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Make Me a Right of Refusal I Can't Refuse

By **Loren R. Taub**
Special Counsel | Real Estate

The New York State rule against perpetuities is based on the common law rule and provides that "no estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved." The purpose of the rule against perpetuities in the real estate context is to prevent any interest in real property from remaining non-transferable for an exceedingly long period of time. For example, if a transferor grants to a transferee a right of first refusal to purchase real property (a "ROFR") – that is, the contractual right to purchase real property after the seller has received an offer to purchase the same from a third party (generally on the same terms as the third-party offer) – and any such ROFR runs to the benefit of the transferee's successors and assigns with no termination date, the same would violate the rule against perpetuities and be void.

How do we know that the foregoing ROFR violates the rule against perpetuities? Technically, the ROFR could benefit the transferee's heirs and distributees for a period which exceeds twenty-one (21) years after all "lives in being at the creation of the estate and any period of gestation" – *i.e.*, the ROFR would remain in effect after all of the heirs and distributees of the transferee which are alive (or in gestation) at the time of the grant have died plus an additional twenty-one (21) years. A violation of the rule against perpetuities will result in the intended grant – in this case, a ROFR – being deemed null and void.

The Appellate Division of the Fourth Department of the Supreme Court of New York recently reviewed a claim that a ROFR was void, in part, because it violated the rule against perpetuities in a case entitled *Jeffrey P. Martin and Michele R. Martin, as plaintiffs, v Willard L. Seeley, Doris J. Seeley and Todd T. Schilling, as defendants*.[1] In this case, the Martins purchased a piece of real property from the Seeleys ("Parcel 1") and, in the contract and the deed relating to Parcel 1, the Seeleys gave to the Martins a ROFR to purchase another piece of real property adjacent to Parcel 1 ("Parcel 2"). Several years after the Martins purchased Parcel 1, the Seeleys sold Parcel 2 to Todd T. Schilling (one of the defendants), and the Martins claimed that the Seeleys violated the Martins' ROFR with respect to Parcel 2. The ROFR provided as follows: "[t]his [r]ight of [f]irst [r]efusal shall run with the land and inure to and be for the benefit of the [plaintiffs] but not their successors and assigns tenants subtenants licenses mortgagees and possession [sic] and invitees."

The Seeleys claimed that the ROFR violated the rule against perpetuities because the same "ran with the land" and therefore was not "personal to plaintiffs and may be exercised by their heirs and distribute more than 21 years after plaintiffs' deaths." The language of the ROFR was ambiguous in that the drafter specifically stated that the same would benefit the Martins but not their successors and assigns, and the language of the ROFR also stated that the ROFR ran with the land which suggests that the same does benefit anyone who owns the land in perpetuity. The lower court (as affirmed by the Appellate Division) looked to the common law rule of construction which provides that "parties who make grants of real property interests presumably intend their grants to be effective and that reviewing courts should, if at all possible, avoid constructions which frustrate their intended purposes," and ruled that the ROFR in question did not violate the rule against perpetuities because the language in the deed provided that the ROFR was for the benefit of the Martins only. The lower court (as affirmed by the Appellate Division) determined that the ROFR could not vest in the Martins' heirs and distribute more than 21 years after the Martins' deaths without also vesting in the Martins' successors and assigns (and the grant clearly stated that the option did not run to the benefit of successors and assigns).

In New York State and other states that have codified the rule against perpetuities, it is of the utmost importance that when drafting a ROFR (as well as other options to purchase real estate, such as a right of first offer) to clearly state that such right is personal to the grantee of such right and that the same does not run to the benefit of successors and assigns or that the same runs with the land.

[1] All quotations in this article are from the *Martin v Seeley* court decision.