

STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL DISTRICT  
CIVIL ACTION # 2020-CP-07-02301

GEORGIA HARRISON, BARBARA  
HARRISON, JOYCE ELLEN HARRISON,  
WILLIAM S. HARRISON, III, STANLEY  
ROBERTS AND DIANA MENDHEIM  
INDIVIDUALLY AND AS AGENT AND  
ATTORNEY IN FACT,

**Plaintiffs,**

vs.

STEPHANIE LORRAINE KIRKLAND, GARY  
LAMONT KIRKLAND, KIETA NICOLE  
WHITE, AND CHERYL KIRKLAND,

**Defendants.**

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**DEFENDANT’S MOTION TO  
ENFORCE RIGHT OF FIRST REFUSAL  
UNDER PINCKNEY ACT AND  
ALTERNATE RELIEF**

**RECEIVED**

**Apr 24 2023**

**SC Court of Appeals**

TO: THOMAS C TAYLOR, ESQ. AND CHESTER C. WILLIAMS, ESQ, ATTORNEYS FOR  
THE PLAINTIFFS.

The Defendants, through their undersigned counsel, would pursuant to Rule 7(b) SCRPC  
would move the court to Enforce their Right of First Refusal Under Pinckney Act and other  
alternative relief as follows:

#### **BACKGROUND**

Plaintiffs commenced this action to clear title on November 24, 2020, attempting to sell  
their interests in the approximately 26.462 acres of real property located at the north end of Hilton  
Head Island, Beaufort County, South Carolina (the “Property”) to a third party – Rotunda Land  
and Development Corporation LLC (“Rotunda”); Plaintiffs entered the contract to sell the Property  
to Rotunda prior to commencing this lawsuit. It was determined by the Court by order dated  
September 15, 2021 that the Property was worth \$9.1 million. Defendants were only notified of  
their right of first refusal under South Carolina statute almost a year after the commencement of

this lawsuit on October 20, 2021 (the “Notice”) and after Plaintiffs already entered a contract to sell the property to a third party – Rotunda.

Defendants then properly notified the Court of their interest in purchasing the Property. The Court then ordered that Defendants pay the \$9.1 million in full within sixty days of the Notice (December 22, 2021). Given the considerably large purchase price, given the necessary due diligence required to close on the Property, and given the statutory scheme allowing for a period of longer than sixty days to put forth the purchase price, Defendants requested an extension of the sixty-day timeline in order to secure funding for the purchase of the Property; that request was denied.

Defendants have maintained throughout this litigation that they wish to purchase the Property. Defendants secured funding to purchase the Property before December 22, 2021. However, Defendants must use, as collateral, the clear, fee simple title to the Property. Without having a clear, marketable title to the Property, Defendants have been prohibited from purchasing the Property. In essence, this litigation primarily requests that the Court clear title to the property by issuing a fee simple title to the Property. The Court has refused to issue an Order declaring the fee simple absolute title to the Property is vested in the parties to this action as tenants in common.

On March 9, 2022, Defendants filed an appeal of the Court’s orders dated March 7, 2022, October 20, 2021, and September 25, 2021. On March 13, 2023, Defendants filed an appeal of the Court’s order filed March 8, 2023 denying Defendant’s Motion for Reconsideration. The second appeal is still pending; Plaintiffs attempted to close and sell the Property to Rotunda without first notifying the title company of the pending appeal. The title company will not close on the sale of the Property to Rotunda. Ultimately, Plaintiffs are unable to close on the sale of the Property to Rotunda. At the time Defendants were first given Notice, they did not have sufficient time to

conduct due diligence and secure funding to purchase the Property within sixty days. However, Defendants have been prepared to promptly deposit the full purchase price of the Property into the Court's registry and complete the purchase of the Property since December 22, 2022. Defendants thus respectfully request that the Court enter an order renewing Defendants' right of first refusal to purchase the Property under *S.C. Code Ann. § 15-61-310, et seq.* (the "Pinckney Act").

### **ARGUMENT**

The Court should grant the Motion and award Defendants the right to exercise their right to purchase the Property with a clear, marketable title under the Pinckney Act and under general principles of South Carolina law governing the right of first refusal.

#### *A. The Pinckney Act*

The Pinckney Act provides that upon filing a petition for partition of real property owned by joint tenants or tenants in common, the court shall provide for non-petitioning joint tenants or tenants in common<sup>1</sup> who are interested in purchasing the property to notify the court of that interest no later than ten days prior to the date set for the trial of the case; a joint tenant or tenant in common that properly notifies the court prior to the deadline "must be allowed to purchase the interests of any cotenant who requested a partition by sale..." *S.C. Code Ann. §§ 15-61-330(A); 15-61-370(B)*. In other words, non-petitioning joint tenants or tenants in common have a right of first refusal to purchase subject property. The purchase price for the interests of a cotenant that requested a partition by sale is the value of the entire parcel determined by the Court pursuant to § 15-61-360 multiplied by the cotenant's fractional ownership of the entire parcel. *S.C. Code Ann. § 15-61-370(C)*.

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<sup>1</sup> For purposes of the Pinckney Act, heirs and devisees are included within the definition of joint tenants and tenants in common. *S.C. Code Ann. § 15-61-25*.

If a joint tenant or tenant in common elects to buy all interests of its cotenants that requested partition by sale, the court shall notify the petitioning party of that fact; the petitioning party then shall notify all other parties of that same fact. *S.C. Code Ann. § 15-61-370(D)*. Once notices are properly sent, the court shall set a date, not sooner than sixty days after the date the notice was sent, by which purchasing joint tenants or tenants in common must pay their apportioned price into the registry of the court. *S.C. Code Ann. § 15-61-370(E)*. If apportioned amounts are properly and timely paid, the court shall issue an order reallocating the interests and disbursing the amounts held by the court to the persons entitled to them. *Id.*

After receiving the Notice, Defendants have worked in good faith to secure the purchase of the Property, despite the fact that Plaintiff disregarded Defendants' right of first refusal and had already entered into an agreement to sell the Property to Rotunda. Because the Pinckney Act expressly allows the Court to grant the Defendants more than sixty days to put forth the funds to purchase the Property, and because of the complexity and value of the Property, Defendants requested a longer time period than sixty days to deposit the funds in accordance with the statute. That request was denied. Defendants were able to secure full funding for the Property's purchase by December 22, 2021, but requested the Court issue a marketable, clear title to the Property in order for Defendants to put forth the Property as collateral. That request was also denied. Defendants have put forth their best efforts in comporting with the Pinckney Act. The Pinckney Act's right of first refusal was promulgated so that properties, such as the Property, could remain in the interest of its cotenants if cotenants so chose. The intent to give cotenants an opportunity to maintain their interests in properties is particularly imperative here with the Property remaining one of the last undeveloped areas of this size and value on Hilton Head Island.

Additionally, Plaintiffs have maintained throughout this litigation that it would be impractical for it to honor Defendants' right of first refusal under the Pinckney Act given the advanced stage of the deal with Rotunda. However, any resulting damage to Plaintiffs or Rotunda in the Court's honoring of Defendants' right of first refusal under the Pinckney Act is directly because of Plaintiffs' own failure to notify Defendants of their intent to sell the Property until almost a year after commencing this suit and because Plaintiffs prematurely entered into the contract with Rotunda before honoring Defendants' right of first refusal under Pinckney Act. Furthermore, Rotunda cannot close on the Property with the appeal pending. Plaintiffs' and Defendants' interests are aligned in completing the sale of the Property; Plaintiffs want to sell and Defendants want to buy at the fair price.

Additionally, the spirit of the Pinckney Act provides that cotenants may have up until ten days prior to the trial setting to elect to purchase the subject property. *S.C. Code Ann. § 15-61-370(B)*. Defendants have expressed their intent to purchase the Property well before trial on this lawsuit. If Defendants had slightly more time, as allowed by statute, to complete the minimal due diligence as a condition to secure funding for the purchase of the Property, and if the Court had issued marketable title to the Property, Plaintiffs would have had no choice but to renege on the deal with Rotunda and sell the Property to Defendants anyway.

Because Defendants complied with all Pinckney Act notice requirements in expressing Defendants' good faith intent to purchase the Property; because the Pinckney Act's purpose is to allow cotenants the right to purchase other cotenants' interests as a right of first refusal; because Plaintiffs are unable to sell the Property to Rotunda; because Defendants are prepared to purchase the Property; and because any harm to Plaintiffs as a result of the Court's honoring of Defendants' right of first refusal results from Plaintiffs' own premature entry of an agreement to sell the

Property to a third party, Defendants respectfully request that the Court grant the Motion and allow Defendants to renew their rights under the Pinckney Act to purchase the Property.

B. Right of First Refusal

While the text and the spirit of the Pinckney Act favors Defendants' renewal of their right of first refusal to purchase the Property, South Carolina case law supports Defendants' position as well. Under well-established South Carolina law, a property owner is generally required, when he or she decides to sell, to first offer the property to the holder of a right of first refusal. *Webb v. Reames*, 485 S.E.2d 384, 385 (S.C. App. 1997). A right of first refusal constrains a real property owner's power of alienation of the property to a certain degree by requiring the owner to offer the property first to the holder of the right. *See Cnty. Of Jackson v. Nichols*, 623 S.E.2d 277, 280 (S.C. App. 2005).

A right of first refusal is only unenforceable if it unreasonably restrains alienation. *Wise v. Poston*, 316 S.E.2d 412, 415 (S.C. App. 1984); *Restatement (Third) of Property: Servitudes* §3.4. South Carolina courts consider the following factors in determining whether rights of first refusal are enforceable: (a) the legitimacy of the purpose of the right of first refusal, (b) the price at which the right of first refusal may be exercised, and (c) the procedures for exercising the right of first refusal. *Clarke v. Fine Housing, Inc.*, 882 S.E.2d 763, 767 (S.C. 2023) (citing *Restatement (Third) of Property: Servitudes* §3.4 cmt. f). "If the right to purchase is on the same terms and conditions as the owner may receive from a third party, if the procedures for exercising the right are clear, and if the period within which it must be exercised is relatively short, the right of first refusal is valid unless the purpose is not legitimate." *Restatement (Third) of Property: Servitudes* § 3.4 cmt. f. Courts typically only deem rights of first refusal to be invalid where the right of first refusal sets

forth no mechanism to determine the price of the property or where the right of first refusal period is unreasonably long. *See Clarke v. Fine Housing*, 882 S.E.2d at 766-767; *see also Mitchell v. Albertelli*, 2023 WL 292918 (S.C. App. 2023). Otherwise, rights of first refusal are honored and taken seriously.

Here, the Defendants' right of first refusal is valid and should be enforced. It is for a legitimate purpose – Defendants wish to retain the Property in which they hold interest as heirs. As stated above, Defendants' purpose in purchasing the Property is even more important because the Property is one of the last remaining undeveloped areas of this size on Hilton Head Island; the nature of the Property's ownership is critical.

Further, Defendants' purchase of the Property is pursuant to the payment terms set by the Court under the Pinckney Act, which is a fair and adequate figure. Defendants have no issues with paying the amounts set by the Court to purchase the Property. Additionally, the Defendants' right of first refusal is not for an unreasonable time period; the South Carolina legislature, per the Pinckney Act, has approved non-petitioning cotenants to elect to invoke their rights of first refusal and purchase respective properties as late as ten days prior to trial on a matter to partition property.

Because South Carolina law favors honoring rights of first refusal and because Defendants' right of first refusal does not unreasonably restrain alienation of the Property and Plaintiffs' Property rights, Defendants respectfully request the Court grant the Motion and enter an order allowing Defendants to invoke their right of first refusal to purchase the Property as they intend.

*C. Open-Market Sale or Auction Required if Right of First Refusal Not Reinstated*

If the Court does not reinstate Defendants' right of first refusal, the proper protocol is for the court to order an open-market sale or action. According to Pinckney Act (S.C. Code §15-61-

400(A)), “If the court orders a sale of heirs’ property, *the sale must be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group.*” (emphasis added). Rather than an open-market sale, the Plaintiffs brought in a premature contract to sale the Property. Plaintiffs cannot circumvent the Pinckney Act by prematurely entering into a contract with Rotunda prior to filing suit and prior to Defendants being appraised of their right of first refusal. If the court orders an open-market sale, the parties are first tasked with trying to jointly agree upon a broker. S.C. Code §15-61-400(B). If the parties cannot agree on a broker within thirty days after entry of order, “. . .the court shall appoint a disinterested real estate broker licensed in this State to offer the property for sale and shall establish a reasonable commission.” S.C. Code §15-61-400(B).

“If the court orders a sale by sealed bids or an auction, the court shall set terms and conditions of the sale.” S.C. Code §15-61-400(E). The auction must be conducted in accordance with procedures governing judicial sales and auctions. S.C. Code §15-61-400(E).

In the event the court does not reinstate Defendants’ right of first refusal and proceeds with an order to sale the Property, the proper protocol is to order either an open-market sale or auction. Defendants exercised their right of first refusal and should have first opportunity to purchase the Property pursuant to the Pinckney Act and other South Carolina law governing the exercise of rights of first refusal.

## **CONCLUSION**

WHEREFORE, Defendants respectfully request that the Court grant this Motion and enter an order allowing Defendants to invoke their right of first refusal under the Pinckney Act to purchase the Property with a marketable, fee simple title thereto. In

the alternative, Defendants respectfully request that the Court order an open-market sale or auction of the Property and / what further alternate relief that the court may deem equitable and just in the premises.

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April 22, 2023  
Hilton Head Island, SC

IN THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

**Apr 24 2023**

**SC Court of Appeals**

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The Honorable Marvin H. Dukes, III  
Beaufort County  
Trial Court Case No. 2020-CP-07-0231

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APPELLATE CASE NO. 2022-000277  
\_\_\_\_\_

Georgia Harrison, Barbara Harrison,  
Joyce Ellen Harrison, William S. Harrison III,  
Stanley Roberts and  
Diana Mendheim Individually And As Attorney In Fact,

Respondents,

vs.

Stephanie Lorraine Kirkland, Gary Lamont Kirkland,  
Kieta Nicole White, And Cheryl Kirkland,

Appellants.

\_\_\_\_\_  
PROOF OF SERVICE  
\_\_\_\_\_

I hereby certify that this law firm represents the Appellants in the above-captioned matter and that on the date below, in Hilton Head Island, South Carolina, I served a copy of the forgoing on the following person via electronic mail to his ATS E-mail address and by USPS postage prepaid and affixed.

**Documents Served: Appellants ' Amended Exhibit 1**

**Parties Served:**

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Attorney for Respondents

This 23<sup>nd</sup> day of April 2023.

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Attorney for Appellant

April 23, 2023  
Hilton Head Island, SC