

IS RAP GONE? HOW *OLD PORT COVE HOLDINGS, INC.* STILL LEAVES RAP ALIVE IN FLORIDA

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I. INTRODUCTION

“No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”¹ This rule, the rule against perpetuities (RAP), has confounded many a law school student and caused numerous sleepless nights. Who is a life in being? Is an interest vested or contingent? Is there a measuring life? Is the rule against perpetuities applicable here? The Florida Supreme Court’s holding in *Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Ass’n One*, attempts to end some of those sleepless nights and works to resolve a split between two Florida District Courts of Appeal.²

Old Port Cove Holdings, Inc. arose out of an agreement signed in 1977 between Old Port Cove Investment, Inc. and Old Port Cove Condominium Association One, Inc. (the Association).³ The agreement granted the Association the right of first refusal in the event a sale was proposed.⁴ In 2002, Old Port Cove Holdings, Inc. (Old Port), the successors in interest of the property, sought a declaratory judgment, argu-

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¹ JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (2d ed. 1906).

² See *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass’n One*, 986 So. 2d 1279, 1281 (Fla. 2008).

³ *Id.*

⁴ *Id.* (“The ASSOCIATION shall have the right of first refusal for the purchase of said real property upon the same terms and conditions as are proposed for its sale and purchase, . . . said right of first refusal to be exercised by the ASSOCIATION within thirty (30) days following written notice to it of such proposed sale, following which said right of first refusal shall terminate.”).

ing the right of first refusal contained in the contract violated the rule against perpetuities.⁵ Old Port argued (1) Florida Statutes section 689.225 did not retroactively abolish the common law rule against perpetuities⁶ and (2) the right of first refusal is a nonvested property interest subject to and in violation of the rule against perpetuities.⁷ The Association counterclaimed for a declaratory judgment in its favor and for reformation of the agreement.⁸ The Association contended that (1) Florida Statutes section 689.225 applied retroactively⁹ and (2) a right of first refusal is a contractual interest and thus not subject to the rule against perpetuities.¹⁰

Noting conflict among the Florida District Courts of Appeal,¹¹ the Florida Supreme Court held: first, Florida Statutes section 689.225 did not retroactively abolish the rule against perpetuities,¹² and second, the rule against perpetuities does not govern a right of first refusal, as it is a contractual interest.¹³

II. BACKGROUND

The rule against perpetuities, in Florida, was originally part of the common law.¹⁴ The common law rule essentially followed the historical iteration of John Chipman Gray.¹⁵ In 1979, the Florida Legislature first codified the rule against perpetuities.¹⁶ This initial codification invalidated interests that would not “vest, if at all, not later than 21 years after one or more lives in being at the creation of the and

⁵ *Id.*

⁶ Petitioners’ Initial Brief at 15-16, *Old Port Cove Holdings, Inc.*, 986 So. 2d 1279 (No. 07-1032), 2007 WL 4328974, at *15-16 (citing *Fallschase Dev. Corp. v. Blakey*, 696 So. 2d 833, 836 (Fla. Dist. Ct. App. 1997)).

⁷ *Id.* at 10 (citing *Fallschase Dev. Corp.*, 696 So. 2d at 834).

⁸ *Old Port Cove Holdings, Inc.*, 986 So. 2d at 1281.

⁹ Respondent’s Answer Brief at 37, *Old Port Cove Holdings, Inc.*, 986 So. 2d 1279 (No. SC07-1032), 2007 WL 4632629, at *37.

¹⁰ *Id.* at 26.

¹¹ *Old Port Cove Holdings, Inc.*, 986 So. 2d at 1281-82.

¹² *Id.* at 1289.

¹³ *Id.* at 1287, 1289.

¹⁴ *Id.* at 1282.

¹⁵ See *Old Port Cove Holdings, Inc.*, 986 So. 2d at 1282 (citing *Iglehart v. Phillips*, 383 So. 2d 610, 614 (Fla. 1980)); GRAY, *supra* note 1, § 201.

¹⁶ 1977 Fla. Laws 31 (codified at FLA. STAT. § 689.22 (1979) (repealed 1988)).

interest any period of gestation involved.”¹⁷ Then, in 1988 the Florida Legislature repealed the existing law and replaced it with the “Florida Uniform Statutory Rule Against Perpetuities.”¹⁸ This new law, in effect, abolished the old common law thinking and allowed interests if they “either vest[ed] or terminat[ed] within 90 years after [the interest’s] creation.”¹⁹ The 1988 law also included a clause that allowed reformation of certain interests created prior to the statute’s creation.²⁰

With only minor amendments in 1997²¹ and 2000,²² the law has remained the same since its enactment in 1988. The final amendments in 2000 sought to clarify the legislative intent behind the statute by adding, “[t]his section is the sole expression of any rule against perpetuities or remoteness in vesting in this state. No common[]law rule against perpetuities or remoteness in vesting shall exist with respect to any interest . . . regardless of whether such interest or power is governed by this section.”²³

At the district court level, the Florida Fourth District Court of Appeal relied on the statute’s reformation clause²⁴ and held that “[t]here can no longer be any proper application of the common law rule against perpetuities in Florida.”²⁵ This was in conflict with the Florida First District Court of Appeal’s decision in *Fallschase Development Corp. v.*

¹⁷ *Id.* at 32. This law also exempted “preemptive rights in the nature of a right of first refusal” from the rule. *See id.* at 33.

¹⁸ 1988 Fla. Laws 277, 277 (codified at FLA. STAT. § 689.225 (1989)).

¹⁹ FLA. STAT. § 689.225(2)(a)(2) (1989).

²⁰ *See id.* (allowing interests “created before October 1, 1988 . . . determined . . . to violate this state’s rule against perpetuities as that rule existed before October 1, 1988, . . . [to be] reform[ed] . . . in the manner that most closely approximates the transferor’s manifested plan of distribution . . . within the limits of the rule against perpetuities applicable when the . . . interest . . . was created”).

²¹ 1997 Fla. Laws 4404, 4424 (codified without the Governor’s approval at FLA. STAT. § 689.225 (1997)).

²² 2000 Fla. Laws 2392 (codified at FLA. STAT. § 689.225(7) (2001)).

²³ *Id.* at 2393.

²⁴ *See supra* note 20.

²⁵ *Old Port Cove Condo. Ass’n One v. Old Port Cove Holdings, Inc.*, 954 So. 2d 742, 745 (Fla. Dist. Ct. App. 2007).

Blakey.²⁶ The Fourth District further held that a right of first refusal is a vested, contractual interest, not subject to the rule of perpetuities.²⁷ This was also in direct conflict with the First District's decision in *Fallschase Development Corp.*²⁸

III. ANALYSIS

A. Retroactive Application of Florida Statute Section 689.225

1. Statutory Language

“Except as extended by paragraph (c), this section applies to a nonvested property interest or a power of appointment that is created on or after October 1, 1988.”²⁹

If a nonvested property interest or a power of appointment was created before October 1, 1988, and is determined . . . to violate this state's rule against perpetuities as that rule existed before October 1, 1988, a court . . . may reform the disposition in the manner . . . within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.³⁰

“This section is the sole expression of any rule against perpetuities or remoteness in vesting in this state. No common law rule against perpetuities or remoteness in vesting shall exist with respect to any interest or power regardless of whether such interest or power is governed by this section.”³¹

²⁶ *Fallschase Dev. Corp. v. Blakey*, 696 So. 2d 833, 836, 837 (Fla. Dist. Ct. App. 1997) (holding the Legislature intended retroactive application, but certifying the question to the Florida Supreme Court as one of great public importance).

²⁷ *Old Port Cove Condo. Ass'n One*, 954 So. 2d at 743.

²⁸ See *Fallschase Dev. Corp.*, 696 So. 2d at 837 (“Rights of first refusal . . . are interests in property and not merely contract rights.”) (quoting *Ferrero Constr. Co. v. Dennis Rourke Corp.*, 536 A.2d 1137, 1139 (Md. 1988)).

²⁹ FLA. STAT. § 689.225(6)(a) (2008).

³⁰ *Id.* § 689.225(6)(c).

³¹ *Id.* § 689.225(7).

2. Arguments

For a statute to operate retroactively: first, the statute itself must express an intent that it apply retroactively, and second, retroactive application must be constitutional.³² There is a presumption that a law operates prospectively absent the above requirements.³³ In *Old Port Cove Holdings, Inc.*, the Association argued that the 2000 amendment³⁴ expressed the Florida Legislature's intent that this statute operate retroactively.³⁵ By adding "[t]his section is the *sole expression* of any rule against perpetuities" and "[n]o common[]law rule against perpetuities . . . shall exist . . . regardless of whether such interest or power is governed by this section," the Association argued the Legislature expressed its intent to abolish the common law rule retroactively.³⁶ The Association also argued words and phrases such as *sole expression*, *any*, and *no common law rule against perpetuities*, showed a clear intent for future and past application of the law.³⁷ The combination of this language with the ability to reform interests created before the effective date, according to the Association, was further evidence that the Legislature intended retroactive application.³⁸

Old Port first argued that the Fourth District scrutinized the wrong language.³⁹ By using the words "no common-law rule . . . shall exist," Old Port contended that the most recent amendment was acting prospectively.⁴⁰ Something that *shall* cease to exist is different from something that simply ceases to exist. Old Port further maintained that the reformation language included in the 1988 statutory enactment also showed this prospective intent by only allowing reformation of interests

³² *Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499 (Fla. 1999).

³³ *See id.* at 499-502 (discussing the presumption of prospective application, reasons for the presumption, and ways to overcome the presumption).

³⁴ 2000 Fla. Laws 2392 (codified at FLA. STAT. § 689.225(7) (2001)).

³⁵ *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One*, 986 So. 2d 1279, 1284 (Fla. 2008).

³⁶ *Id.* (emphasis added) (quoting FLA. STAT. § 689.225(7)).

³⁷ Respondent's Answer Brief, *supra* note 9, at 40.

³⁸ *Id.* at 40, 45.

³⁹ Petitioners' Initial Brief, *supra* note 6, at 22-24.

⁴⁰ *Id.* at 23.

“created on or after October 1, 1988”⁴¹ By allowing reformation only for interests created after the effective date, the Legislature could have hardly sought to subject all interests to the statutory rule; thus, the Association could not overcome the presumption that legislation operates prospectively.⁴² Additionally, Old Port contended that even if the court found that the Legislature intended retroactive application, it would be unconstitutional to retroactively apply the statute.⁴³ Because Old Port asserted that a right of first refusal was a nonvested property interest,⁴⁴ retroactively applying this rule would affect property rights and would thus be unconstitutional.⁴⁵

3. The Court’s Decision Regarding Retroactive Application

The Florida Supreme Court agreed with the Association that the “[l]anguage reflects an intent to abrogate the common law rule.”⁴⁶ The court disagreed, “[h]owever, that it reflects a clear intent to do so *retroactively*.”⁴⁷ The court employed a maxim of statutory interpretation, reading subsections of the same statute together, rather than independently.⁴⁸ According to the court, these subsections, when read together, could not overcome the presumption that the law operates prospectively.⁴⁹ Adopting the view of Old Port, the court stated chapter 689.225(6)(a) of the Florida Statutes “[a]pplies to a nonvested property interest . . . that is *created on or after October 1, 1988*.”⁵⁰ Further, the court noted that reformation under the statute must be done, “[w]ithin the limits of the rule against perpetuities applicable when the nonvested

⁴¹ FLA. STAT. § 689.225(6)(a) (1989); Petitioners’ Initial Brief, *supra* note 6, at 23 (internal quotation marks omitted).

⁴² See Petitioners’ Initial Brief, *supra* note 6, at 23.

⁴³ *Id.*

⁴⁴ See *infra* Part III.B for a discussion of Old Port’s argument that a right of first refusal is a nonvested property interest.

⁴⁵ Petitioners’ Initial Brief, *supra* note 6, at 23.

⁴⁶ *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass’n One*, 986 So. 2d 1279, 1284 (Fla. 2008).

⁴⁷ *Id.*

⁴⁸ See *id.* (citing *State v. Riley*, 638 So. 2d 507, 508 (Fla. 1994) (requiring subsections of the same statute to be read *in pari materia*)).

⁴⁹ See *id.* at 1284, 1285.

⁵⁰ *Id.* at 1284 (citing FLA. STAT. § 689.225(6)(a) (2007)).

*property interest . . . was created.*⁵¹ Therefore, the interpretation advanced by the Association would be inconsistent with the plain language of the statute and render these subsections meaningless.⁵² The court found it unnecessary to discuss the second prong of the test, whether retroactive application would be unconstitutional, because the Legislature did not express a clear intent to retroactively abolish the rule against perpetuities.⁵³ Therefore, the court resolved the certified question, decided in favor of Old Port on the issue, and held “the abrogation of the common law rule against perpetuities does not apply retroactively.”⁵⁴

B. Classifying the Right of First Refusal

Whether to classify a right of first refusal as a nonvested property interest or a contractual interest was an issue of first impression for the Florida Supreme Court.⁵⁵ The Florida District Courts of Appeal split on this issue.⁵⁶ Further, other jurisdictions also split on the proper classification.⁵⁷

While sometimes confused with options,⁵⁸ rights of first refusal are notably different. A right of first refusal allows the holder to “elect to take specified property at the same price and on the same terms and conditions as those contained in a good faith offer by a third person if

⁵¹ *Id.* at 1284-85 (citing FLA. STAT. § 689.225(6)(c) (2007)).

⁵² *Id.*; see also *Koile v. State*, 934 So. 2d 1226, 1231 (Fla. 2006) (following the rule of statutory construction, which provides that statutes are not construed as superfluous when a reasonable meaning exists).

⁵³ *Old Port Cove Holdings, Inc.*, 986 So. 2d at 1284; see also *Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 784 So. 2d 438, 441 (Fla. 2001) (declining to weigh on the constitutionality of a statute if it can be decided on other grounds).

⁵⁴ *Old Port Cove Holdings, Inc.*, 986 So. 2d at 1285.

⁵⁵ *Id.* at 1285-88.

⁵⁶ Compare *Old Port Cove Condo. Ass'n One v. Old Port Cove Holdings, Inc.*, 954 So. 2d 742, 743 (Fla. Dist. Ct. App. 2007) (finding a right of first refusal to be a contract interest), with *Fallschase Dev. Corp. v. Blakey*, 696 So. 2d 833, 835 (Fla. Dist. Ct. App. 1997) (finding that the right of first refusal is more akin to a property right).

⁵⁷ *Old Port Cove Holdings, Inc.*, 986 So. 2d at 1285, 1285 n.2.

⁵⁸ *Id.* (citing *Steinberg v. Sachs*, 837 So. 2d 503, 505 (Fla. Dist. Ct. App. 2003); *Points v. Barnes*, 301 So. 2d 102, 104 (Fla. Dist. Ct. App. 1974)).

the owner manifests a willingness to accept the offer.”⁵⁹ However, it is only after the willingness to accept the good faith offer that “[t]he right of first refusal ripens into an option.”⁶⁰ An option, on the other hand, “is a unilateral contract which gives the option holder the right to purchase under the terms and conditions of the option agreement.”⁶¹

The Association argued that a right of first refusal is a contractual interest, not subject to the statutory provision relating to nonvested property interests.⁶² According to the Association, its right of first refusal is not a property interest; but rather, simply allows the Association to exercise a contractual agreement, which it bargained for and for which it paid valuable consideration.⁶³ Because the contract itself is the basis of the right of first refusal, it vests at the moment of contracting, only to be exercisable upon an attempted sale, with that right being extinguished thirty days after.⁶⁴ The Association argued that the purpose of the rule against perpetuities is to deal with “fettering real property with future interests dependent upon contingencies unduly remote”⁶⁵ Because the right in the instant case was first, certain to extinguish or be exercised within thirty days, and second, vested in the holder at the moment of contracting, there were no remote contingencies present to invoke the rule against perpetuities.⁶⁶ Thus, the proper analysis for invalidation of a right of first refusal would be unreasonable restraints on alienation, rather than the rule against perpetuities.⁶⁷ Due to the limited duration and by setting the price at the amount the seller receives in the proposed offer, the Association argued, this interest does

⁵⁹ *Pearson v. Fulton*, 497 So. 2d 898, 900 (Fla. Dist. Ct. App. 1986).

⁶⁰ *Id.*

⁶¹ *S. Inv. Corp. v. Norton*, 57 So. 2d 1, 2 (Fla. 1952) (en banc).

⁶² Respondent’s Answer Brief, *supra* note 9, at 26; *see also* FLA. STAT. § 689.225(6)(c) (2008).

⁶³ *Id.* at 32-33.

⁶⁴ *Old Port Cove Condo. Ass’n One v. Old Port Cove Holdings, Inc.*, 954 So. 2d 742, 743 (Fla. Dist. Ct. App. 2007).

⁶⁵ Respondent’s Answer Brief, *supra* note 9, at 33 (quoting *Weber v. Texas Co.*, 83 F.2d 807, 808 (5th Cir. 1936)).

⁶⁶ *Old Port Cove Condo. Ass’n One*, 954 So. 2d at 743.

⁶⁷ Respondent’s Answer Brief, *supra* note 9, at 34 (citing *Iglehart v. Phillips*, 383 So. 2d 610, 614 (Fla. 1980) (“[A] repurchase option is more appropriately classified as an unreasonable restraint on the use of the subject property.”)).

not involve remoteness in vesting issues and does not unreasonably restrain alienability of land.⁶⁸

Old Port, on the other hand, argued that because the interest holder may seek specific performance in a court of equity, requiring the property to be conveyed to him, the right of first refusal is a property interest.⁶⁹ The interest holder may bring suit only when a proposed sale occurs; thus, the interest only vests if and when the property owner decides to sell the property.⁷⁰ Therefore, remoteness in vesting is implicated and the rule against perpetuities applies.⁷¹ This argument is in accord with the majority of courts holding rights of first refusals are property interests that only vest upon a proposed sale.⁷² Because the interest granting property rights cannot vest until there is a proposed sale⁷³ and that interest is never certain to vest or fail, let alone within twenty-one years after a life in being at the time of creation, the interest does not meet the rule's requirements.⁷⁴ Further, because the interest failed the rule against perpetuities, it was void *ab initio*.⁷⁵ When an invalid attempt at creation occurs, the interest is not voidable, it is void, and creates no interest at all.⁷⁶ Thus, any attempt by the court at reformation would be improper.⁷⁷ The court cannot "rewrite the instrument for the parties after the fact, supplying its own terms, to create an interest in property where none existed."⁷⁸

Additionally, Old Port argued that even if the court found the Legislature intended for the statute to apply retroactively, it would be unconstitutional to do so, because a right of first refusal creates a sub-

⁶⁸ *Id.* at 33-34.

⁶⁹ Petitioners' Initial Brief, *supra* note 6, at 13; *see also* Fallschase Dev. Corp. v. Blakey, 696 So. 2d 833, 837 (Fla. Dist. Ct. App. 1997).

⁷⁰ Petitioners' Initial Brief, *supra* note 6, at 5; *see also* Fallschase Dev. Corp., 696 So. 2d at 837.

⁷¹ Petitioners' Initial Brief, *supra* note 6, at 5.

⁷² *Id.* (stating the matter is "well settled"); *see also* Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, 986 So. 2d 1279, 1286 n.2 (Fla. 2008) (citing to multiple cases from other jurisdictions and finding this to be the majority view).

⁷³ Petitioners' Initial Brief, *supra* note 6, at 5.

⁷⁴ *Id.* at 11-12.

⁷⁵ *Id.* at 12.

⁷⁶ *Id.* at 6.

⁷⁷ *Id.* at 7.

⁷⁸ *Id.*

stantive property interest.⁷⁹ When a “statute impairs vested rights,” it is unconstitutional to enforce the statute retroactively.⁸⁰ Because the right of first refusal was void *ab initio*, Old Port contended it had an interest in the property free from any restriction. Allowing reformation would impair that property right and would therefore be unconstitutional.⁸¹

To resolve the conflict, the court first noted that “[i]n Florida . . . an option does *not* create a legal or equitable interest in property.”⁸² “[U]ntil an optionee exercises the right to purchase . . . he has no estate, either legal or equitable, in the lands involved.”⁸³ Because “Florida law has consistently” determined options do not create interests in land, it follows that a right of first refusal “which *may* or *may not* ripen into an option . . . cannot create an interest in land, either.”⁸⁴ As this was not a property interest, it was proper to analyze this interest under restraints on alienation, rather than remoteness in vesting.⁸⁵ Therefore, according to the court, the rule against perpetuities, a rule of property law, is inapplicable to the contractual right created by a right of first refusal.⁸⁶ In applying the restraint on alienation analysis, the court determined that it is clear: “a repurchase option at market or appraised value for unlimited duration is not an unreasonable restraint.”⁸⁷

The court noted that it was adopting the minority approach, as the majority of jurisdictions have held that a right of first refusal is a

⁷⁹ *Id.* at 6.

⁸⁰ *See Fallschase Dev. Corp. v. Blakely*, 696 So. 2d 833, 836 (Fla. Dist. Ct. App. 1997) (citing *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995)).

⁸¹ Petitioners’ Initial Brief, *supra* note 6, at 5.

⁸² *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass’n One*, 986 So. 2d 1279, 1286 (Fla. 2008).

⁸³ *Id.* at 1286-87 (citing *Gautier v. Lapof*, 91 So. 2d 324, 326 (Fla. 1956)).

⁸⁴ *Id.* at 1287 (emphasis added).

⁸⁵ *Id.*; *see also Iglehart v. Phillips*, 383 So. 2d 610, 614 (Fla. 1980) (“[A] repurchase option is more appropriately classified as an unreasonable restraint on the use of the subject property.”).

⁸⁶ *Old Port Cove Holdings, Inc.*, 986 So. 2d at 1287-88; *see also Iglehart*, 383 So. 2d at 614.

⁸⁷ *Old Port Cove Holdings, Inc.*, 986 So. 2d at 1288, n.4 (citing *Iglehart*, 383 So. 2d at 615).

property interest.⁸⁸ However, the court first explained that its approach was the “more modern one.”⁸⁹ Second, the policy behind implementing the rule against perpetuities is to “prohibit[] restraints that remove property from a beneficial use for an extended period of time.”⁹⁰ Holding rights of first refusal subject to the rule against perpetuities, opined the court, would be contrary to this policy and purpose.⁹¹ A right of first refusal does not indefinitely tie up land or prohibit the seller from selling or using the property beneficially; therefore, the rule against perpetuities is inapplicable.⁹²

Based on the court’s precedent (holding that even options do not create legal or equitable interests in property under Florida law⁹³), the court concluded that it is consistent with Florida’s law that a right of first refusal cannot be an interest subject to the rule against perpetuities.⁹⁴ Resolving the conflict in favor of the Association, the Florida Supreme Court approved of the Fourth District’s interpretation and held “the rule [against perpetuities] does not apply to rights of first refusal.”⁹⁵

C. *Application to These Parties*

Old Port won its argument on retroactive application.⁹⁶ The common law rule against perpetuities still exists as to nonvested property interests created before the statute’s enactment.⁹⁷ However, the Association won its argument that a right of first refusal was a contract

⁸⁸ *Id.* at 1288; *see also id.* at 1286 n.2 (citing to multiple cases from other jurisdictions and finding the majority view to be a right of first refusal is a property interest).

⁸⁹ *Id.* at 1288; *see* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.3 (2000) (determining that rights of first refusal are no longer subject to the rule against perpetuities).

⁹⁰ *Old Port Cove Holdings, Inc.*, 986 So. 2d at 1288 (citing *Iglehart*, 383 So. 2d at 613).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1286.

⁹⁴ *Id.* at 1289.

⁹⁵ *Id.*

⁹⁶ *See id.* at 1284.

⁹⁷ *See id.* at 1284-85.

interest.⁹⁸ In the end, though Old Port won the retroactivity argument, by losing the argument on the classification of a right of first refusal Old Port lost the overall case; the right of first refusal stands to limit Old Port's ability to sell the property.⁹⁹

IV. COMMENTS

The Florida Supreme Court's decision in *Old Port Cove Holdings, Inc.*, sought to put to rest two questions: first, whether Florida Statutes section 689.225 applied retroactively, and second, whether a right of first refusal is subject to the rule against perpetuities.¹⁰⁰ While answering both questions, the court only provided one truly dispositive answer.¹⁰¹ The court firmly settled the question of the proper classification of right of first refusal.¹⁰² While the court adopted the minority approach in the holding,¹⁰³ this seems to be the correct interpretation, given the contractual nature of a right of first refusal and the classification of options under Florida law.¹⁰⁴ First, under Florida law, if an option is not an interest in property,¹⁰⁵ then certainly a right of first refusal cannot be either. Though defined differently, both purport to convey a similar interest; the right to purchase upon the happening of some predetermined event.¹⁰⁶ Second, a right of first refusal does not amount to *remote contingencies* that impair the transfer of land and seek to keep land in the hands of a few.¹⁰⁷ It is solely applicable when the owner looks to sell,¹⁰⁸ and further, the owner does not suffer, as he is still able to sell at his desired purchase price or receive that purchase price from

⁹⁸ See *id.* at 1289.

⁹⁹ See *id.*

¹⁰⁰ See *id.* at 1289.

¹⁰¹ See *id.* at 1284.

¹⁰² See *id.* at 1287, 1289 (explaining that “[a] right of first refusal is a contractual right” and the rule against perpetuities “does not apply to rights of first refusal”).

¹⁰³ *Id.* at 1286.

¹⁰⁴ *Id.* at 1285 (citing *S. Inv. Corp. v. Norton*, 57 So. 2d 1, 2 (Fla. 1952) (en banc) (“An option contract is ‘a unilateral contract which gives the option holder the right to purchase under the terms and conditions of the option agreement.’”).

¹⁰⁵ *Id.* at 1286.

¹⁰⁶ *Old Port Cove Condo. Ass'n One v. Old Port Cove Holdings, Inc.*, 954 So. 2d 742, 743 (Fla. Dist. Ct. App. 2007).

¹⁰⁷ *Id.* at 743.

¹⁰⁸ *Id.*

the current possessor.¹⁰⁹ Thus, no impairment to the owner, prospective purchaser, or current possessor exists.¹¹⁰

While the court definitively resolved the classification of a right of first refusal, a cloud still exists as to the other question presented to the court. Seemingly, a conclusive answer resulted from the opinion: “[S]ection 689.225, Florida Statutes, has not retroactively abolished the common law rule against perpetuities.”¹¹¹ What this does, while answering the question directly posed, is to leave open a world of other possibilities and questions. Attorneys will have the duty of arguing over what the rule against perpetuities was at the time of the conveyance, if made prior to October 1, 1988. Because the statute only allows for reformation of nonvested property interests “within the limits of the rule against perpetuities applicable when the nonvested property interest . . . was created,”¹¹² endless sleepless nights still loom. In Florida, at least, attorneys must constantly remember John Chipman Gray’s iteration of the rule and toil, just as they did in their first year of law school, looking for “li[ves] in being,” and any singularly remote possibility that a random occurrence could operate to invalidate the interest.¹¹³ An attorney will need to satisfy the rule if the interest is to be reformed. If the older rule, whatever that may be, cannot be satisfied, reformation is not possible and the interest will fail. Though it is now clear that a right of first refusal will not satisfy the “nonvested property interest” requirement,¹¹⁴ a plethora of other interests will still meet ancient notions of *remote contingencies*.¹¹⁵ Thus, while likely coming to the correct result based on the statutory language—that the Legislature did not expressly intend for retroactive application—and closing the door on rights of first refusal needing to conform, the old common law rule against perpetuities is still alive and well in Florida, despite repeated legislative attempts to put it to rest.

¹⁰⁹ *Id.* at 743-44.

¹¹⁰ *Id.* at 744.

¹¹¹ *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass’n One*, 986 So. 2d 1279, 1289.

¹¹² FLA. STAT. § 689.225(6)(c) (2008).

¹¹³ GRAY, *supra* note 1, § 201.

¹¹⁴ *See* § 689.225(6)(c).

¹¹⁵ *Old Port Cove Condo. Ass’n One*, 954 So. 2d at 743.

If the Legislature did intend to abolish the old common law thinking, which one may argue given the repeated attempts to change the common law approach, more legislation is sure to follow. As the Legislature has the prerogative to clarify their position and intent, via new legislation on the issue, the matter hardly seems over.

In the end, *Old Port Cove Holdings, Inc.* will still lead to headaches and sleeplessness for many current attorneys and law school students. RAP, in Florida, is here to stay. My apologies to any first year law school students. John Chipman Gray, validating lives, unborn widows, and the elusive rule against perpetuities will not be going away any time soon.