



## Who Owns It? Title & Ownership of Real Estate in Virginia

- I. Multiple Owners, Types of Tenancy
  - A. Tenants in common
    1. This is the default form of ownership. No special language needed in the deed. Co-owners may take in unequal shares.
    2. All co-owners (i.e., co-tenants) must sign to convey or encumber full fee simple title.
    3. Any individual owner may convey his interest without the agreement of the others.
    4. The rules applicable to the conveyance or encumbrance of individual interests are the same that apply to full fee simple owners, except at to the percentage of ownership conveyed.
    5. Ownership is a percentage of the whole. All owners are equally allowed access, unless an agreement otherwise between the co-owners.
    6. Listing agreement/contract of sale must have signature of all owners to convey a fee simple interest. Often all owners are not determined until title search is completed. Lenders may request contact be amended to add signatures of additional owners.
    7. If one owner dies, his will or the intestate laws control who inherits his interest.
    8. When multiple people inherit real estate this is the form of title, unless the will states otherwise.
    9. Judgments of any owner attach to his interest in the real estate. If the amount of the judgment exceeds the amount of the ownership interest a release as to the ownership interest in the real estate to be insured.
    10. Judgment creditors and co-owners may force partition of the real estate.
  - B. Joint Tenants
    1. Any two or more co-owners where deed makes it clear survivorship is intended.
    2. All co-owners must sign to convey or encumber full fee simple title.
    3. Individual joint tenant may convey his interest, but it terminates the joint tenancy, converting it to tenants in common as to the new owner.
    4. The death of a joint tenant vests his interest in the surviving tenants in equal shares.
    5. Judgments against any one owner attaches to his interest in the real estate.
    6. Judgment creditors and co-owners may force partition of the real estate to obtain their economic interest.
  - C. Tenants by the Entirety
    1. Husband and wife are owners with a clear statement in the deed conveying to them that they take title as “tenants by the entirety”  
NOTE: Historically the words needed were “tenants by the entirety with right of survivorship as at common law,”
    2. Both husband and wife must sign to convey or encumber with a third party. A judgment against either one of them does not attach to the real estate during the ownership as tenants by the entirety.

3. Both husband and wife must sign to convey to each other. If one conveyed to another LOOK AT THE DEED to determine if tenancy by the entirety is severed.
4. Death of either spouse automatically vests title in the survivor. If a judgment exists against the deceased person, it never attaches to the real estate. If a judgment exists against the surviving spouse, the judgment attaches upon death of the other spouse.
5. Final divorce decree terminates the tenancy, converting it to tenants in common. Judgments against either spouse individually attach upon granting of the final divorce decree.

## II. Death of an Owner

### A. Overview

1. Real estate owned by someone at death will pass by terms of the deed if survivorship is stated in the deed, i.e., tenants by the entirety or joint tenancy. If survivorship is not addressed, title passes by terms of a probated will, or, if no will, by intestate laws which vest title in the heirs of the deceased owner at the moment of death. A deed to the person(s) inheriting is not required in Virginia.
2. Regardless of where the will is probated (admitted to record for estate purposes, usually locality of residence at the time of death), it should be recorded in the City or County in which the real estate is located to pass title to one who is named in the will.
3. No judicial proceedings are necessary in Virginia for heirs to inherit real estate if no will is probated. However, a list of heirs is generally required to be recorded by title insurance companies.

### B. Passage of Title by Will

1. A probated will may leave (devise) real estate to a specific person (devisee). Two problems exist: identifying both the real estate and the devisee with certainty. The rule may be stated as “A specific devise is the passage of title to real estate which is reasonably described but identified with certainty to an individual or entity who may also be reasonably described but identified with certainty.”

Example: “I leave my house in Burgess to my children.” If there is only one house owned in Burgess then it is reasonably described and can be identified with certainty. The same is true of “my children.”

However, if there is no “house” in Burgess, but only an unimproved lot, it would not pass as part of this specific devise.

2. A specific devise may create any tenancy which may be created by a deed .
3. Rather than a specific devise, real estate may be left by a residuary clause in the will. A residuary clause involves the passage of title to ALL tangible, intangible and real property not otherwise specifically left to someone. No description of the property is required if all remaining property is included in the language, such as “All the rest, residue, and remainder of my estate I give, bequeath and devise to my children who survive me, in equal shares.” Judgments of the beneficiaries would attach to the real estate.
4. A probated will may leave real estate to the Executor of the estate. The will may direct (command) the Executor to sell the real estate. Title is vested in the Executor. The proceeds would then be distributed among the beneficiaries, as the will directs. In this case the Executor would be the proper party to sign a listing agreement/contract.

5. Generally a will contains language granting an Executor fiduciary powers. Sometimes the Executor is given discretionary power to sell the real estate by specific language, or just given the general fiduciary powers of Section 64.1-57 of the Code of Virginia. Such power does not vest title in the executor, but allows the executor to sign all documents relating to the sale of the real estate and accepting the proceeds from the sale. Judgments of the beneficiaries would attach to the real estate.
6. Best practice: Real estate agents should have beneficiaries and executor sign the listing agreement and contract. The title company and attorney can decide who needs to sign the deed once the title search has been done.

C. Intestate Succession (no will probated for a decedent)

1. Virginia statutory and case law make it clear that title passes to the heirs at the moment of death. It occurs by operation of law without the necessity of a deed.
2. Ways inheriting under the intestate laws arise:
  - a. decedent never had a will
  - b. decedent executed a will which was never probated (due to beneficiaries being the same in the will and under the intestate laws) or the will was lost
  - c. decedent's will was not "self-proving" and witness could not be located at the time probate was necessary
  - d. decedent's will was lacking a residuary clause, and the will did not address some real estate owned by the decedent at the time of death.

3. Problem with Intestate Succession = **who are the heirs?**

- a. Heirs are determined by blood line or adoptive relationships. Families have convenient memories and often forget about Uncle Joe who left home in 1969 and has never been heard from since.
- b. There is NO legal requirement of any notice to heirs, nor is there any non-judicial process to determine the identity of heirs with legal certainty.
- c. The Virginia Code provides two helpful, but not conclusive, documents bearing on the identity of heirs.
  - 1) Section 64.1-134 requires that the personal representative of the estate (may be the Executor) file a list of heirs with the last know address for each. This is required simultaneously with the probate of a will, if one exists.
  - 2) Section 64.1-135 allows anyone having an interest in the estate to record an affidavit of heirs with the same information.
  - 3) While both documents may be helpful, neither is legal proof as to those listed being the only heirs (as defined in the Code) of the decedent. If the name of an heir is negligently, unknowingly, intentionally, or fraudulently omitted, the interest of the one whose name is omitted is not affected, i.e., if someone is left off the list they are still an heir and still have an ownership interest.
- d. Title insurance underwriters generally require affidavits as to heirs from two disinterested parties, to provide evidence of due diligence.
- e. See attached chart of Descent and Distribution.
- f.

#### D. Contracts of Sale Signed, but not Performed, Prior to the Death of an Owner

1. When an owner signs a contract of sale, then dies prior to settlement, Va. Code Section 64.1-148 provides that the deed and related documents be signed by the personal representative of the decedent contract seller, whether this is the executor of a will or administrator of the estate. A copy of the original contract of sale must be recorded with the deed as an exhibit.
2. Such transactions, even though completed after death, are not part of the estate, in that they are not subject to the terms of the will or objections of the heirs. Judgments of the heirs do not attach. This type of real estate transaction is considered a personal property issue, rather than a real property issue.

### III. Special Issues

#### A. Non-Owning Spouse Issues

1. Dower and Curtesy were abolished as of January 1, 1991. Historically dower and curtesy were statutory provisions to protect non-owning spouses from being disposed when spouse owning the family residence passed away.
2. Augmented estate rules replaced dower and curtesy (Va. Code 64.1-16 et seq). Non-owning spouse generally cannot be required to sign a deed, as they have no interest in the real estate itself, just the value of the real estate.
3. Special Circumstances:
  - a. Some attorneys require non-owning spouses to sign deeds, etc. to release any interest they may have under augmented estate rules.
    - i. Sale of property acquired by the owning spouse through inheritance, IF the property is held and possessed as separate property (not maintained with marital assets), is not subject to augmented estate rules. Non-owning spouse has no interest in the real estate.
  - b. With sale of real estate to a bona fide purchaser (BFP) as defined in Code Section 64.1-1:01 the non-owning spouse has no interest in it.
  - c. These matters may need legal counsel guidance.
4. Sole separate equitable estate was abolished as of January 1, 1991 but you will still find attorneys using that language in deeds. It has no legal effect as that form of ownership is abolished.

#### B. Life Estates

1. Life estates occur when Grantor either reserves a right to remain in the property until their death upon transfer of the ownership to another, or when property is purchased with one of the purchasers taking title as a life estate.
2. Designated person may reside in the house until their death. They have a right of possession. They can convey their life interest, but the interest ceases to exist when they die. The remaindermen are responsible for capital improvements (new roof, replace rotted deck, etc.) and the life tenant is responsible for ordinary maintenance unless the deed or will says otherwise.
3. Life tenant's interest can be severed by partition. Actuarial tables can value the life expectancy of the life tenant.
4. Life tenant MUST sign the listing agreement and the deed unless there is a court order authorizing a special commissioner to sign on his or her behalf.

C. Shared appreciation; rights of first refusal

1. Often this aspect of ownership will not surface until a title search is done. In some jurisdictions in return for downpayment assistance, or special loan considerations, a local Housing Development Authority (ex: Fairfax) will require the owners to remain as owners for a specified time, i.e., 5 years, or the owners will need to have the permission of the HDA to sell the real estate. As part of the sale, the HDA may be entitled to a portion of the appreciated value of the property. Whether the HDA needs to sign the deed, etc. depends on the terms of the deed vesting title in the owner.
2. An alternative to shared appreciation may be a right of first refusal, where the HDA must have the right to purchase the real estate prior to a third party purchasing the property.

IV. Trusts

A. All trusts consist of several basic elements:

1. Trust is created by written agreement/instrument by a trustor (creator, grantor, settlor).
2. The trust names a trustee who is the legal owners of trust property and may be the manager or have control of the property.
3. Beneficiaries (one or more) have an interest in the trust, but not an ownership interest. They get the benefit of the trust (income, profit, etc.) arising from trust property. The trust may be set up so the beneficiary's interest is immune from creditors up to a statutory dollar amount.
4. Assets of the trust, which is called trust property, may be real estate or personal property, tangible or intangible.

B. Types of trusts

Samples of trust titles you often hear. The list is not exhaustive

1. inter vivos trust – “during life” trust
2. testamentary trust – set up by a will
3. charitable trust – for charitable purposes
4. employee benefit trust – for retirement accounts/benefit programs
5. educations trust – for educational purposes
6. spendthrift trust – to limit access to trust assets by a beneficiary or a beneficiary's creditors
7. real estate trust – to transfer title to real estate in special circumstances

C. Basic rules regarding sale of real estate held in trust

1. The trustee must sign any documents which binds the trust or conveys its property. If the trustee is deceased, or cannot or will not act, a new trustee may be substituted either by terms of the trust agreement, or through circuit court order.
2. Title to real estate must be vested in the name of the trustee or, since July 1, 2007, in the name of the trust.
3. A trustee of a trust has NO powers UNLESS found in the deed conveying the real estate to the trustee, or in the terms of the written trust agreement, or ordered by the court.

4. There are no statutory or case law requirements that a trust agreement be recorded, however title underwriters may require the trust agreement be recorded to supply the proper chain of title.

#### D. Deeds of Trust and Foreclosure Sales

1. Deeds of Trust are a specialized type of trust, the one with which we in title insurance are most familiar. Foreclosure sales have become a mainstay of real estate transactions in the last few years, requiring much greater knowledge of how deeds of trust work.
2. Of primary concern is making sure the trustee met all of the requirements, both those stated in the deed of trust and the statutory requirements, to have a valid foreclosure.
3. Of equal concern is making sure that the entity (Bank) that purchased at foreclosure is the same entity that is selling the real estate. If the Bank-owner has designated a fiduciary to act on its behalf, make sure the entity is the correct entity, and that the person signing has authority to sign. You will not be able to obtain a copy of the Pooling Trust agreements.

### V. Entities

#### A. Corporations –

1. Corporations are composed of shareholders, a Board of Directors, officers and employees.
  - a. In closely held businesses shareholders (owners) may also serve as a director and officer.
  - b. It is of significant importance that documents be signed in the proper capacity.
  - c. The Board of Directors authorize the sale of real estate by means of a corporate resolution which details acceptable terms.
  - d. Officers carry out the authorization of the Board.
2. In most circumstances having the listing agreement/contract, deed and related documents signed by the President or a Vice President is sufficient to show authority. The Board may authorize others to sign on behalf of the corporation, but you would need a copy of the resolution.
3. Often the Secretary of the corporation will need to send a copy of the resolution showing the sale is authorized and who may sign.
4. If a corporation is dissolved and still owns real estate, who needs to sign depends on whether or not the dissolution was voluntary or not.
  - a. If voluntary, and the time since dissolution is less than 5 years, then the corporation may be reinstated by filing proper papers and paying applicable fees to the State Corporation Commission.

After 5 years a court order would be needed to convey real estate.
  - b. If an involuntary dissolution, the Virginia Code provides that the members of the Board of Directors at the time of dissolution become trustees in liquidation with power to dispose of the assets of the company. No time limit is mandated. All members must sign (the deed) in this circumstance.

#### B. Partnerships

1. Defined as “two or more persons carrying on business for profit.”

2. General partnerships are the default form of partnership, i.e., if no documents set this up as a limited partnership, it's a general partnership.
  - a. All partners need to sign with general partnerships unless there is a written partnership agreement that states otherwise
  - b. The act of any one general partner binds the partnership but that act must be in furtherance of the business of the partnership.
  - c. The same is true when winding up the general partnership.

C. **Limited partnerships** have one or more general partner, and one or more limited partners.

1. Only general partners have power to act on behalf of the partnership.
2. Written partnership agreement may provide guidance as to authority of the general partner(s) to act with the purchase or sale of real estate.
3. Limited partners have no management authority nor power to dispose of partnership property.
4. General partners have statutory authority to wind up the affairs of the partnership upon voluntary dissolution. General partners by statute become trustees in liquidation upon involuntary dissolution resulting from failure to pay annual fees or file annual reports with the State Corporation Commission

D. **Limited Liability Companies (LLC)**

1. LLCs are the current ultimate, convenient and practical business entity.
2. An LLC is owned by members and managed by managers. An LLC may use terminology of a corporation as to officers and employees.
3. Conveyance of real estate owned by an LLC must be done by all members, unless there is a written operating agreement that sets up other terms. One manager may be appointed to sign contracts, deeds, etc.
4. Any member, acting alone, may bind the LLC in the course of furthering the business of the LLC.
5. Upon dissolution, whether voluntary or not, members become trustees in liquidation to dispose of the assets of the LLC