FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title News

Use of Unrecorded Power of Appointment

The Supreme Court, Suffolk County, recently decided an interesting case concerning powers of appointment. Parents conveyed their home to their four children reserving a life estate. By a simultaneous but separate agreement with their children-grantees, the parents also reserved the right to divest and revest the remainder interest by written instrument (the "power of appointment"). The deed was recorded in due course, the power of appointment was not. After the father's death, the mother exercised the power of appointment three times by written instruments. In effect, she reduced the shares of two of her children to nominal amounts and gave shares to her grandchildren, favoring one of the four lines. The exercises of the power of appointment were not recorded either.

After the mother died, the family could not agree on the distribution. One side of the family claimed under the power of appointment, the other under the original recorded deed. On the question of the validity of the power of appointment, the court held that simultaneous instruments executed by the same parties and substantially over the same subject matter are to be read together to divine the true intent of the parties (i.e. as if one instrument).

As to the validity of the exercises of the power of appointment, the court held that the same formalities applicable to deeds applied. As such, the written instruments sufficed, notwithstanding the fact that they were never recorded. *McLaughlin v. Logan*, Index No. 09-6458 (Suffolk Cty. Sup. Ct., 6/23/10). This holding may at first seem troubling, but in reality, it adds nothing to the well-known risk posed by unrecorded no consideration deeds. There is no doubt that the result would have been different for a bona fide purchaser for value without notice of the power of appointment.

Water Rights

In a decision concerning the rights of owners fronting on the ocean, the U.S. Supreme Court delineated the applicable common law. Although the decision was based on Florida law, the points of common law are largely applicable to New York, as well. Private property extends up to the high-tide water line; i.e. the mean line of the high-tide. Lands under water (i.e. beyond the high-tide) are owned by the State. Beach front owners have four special water rights: (a) the right to access water; (b) the right to use the water for certain purposes; (c) the right to have an unobstructed view of the water; and (d) the right to accretions. Accretions occur when the high-tide line shifts toward the water imperceptibly over the

years. The uncovered land becomes part of the owner's title. To contrast, a sudden perceptible change in the high-tide line (an "avulsion") does not alter the owner's title. The property line continues to be the prior high-tide line. For example, Battery Park City was land under water that was filled-in with dirt and rocks from large construction projects in Manhattan. Since it was land that became "dry" by a sudden perceptible change, the land belongs to the State of New York and not to the City or its residents. To this day, BPC is managed by a state agency and purchasers of units buy only leaseholds and not fee title.

In the instant case, the Florida legislature had passed a statute that allowed municipalities to fill-in and develop under water state-owned property. Beach front owners brought suit alleging that they had been deprived of their private property right to accretions without compensation or due process of law. There was no question that the municipalities could have taken those rights by eminent domain, but then a specific procedure would have had to be followed.

The U.S. Supreme Court decided in favor of the municipalities. It began by reasoning that the right to accretions is always subject to avulsion. In other words, once a "sudden" perceptible change occurs, the previous high-tide line becomes the fixed line between the owner's land and the newly uncovered land. As the owner is no longer abutting water, there can be no more accretions. The Court then moved on to consider whether the acts (or future acts) of the municipality constitute an avulsion. After reviewing the Florida case law, the Court found no reason why an avulsion could not occur artificially; i.e. there is no requirement under Florida law (and probably the same would apply to New York) that the sudden change in the high-tide line occur only naturally to constitute an avulsion.
