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ARUNDEL CORP. v. MARIE:

*A Right of First Refusal Is Void under the Traditional
Common Law Rule Against Perpetuities as well as the
Legislative Modification of that Rule*

By: Emily J. King

The Court of Appeals of Maryland held that a right of first refusal is void under the traditional common law rule against perpetuities as well as the legislative modification of that rule. *Arundel Corp. v. Marie*, 383 Md. 489, 860 A.2d 886 (2004). The Court also declined to modify the common law rule, expressing its belief that any modification should be reserved for the legislature. *Id.*

On July 28, 1960, Camille and Mary Marie (“Maries”) conveyed a parcel of land, which was part of a tract owned by them, to the Arundel Corporation (“Arundel”). In consideration of one dollar, the deed gave Arundel a right of first refusal to purchase the portion of the property the Maries retained. The Maries agreed that whenever they or their heirs, executors, administrators or assigns decided to sell the property, Arundel, its successors and assigns would be offered the additional property for a price of \$2,250 per acre.

Camille Marie, having survived his wife Mary, died intestate. The couple’s children, Olivia Dulany Green and Richard Mercer Marie (“personal representatives”), were appointed personal representatives of Camille’s Estate (“Estate”). The personal representatives wrote to Arundel and informed the corporation of their intent to sell the property and distribute all of the Estate assets, free of the right of first refusal. The personal representatives asked Arundel to disclaim its interest in the Marie property, but Arundel refused, countering that the right of first refusal had vested, and therefore was enforceable. Arundel further claimed that even if the right was void under the common law rule against perpetuities (“the Rule”), the vesting of their right of first refusal was in conformance with the modified rule found in MD. CODE ANN., EST. & TRUSTS § 11-103(a) (2004) (“Section 11-103”).

Arundel filed suit in the Circuit Court for Baltimore County, which granted summary judgment in favor of the personal representatives, concluding the right of first refusal was void under the

Rule and could not be saved by Section 11-103. Arundel appealed to the Court of Special Appeals, but the Court of Appeals of Maryland issued a writ of certiorari on its own initiative to determine if the right of first refusal was void under the Rule or if it could be saved by Section 11-103.

The Rule states, “[n]o 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.” *Id.* at 495, 860 A.2d at 890 (quoting Gray, *The Rule Against Perpetuities*, § 201 (4th ed. 1942)). The Rule was designed to prevent the alienability of property and the controlling of property by the dead. *Id.* Since its inception, however, it has confused many people and presented difficulties in application. *Id.*

The Court of Appeals reasoned that many state legislatures revised the Rule because of its harsh effect and the often illogical possibilities it proposes. *Id.* at 496, 860 A.2d at 891. In 1960, the Maryland General Assembly passed an earlier version of what is now Section 11-103(a) of the Estates and Trusts Article. *Id.* at 497, 860 A.2d at 891. That statute reads as follows:

In applying the rule against perpetuities to an interest limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being when the period of the rule commences to run, the validity of the interest shall be determined on the basis of facts existing at the termination of one or more life estates or lives. In this section an interest which must terminate not later than the death of one or more persons is a “life estate” even though it may terminate at an earlier date.

Id.

The Court determined that the Maryland General Assembly had several models to choose from when drafting the modification to the Rule. The first approach is currently in effect in Pennsylvania. *Id.* at 498, 860 A.2d at 892. The Pennsylvania method “waits” until the end of the period allotted by the Rule to “see” if a future interest will vest. *Id.* at 497-498, 860 A.2d at 892.

The second approach originated in Massachusetts and is more limited than the Pennsylvania approach. *Id.* at 498, 860 A.2d at 892. The Massachusetts method “waits” only until the end of the life estate or life in being to “see” if a future interest will vest. *Id.* at 498, 860 A.2d at 892. The drafters of this method believed it to be more realistic than the common law Rule because it removes the absurd possibilities that could invalidate the vesting of the interest. *Id.*

The third approach has been adopted by the Kentucky, Vermont, and Washington legislatures. *Id.* at 499, 860 A.2d at 893. This method allows a court to look at the intention of the creator to determine if an interest is valid and whether to incorporate actual events, as opposed to possible events, in that consideration. *Id.* at 500, 860 A.2d at 893.

The fourth approach was developed more recently. In 1986, a Uniform Statutory Rule Against Perpetuities was proposed by the National Conference of Commissioners on Uniform State Laws. *Id.* at 501, 860 A.2d at 893. Under the uniform rule, a “future interest would be valid if either (1) it complies with the common law rule against perpetuities, or (2) it vests or terminates within ninety years after its creation.” *Id.* at 501, 860 A.2d at 893-94.

The Court found that the Maryland General Assembly adopted the Massachusetts approach. *Id.* at 502, 860 A.2d at 894. The General Assembly modified the strict common law Rule by “waiting” until the end of the life estate or life in being to “see” if the future interest will vest. *Id.* at 502, 860 A.2d at 894-95.

The Court of Appeals determined that Arundel’s argument that the statute saves the right of first refusal cannot stand because the right of first refusal is not sure to vest at the end of a particular life estate or life in being. *Id.* at 502, 860 A.2d at 895. The Maries could have sold their property and activated the right of first refusal at any time during their lives. *Id.* at 502-503, 860 A.2d at 895. The Court also reasoned that the right of first refusal is invalid under the Rule because the vesting could take place too remotely. *Id.* at 503, 860 A.2d at 895. It is possible that neither the Maries nor any of their heirs would ever actually sell their property. *Id.*

The Court of Appeals of Maryland held that a right of first refusal is void under the common law rule against perpetuities, as well as the Maryland General Assembly’s modification of that Rule. The Court has also declined the opportunity to further modify the Rule, deeming that to be the job of the Legislature. The Court noted that the Legislature has, on several occasions, declined to modify the Rule any

further. It is likely, therefore, that the Rule will not be modified by the legislature either and will remain in its current format indefinitely, thus rendering the right of first refusal void indefinitely as well.