

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
S. Jackson Kimball, Special Circuit Court Judge

Case # 2019-001945

Edward R. Kelly and Deirdre O. Kelly.....*Petitioners,*

v.

Allen S. McCombs and Benjamin James Russell.....Respondents

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

- I. Did the Court of Appeals err by failing to hold that the Quitclaim Deed to the son was explicitly "subject to" the FROR?
- II. Did the Court of Appeals err by holding that the FROR provision required "successors or assigns or heirs" language for it to apply to the son?
- III. Did the Court of Appeals err by failing to hold that the habendum clause of the Deed to Henry McCombs includes language making the FROR applicable to his "heirs ... successors and assigns"?
- IV. Did the Court of Appeals err by failing to construe the Deed to avoid the absurd result that the FROR could be circumvented by an immediate gratuitous transfer?

STATEMENT OF THE CASE

In 1996, the property that is subject to this action was conveyed to Henry McCombs. The deed contain a provision that the, "grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion of the same". In 2012, Henry McCombs conveyed the property to his son by a quitclaim deed. The quitclaim deed noted the consideration to be Five Dollars (\$5.00) love and affection. In 2015, Henry McCombs' son sold the property to the Respondent for Four Hundred Twenty-Five Thousand Dollars (\$425,000.00). Henry McCombs died on June 2015.

ARGUMENTS

- 1. The Court of Appeals did not err by failing to hold that the Quitclaim Deed to the son was explicitly "subject to" the First Right of Refusal (FROR)?**

The Respondent contends that the FROR was included in the deed because the deed had language stating that the property was, "subject to any Restrictions, Conditions, Covenants, Rights, Rights of Way, and Easements now of record". This argument assumes that there was a valid FROR. Whether a right of first refusal is valid depends on the legitimacy of the purpose,

the price at which the holder may purchase the land, and the procedures for exercising the right. Restatement (Third) of Prop.: Servitude § 3.4 cmt. (f) (2000). In the present case, the procedures for exercising the right are omitted. The first right of refusal in the instant case "contains no specification for giving notice of a third party's offer to purchase, no specification of time after notice within which the first right of refusal must be exercised by, no specification of the time within which must pay the consideration for repurchase, or any other terms by which the reasonableness of the servitude imposed by the first right of refusal may be assessed. The first right of refusal in this matter contains no specification of how price or value are to be determined, and it contains no specification as to how long either party, if notice is given, has to reject or accept the right of refusal or any determination of the timing of the closing.

A first right of refusal should be strictly construed. South Carolina has long disfavored subsequent clauses in deeds that purport to cut down a fee simple estate contained in the granting clause. See *Sanford v. Sanford*, 106 S.C. 304,306, 91 S.E. 294, 295 (1917); *Douglas v. Medical Investors, Inc.* 256 S.C. 440,445, 182 S.E.2d 720, 722 (1971); *Stylecraft, Inc. v. Thomas*, 250 S.C. 495,498, 159 S.E.2d 46, 47 (1968); *Batesburg-Leesville School Dist. No. 3 v. Tarrant*, 293 S.C. 442,444,361 S.E.2d 343,345 (Ct. App. 1987).

One of the commonly acknowledged attributes of fee simple ownership in South Carolina is the ability to freely convey the property without any restrictions. Any restraint on alienation, including a first right of refusal, not specific in all elements including legitimacy of purpose, price and detailed procedures for exercising the right, runs counter to this commonly acknowledged attribute. Without detailed procedures for exercising the right, the first right of refusal in the instant case is an unreasonable restraint on the alienability of the property and it therefore violates the public policy of South Carolina, and is thus unenforceable. *McCravey v. Otts*, 90 S.C. 447,452, 74 S.E. 142, 143 (1912); *Wise v. Poston*, 281 S.C. 574,579, 316 S.E.2d 412,415 (Ct.App. 1984).

There being no valid restriction in the quitclaim deed there was no restriction for the son, Allen

McCombs to accept.

2. The Court of Appeals did not err by holding that the FROR provisions required "successors or assigns or heirs" language for it to apply to the son.

The deed from the Kelly's to Henry McCombs did not extend the right of first refusal to Henry McCombs' successors, heirs and assigns. A right of first refusal is a preempted right. Any restriction or prohibition against transfer acts as a restraint on alienation and should be strictly construed against the party urging the restriction. There was a restriction in the deed pertaining to mobile homes that made the restriction binding on Henry and his successors, heirs and assigns. As the Court of Appeals noted, "When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred." *Little v. Town of Conway*, 171 S.C. 27, 31, 171 S.E. 447, 448 (1933); *Atlanta Skin & Cancer Clinic, P.C. v. Hallmark Gen. Partners, Inc.*, 320 S.C. 113, 119, 463 S.E.2d 600, 604 (1995) The enumeration of particular things excludes the idea of something else not mentioned. *Pa. Nat'l Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 554, 320 S.E.2d 458, 463 (Ct. App. 1984). As the Court of Appeals noted the Parties knew how to make a restriction binding on Henry McCombs and his successors, heirs and assigns and chose not to employ his language in the right of first refusal provision.

3. The Court of Appeals did not err by failing to hold that the habendum clause of the Deed to Henry includes language making the FROR applicable to his "heirs, successors and assigns"?

The Appellants contend that the addendum clause of the deed which states that the premises above named are conveyed to Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever should be interpreted to include the FROR. The habendum clause of the deed addresses the fee simple interest of Henry McCombs'. It should not be interpreted to restrain the fee simple interest set forth in the deed. A right of first refusal is

presumed to be personal and is not ordinarily construed as transferrable or assignable unless the particular clause granting the right refers to successors, heirs and assigns for the instrument or otherwise clearly shows that the right was intended to be transferrable or assignable.

Watersstradt v. Snyder, 194 SW2d 389,390 (MI Ct App. 1971) A clause granting a fee simple estate should not be used to make valid a restriction in the deed.

The Court of Appeals is correct in that that issue was not preserved for review. The order of the lower court does not address this issue. There is nothing in the record that indicates that the Petitioner made a Rule 59(e) motion requesting the Court address this issue. Therefore the issue is not preserved for review.

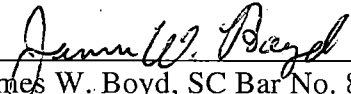
4. The Court of Appeals did not err by failing to construe the Deed to avoid the result that the FROR could be circumvented by an immediate gratuitous transfer?

The Petitioner contends that if the court upholds the lower court's decision then Henry McCombs could have circumvented the FROR by transferring the property immediately upon receiving the deed. As Court of Appeals ruled the Court does not need to determine if this case supports the Appellants' contention that the provision is invalid if it could bring about absurd results. In *Charleston and W. Carolina Reg v. Joyce*, 231 S.C. 493, 99 SE2d 187 (1957) the Court held that, "it is the policy of the court to give a reasonable and equitable construction to a contract and void giving a construction that will bring about absurd results". No absurd results happened in this case. The Court of Appeals correctly determined that it took sixteen years to pass between the deed to Henry and the quitclaim deed to Allen. The Court did not need to decide whether equity would have offered relief under a hypothetical the situation.

CONCLUSION

For the reasons stated the Court of Appeals should be upheld and the Court should deny the Writ of Certiorari.

Respectfully Submitted,


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December 20, 2019

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PROOF OF SERVICE

I, James W. Boyd, certify that I served the within Return to the Appellants' Petition for a Writ of Certiorari by depositing a copies of the same in the United States mail, postage prepaid, addressed to their attorney of record, Brian McCoy and Danielle Scimeca, McCoy Law Firm, LLC, 378 East Main Street, Rock Hill, SC 29732.

I further certify that all parties required by Rule 226(b) to be served have been served.

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