FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Specific Devises of Real Property

We have all seen sales of real property involving the estate of a decedent. Usually, the decedent's will names a certain beneficiary to be the Executor of the estate, and that Executor of the estate is certified in title and signs the deed conveying the property to the buyer(s). The proceeds from the sale of the property are then distributed to the beneficiaries of the estate according to the "residuary clause" in the will. If there is no will, a relative of the decedent may apply to be the Administrator of the estate, but if no one does so, the decedent's heirs at law (e.g. – the decedent's ancestors, descendants or collaterals) still have right to the proceeds from the sale of the property. In each of these cases, however, there is no specific devise of the real property to a particular person. Rather, the real property is part of the "residue" of the estate.

Where there is a specific devise of the real property, the Executor has no right to convey title to the property in question. The deed must and can be signed by the specific devisee(s) listed in the will only – or by another person granted a power of attorney by the specific devisee(s) listed in the will. (Please note that an estate Executor or Administrator, being a fiduciary, may not grant a power of attorney in order to convey title by deed, but a specific devisee can.)

The specific devisee's title only becomes effective at the time of the probating of the will, but once the will is in fact probated, title is considered to have vested previously in the specific devisee(s) at the time of the testator's death. If the will is not probated within two years from the time of death, however, the title of a specific devisee does not vest at the time of death. EPTL 3-3.8. The gift of the specific devise of the property is considered an offer that has not been formally "accepted." Nevertheless, that same specific devisee still has an interest in the proceeds from the sale of the property and can recover them from the beneficiaries under the will. *Corley v. McElmeel*, 149 N.Y. 226 (1896).

Where there has been a specific devise of property to two or more people, they are tenants in common unless the will makes them joint tenants

with the right if survivorship. EPTL 6-2.2. If specific devisees are married, they take title as tenants by the entirety. If the will states that specific devisees take title with no right of survivorship, however, such specific devisees take as tenants in common, even though they are married. *In re Gelder's Will*, 112 N.Y.S.2d 428 (Sur. Ct. Yates Co., 1952).

Recent Developments in the Mortgage Crisis

The bankruptcy of Countrywide Mortgage was averted recently when the mortgage lender was acquired by Bank of America. Nevertheless, a number of banks and investment houses have declared losses in the billions of dollars because of the Mortgage Crisis in recent days. Reports by marquis names have caused uncertainty with regard to the stock market causing the Dow Jones average to fall.

The Mortgage Crisis has hurt more than individual borrowers and the banks who lent to them, however. Even municipalities have felt the crunch. As The New York Times and "Marketplace" on NPR have reported, for example, certain school districts in Florida used mortgage funds as bank accounts on which to draw. When the mortgage funds went bad, these same school districts were left with no money and the option of paying either their teachers or their electric bills – but not both. Luckily for them, the utility companies involved were willing to wait for their money, but this example shows how the Mortgage Crisis extends far beyond Wall Street.

President Bush and several of the candidates for the Presidency are now proposing stimulus packages to avert a recession. The Fed continues to cut interest rates, making money cheaper to borrow, but it remains to be seen whether we will enter a recession or not.

New York State Tax Liens

New York State's Real Property Tax Law section 102(21) states that a tax lien is an unpaid tax, special ad valorem levy, special assessment or other charge imposed upon real property by a municipal corporation and which encumbers the property. A tax lien has priority over all other liens, even those previously recorded. RPTL section 1136(2)(d). For this reason, when we see a New York State tax lien, we try to clear it as soon as possible before closing, and if we cannot obtain a written release before closing, we do not take an escrow for the tax lien, since if some clerical error is made in paying it, it remains in the first position of all the liens and creditors.

Although municipalities used to file plenary foreclosure actions similar to mortgage foreclosure actions to collect unpaid taxes, they now commence *in rem* actions to collect them. Under RPTL section 1100, the municipality files a list of delinquent taxes which has the same legal effect as a *lis pendens* or Notice of Pendency. The list is indexed by the block and lot numbers on the tax map and is considered adequate legal notice of the tax lien. Then the municipality files a petition to foreclose the tax lien within 21 months after the date of the filing.

Of particular importance with regard to tax liens is the issue of notice and service of process. This issue has gone all the way to the U.S. Supreme Court. *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). Without getting into the finer points of service of process, it is enough to say that the plaintiff in a tax lien foreclosure action must at the very least mail the Notice of Petition to the debtor of taxes and to all others having an interest in the property. Such a mailing, together with the filing of the list of tax liens, provides debtors/defendants with sufficient notice in compliance with State and Federal due process considerations. Needless to say, if a tax lien foreclosure action arises, all parties involved should consult the applicable sections of the RPTL and applicable case law.
