

A man owned adjoining lots (Lot 1 and Lot 2) in fee simple. He built a house in which he took up residence on Lot 1. Thereafter, he built a house on Lot 2, which he sold, house and lot, to his brother. Consistent with the contract of sale and purchase, a valid deed conveying Lot 2 from the man to the brother contained the following clause:

"In the event my brother, his heirs or assigns, decide to sell the property hereby conveyed and obtain a purchaser ready, willing, and able to purchase Lot 2 and the improvements thereon on terms and conditions acceptable to my brother, said Lot 2 and improvements shall be offered to me, my heirs or assigns, on the same terms and conditions. I, my heirs or assigns, as the case may be, shall have ten days from said offer to accept said offer and thereby to exercise said option."

Three years after delivery and recording of the deed and payment of the purchase price, the brother became ill and moved to a climate more compatible with his health. The brother's daughter orally offered to purchase the premises from him at its then fair market value. The brother declined his daughter's offer but instead deeded Lot 2 to his daughter as a gift.

Immediately thereafter, the daughter sold Lot 2 to her friend at the then fair market value of Lot 2. The sale was completed by the delivery of deed and payment of the purchase price. At no time did the brother or his daughter offer to sell Lot 2 to the man.

The man learned of the conveyance to the daughter and the sale to the friend one week after the conveyance of Lot 2 from the daughter to the friend. The man promptly brought an appropriate action against the friend to enforce rights created in him by the deed of the man to the brother. The man tendered the amount paid by the friend into the court for whatever disposition the court deemed proper.

The common-law Rule Against Perpetuities is unmodified by statute.

Which of the following will determine whether the man will prevail?

- A. The parol evidence rule only.
- B. The parol evidence rule and the Rule Against Perpetuities.
- C. The Rule Against Perpetuities only.
- D. The statute of frauds and the type of recording statute of the jurisdiction in question.

## Explanation:

The **Rule Against Perpetuities** (RAP) applies only to **contingent future interests**—ie, future interests that are held by unknown/unborn persons or subject to a condition precedent. A **right of first refusal** is a contractual right to purchase property before any other person *if* the owner later decides to sell, so it must comply with RAP.

Under the common-law RAP, a contingent future interest is **void *ab initio*** (ie, from the beginning) if there is any possibility that it could **vest more than 21 years after** some relevant **life in being** at the creation of the interest. Therefore, a right of first refusal almost always violates RAP if the conveying instrument **does not provide a termination date\*** that falls **within the perpetuities period**.

Here, there is no termination date for the man's right of first refusal. As a result, it is possible that the right of first refusal may not vest until *after* the perpetuities period—ie, more than 21 years after the man and brother have died. Since this RAP violation renders the man's right of first refusal invalid, RAP determines whether he will prevail in this action.

\*A termination date can be set by a temporal limitation (eg, calendar date) or by reference to a life in being (eg, within 21 years of grantee's death).

**(Choices A & B)** The [parol evidence rule](#) generally bars evidence of a prior agreement to modify or contradict the terms of a final written agreement. But here, the man is seeking to enforce not a prior agreement but the purchase option specified in the deed.

**(Choice D)** The [statute of frauds](#) renders certain contracts, including contracts for the sale of land, unenforceable unless they are in writing and signed by the party against whom enforcement is sought. Additionally, [recording statutes](#) protect earlier-recorded property interests against subsequent purchasers. But neither will protect the man's contingent future interest from being invalidated by RAP.

## Educational objective:

The Rule Against Perpetuities applies to contingent future interests, including a right of first refusal. This contractual right violates RAP if it is not set to terminate within 21 years after some relevant life in being at the creation of the interest.

## References

61 Am. Jur. 2d Perpetuities and Restraints on Alienation § 5 (2020) (Rule Against Perpetuities).

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## Rule against perpetuities (RAP)

