

A grantor owned two tracts of land, one of 15 acres and another of 5 acres. The two tracts were a mile apart.

Fifteen years ago, the grantor conveyed the smaller tract to a grantee. The grantor retained the larger tract. The deed to the grantee contained, in addition to proper legal descriptions of both properties and identifications of the parties, the following language: "I, the grantor, bind myself and my heirs and assigns that in the event that the larger tract that I now retain is ever offered for sale, I will notify the grantee and his heirs and assigns in writing, and the grantee and his heirs and assigns shall have the right to purchase the larger tract for its fair market value as determined by a board consisting of three qualified expert independent real estate appraisers."

With appropriate references to the other property and the parties, there followed a reciprocal provision that conferred upon the grantor and her heirs and assigns a similar right to purchase the smaller tract, purportedly binding the grantee and his heirs and assigns.

Ten years ago, a corporation acquired the larger tract from the grantor. At that time, the grantee had no interest in acquiring the larger tract and by an appropriate written document released any interest he or his heirs or assigns might have had in the larger tract.

Last year, the grantee died. The smaller tract passed by the grantee's will to his daughter. She has decided to sell the smaller tract. However, because she believes that the corporation has been a very poor steward of the larger tract, she refuses to sell the smaller tract to the corporation even though she has offered it for sale in the local real estate market.

The corporation has brought an appropriate action for specific performance of the right of first refusal after taking all the necessary preliminary steps in its effort to exercise its right to purchase the smaller tract. The daughter has asserted all possible defenses.

The common law Rule Against Perpetuities is unmodified in the jurisdiction, and there are no applicable statutes.

If the court rules for the daughter, what will be the likely reason?

- A. Noncompliance with a right to purchase gives rise to a claim for money damages, but not for specific performance.
- B. The grantee's release 10 years ago operates as a waiver regarding any right to purchase that the corporation might have.
- C. The provision setting out the right to purchase violates the Rule Against Perpetuities.
- D. The two tracts of land were not adjacent parcels of real estate, so the right to purchase is in gross and therefore unenforceable.

## Explanation:

A **right of first refusal** is a contractual right to purchase property before any other person *if* the owner later decides to sell. As a result, it is a contingent future interest that is subject to the **Rule Against Perpetuities (RAP)**.

RAP renders such interests **void if** there is any possibility that they ***could vest*** more than **21 years after** some relevant **life in being** at the creation of the interest. Therefore, rights of first refusal almost always **violate RAP** if they are **not set to terminate**—either temporally (eg, calendar date) or by referencing a life in being (eg, within 21 years of the grantee's death)—within the perpetuities period.

Here, the corporation seeks to enforce its right of first refusal over the daughter's smaller tract. Since the deed creating this interest references the parties' heirs and assigns without any mention of a termination date, this right of first refusal could be exercised *after* the perpetuities period. Therefore, the right of first refusal is invalid under RAP, and the court will likely rule for the daughter on this basis.\*

\*Since this jurisdiction follows the common-law RAP, this right of first refusal is struck ab initio (ie, from the beginning). But had this jurisdiction adopted the majority "wait and see" stance, the right would have been valid since it vested within 90 years of its creation.

**(Choice A)** Specific performance is available when money damages are inadequate. Since land is considered unique and money damages cannot compensate for the loss of unique property, this remedy is generally available to those with a right to purchase.

**(Choice B)** The grantee's waiver of his own right of first refusal as to the *larger* parcel does not waive the corporation's right to purchase the *smaller* parcel at issue here.

**(Choice D)** The adjacency of the tracts is irrelevant. Had the right of first refusal been valid, it would have ripened into a right to purchase in gross (ie, in full) when the seller received an offer from a third-party purchaser. And a right to purchase in gross *is* enforceable if it complies with RAP.

## Educational objective:

To comply with the Rule Against Perpetuities, a right of first refusal must be set to vest or fail within the perpetuities period—ie, 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)

