students and New Attorneys; Chicago Kent College of Law, Chicago, Ill.
CLE Credit: 5.00 hours

22 ATG Trust Legal Education Program: Medicaid Planning; Best Western Prairie Inn, Galesburg, Ill.
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MAY

1 ATG Legal Education Program: Foreclosure Workshop; Hamburger University at McDonald's Office Campus, Oak Brook, Ill.
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7 ATG Legal Ed *Connect* Program: Basic Survey Examination; on-line program.
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14 ATG Legal Ed *Connect* Program: Real Estate Fundamentals: Basic Commercial Underwriting (Illinois); on-line program.
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22 ATG Trust Legal Education Program: Medicaid Planning; Hilton Northbrook, Northbrook, Ill.
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17 ATG Legal Education Program: Navigating a Real Estate Transaction: A Seminar for New Attorneys; Hamburger University at McDonald's Office Campus, Oak Brook, Ill.
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