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A Promise of Protection: The Right of First Refusal for Recreational Horse Owners (/full-blog/2015/4/23/a-promise-of-protection-the-right-of-first-refusal-for-recreational-horse-owners)

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(<http://www.flamborodowns.com/sales.html>)

By: Joseph Brown, Staff Member

One feature of many equine transactions is that the seller often conditions the sale of a horse on the buyer's promise to notify the seller when the buyer wishes to sell the horses and give the original seller a chance to repurchase the horse. This is known as the Right of First Refusal ("RFR"). RFR provisions can often be found in sophisticated equine transactions involving race and show horses.[1] (file:///C:/Users/Laken/Downloads/A%20Promise%20of%20Protection_Blog_Brown.docx#_ftn1)
In many cases, horses of high value are divided into shares and owned jointly by multiple parties. Shareholders in a horse use an RFR provision when jointly purchasing a horse so that if any shareholder receives an offer for their share, the other shareholders have a chance to purchase that shareholders stake in the horse.[2] (file:///C:/Users/Laken/Downloads/A%20Promise%20of%20Protection_Blog_Brown.docx#_ftn2)

RFRs are practical for less sophisticated sellers of lower-value recreational horses as well. The problem is that RFR agreements are frequently broken, and sellers are unable to buy back horses when buyers dispose of them.[3] (file:///C:/Users/Laken/Downloads/A%20Promise%20of%20Protection_Blog_Brown.docx#_ftn3) First, these agreements fail because, in many cases, they are unenforceable for lack of consideration. On many occasions, a horse owner will gift a horse to another for no return of value, and makes the recipient promise not to sell the horse without notice to the seller. In such a gratuitous transfer, it is very unlikely that a court will enforce an agreement giving the transferor a RFR, even if it is in writing. In order to be binding, a contract must involve a mutual exchange of consideration between the parties.[4] (file:///C:/Users/Laken/Downloads/A%20Promise%20of%20Protection_Blog_Brown.docx#_ftn4) Therefore, it is wise to always charge a nominal fee for the horse rather than gifting it outright. Charging \$5 or \$10 for the horse will render the agreement enforceable.

A second reason why RFR agreements fail is that they are not expressed in a written document. In many cases, transaction occurs with no written contract at all. Often, even if a transaction does feature a bill of sale, the RFR provision agreed upon orally without being expressly written in the contract. In this scenario, the Parol Evidence Rule may bar enforceability, notwithstanding other supplemental writings evidencing the RFR agreement.[5] (file:///C:/Users/Laken/Downloads/A%20Promise%20of%20Protection_Blog_Brown.docx#_ftn5) To avoid this, sellers should not only have a written contract, but should make the RFR express in the bill of sale. The following is an example of an RFR provision:

“The seller retains right of first refusal if, at any time in the life of the horse, the Buyer is unable or unwilling to keep the Horse. If the Buyer desires to sell or otherwise dispose of the Horse, the Buyer agrees to contact the Seller and allow the Seller the first opportunity to purchase or reclaim the Horse.”[6] (file:///C:/Users/Laken/Downloads/A%20Promise%20of%20Protection_Blog_Brown.docx#_ftn6)

These steps are essential to ensuring that a seller will have a valid and enforceable RFR in a horse, thus being able to repurchase the horse, or sue for damages if the horse is sold without notifying the original seller.

[1] (file:///C:/Users/Laken/Downloads/A%20Promise%20of%20Protection_Blog_Brown.docx#_ftnref 1) Brad Butler, *Realizing Value and Creating Protection: A Practical Approach to Monetizing the Value of A Racehorse While Retaining Control over Future Interests*, 7 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 93, 113-14 (2015).

[2] (file:///C:/Users/Laken/Downloads/A%20Promise%20of%20Protection_Blog_Brown.docx#_ftnref 2) Julie L. Fershtman, “Rights of First Refusal in Equine Contracts”, *Equine Law Blog*, March 6, 2012. Accessed at: <http://www.equinelawblog.com/Rights-of-First-Refusal-Equine-Contracts> (<http://www.equinelawblog.com/Rights-of-First-Refusal-Equine-Contracts>). ; *See also* Black’s Law Dictionary 1521 (10th ed. 2014) (defining right of “first refusal” as “[a] potential buyer’s contractual right to meet the terms of a third party’s higher offer”).

[3] (file:///C:/Users/Laken/Downloads/A%20Promise%20of%20Protection_Blog_Brown.docx#_ftnref 3) “Rights of First Refusals in Horse Sales”, *Equine Legal Solutions*. Accessed at: <http://www.equinelegalsolutions.com/firstrefusalrights.html> (<http://www.equinelegalsolutions.com/firstrefusalrights.html>).

[4] (file:///C:/Users/Laken/Downloads/A%20Promise%20of%20Protection_Blog_Brown.docx#_ftnref 4) *See* Restatement (Second) of Contracts § 71 (1981).

[5] (file:///C:/Users/Laken/Downloads/A%20Promise%20of%20Protection_Blog_Brown.docx#_ftnref 5) Uniform Commercial Code, § 2-202. Final Written Expression: Parol or Extrinsic Evidence.

[6]

(file:///C:/Users/Laken/Downloads/A%20Promise%20of%20Protection_Blog_Brown.docx#_ftnref

6) Fershman, *supra*, note 1

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