I. The Form (Appendix A)

Every deed and corrected or amended deed may be made in the following form, or to the same effect: "This deed, made the ....... day of ........, in the year .........., between (here insert names of parties as grantors or grantees), witnesseth: that in consideration of (here state the consideration, nominal or actual), the said ....... does (or do) grant (or grant and convey) unto the said ........, all (here describe the property or interest therein to be conveyed, including the name of the city or county in which the property is located, and insert covenants or any other provisions). Witness the following signature (or signatures)."

B. The date of a deed may not be the date signed, nor the date of settlement, but the date drafted. Some deeds say “This deed, effective as of (date)” or “This deed, made as of (date).” Mostly it’s another means of identifying the document. Often the date is blank. This is not a defect. Looking at the date the deed was notarized is a better way to determine an effective date. Clerks often refuse to record deeds that were notarized prior to the date they are dated, which gave rise to the “effective as of (date)” language.

C. Consideration in a deed may be the actual amount paid, a nominal amount, something like “love and affection” of the parties for each other (deed of gift), or some other language such as “in compliance with our property settlement agreement.” Most deeds state “Ten Dollars ($10.00) and other good and valuable consideration” in the body of the deed, which causes great concern for those moving to Virginia from other states. Consideration may not be omitted.

II. Grantor vs. Grantee issues – Who Owns It (Appendix B - the basics)
The Grantors (current owners of the real estate) and Grantees (those taking title in the deed) must be identified with reasonable certainty. A person can take title in any name they choose. They have only to state the name they want as grantee on the deed.
(Remember “the person formerly known as Prince.”) BUT conveying title out, once it’s in the name of a specific grantee, can be a nightmare.

A notary is responsible for making sure the person who signs the deed is the person/individual named in the deed, but the settlement agent, title agent or seller’s attorney must provide the evidence the seller is the person or entity who took title. The number of issues that arise with regard to Grantors often seems to be endless.

A. Name changed
A change in name most frequently occurs when someone, usually the wife, marries or divorces. The surname changes. In a divorce a court order restores a wife to a former name, but in a marriage a driver’s license with a different name may be the only evidence provided. In those cases you see “also known as” (a/k/a) or “formerly known as” (f/k/a) showing the name in the prior deed as well as the name currently used. This type of change can be documented.

More of a problem is when there was a clerical error in the prior deed and the Grantee’s name is misspelled. Since Grantees do not sign the deed they may not have looked at it carefully and may not be aware of the error until they are ready to sell or refinance. Depending on the error, it may be wise to contact your underwriter for approval to proceed. Or you may make the determination it is clearly a clerical error, and proceed with “(erroneously know as --- in the prior deed).”

B. Living Trusts, a/k/a inter vivos trusts
Currently living trusts are a popular vehicle for titling real estate. If a real property owner has an estate worth more than $5,000,000 the owner should talk to a tax planning specialist and consider a living trust. But most people who put their property into a living trust do not, in my opinion, need to do so, and do not take care that family members, or someone who might survive them, know where to find the trust agreement.

One of the advantages of a trust is its privacy. Unfortunately significant problems arise when mom and dad put real estate into the “Mom and Dad Living Trust” and no trust can be found upon their death. Or someone puts real estate into a living trust, then passes away, and the heirs say “no trust was set up,” then there is no way to identify beneficiaries to have a new trustee appointed. (In one case an attorney acknowledged putting property into the trust, drafting the trust then never having the settlor sign the documents prior to the “owner” dying 13 years later.) In these cases often a court order may be needed to quiet title. The deed itself, as between the parties, is good. But when the Grantee never existed having the court decide ownership is prudent.
When underwriting title the issue of successor trustees also arises. If a Certification of Trust is recorded third parties may rely upon the recitals in it as to the power of the successor trustee to act.

A related issue is whether all trustees must sign, or whether any one trustee may act independent of the others to sell, gift or mortgage real estate.

Making sure the trustees sign as trustees when conveying interest in the property during the lifetime of the trust is a significant title insurance issue as well. The Virginia Supreme Court has made it clear, when individuals put property in their names as trustees of a trust, their signature as individuals has no legal effect on transferring title. They must convey as trustees.

C. **Entity issues**
Virginia prides itself on being business friendly. Virginia’s statutes and regulations make it easy to form and maintain business entities in Virginia. But when deeding property in an entity name, it is critical for the Grantee to make sure (1) the entity has actually been formed, and (2) the name is correct on the deed. Often Grantees are careless or sloppy when identifying the correct entity name. As was stated above, the title and settlement agent is only required to follow the written instructions of the parties. If the principals in the entity give the wrong name, the title/settlement agent has no liability. BUT when the entity needs to convey major problems arise that can be avoided if the title/settlement agent takes the time to determine the Grantee entity exists.

Principals in a business are excited. They are busy. They are purchasing real estate to get their business moving/growing/expanding. They may fail to pay attention to the details. They meant to set up the corporation/limited liability company, but failed to do so. No entity was formed. Sometimes it’s been 10 years or more that the “business” has been operational, without ever being properly formed. When conveying, a court order may be needed, or at least a deed of correction and confirmation from the original grantor, if the grantor is willing to assist.

A more frequent issue is that the entity was set up, but the name as Grantee does not match the formal name of the entity, or the entity type is misnamed, i.e., it should be “LLC” instead of “Inc.” Again, the owners are being very relaxed in dealing with their company. Unfortunately, regardless of Virginia law requiring the State Corporation Commission not to allow names that are “confusingly similar,” confusingly similar, i.e., identical, names show up for LLCs, corporations, limited partnerships, with different owners.
D. Minors
Parents and grandparents love their children. Unfortunately they show it by giving them real estate, either during their life or in a will. It is possible for real estate to be titled in the name of a minor, but the minor cannot do anything with it until they reach the age of majority, currently age 18. If the real estate is not set up in a trust for the minor, a conservator must be appointed to handle the minor’s business affairs. A court order must specify what power the conservator has over real estate owned by the minor.

E. Fiduciaries as Owners /Estates /Trustees
Fiduciary is a broad term covering, in the context of deeds, any time one person/entity holds title for another person/entity. When someone dies owning real estate with no language in the deed as to survivorship, the real estate is inherited at the moment of death either by those who are named in the Virginia Code as heirs, or by the devisees named in the will of the decedent. The personal representative of the estate (a generic term encompassing Executors as well as others) may, or may not, have the power to sell, mortgage or convey the real estate owned by the decedent at his death. The issue with regard to wills is “who needs to sign the deed?” If there is no will, the personal representative has no power to convey real estate unless he petitions the court for the power. Recording a Real Estate Affidavit is the most efficient way to deal with providing a paper trail in the land records for the transfer of title.

If a will exists and was probated an Executor may have qualified. If so, the Executor may have the power to convey real estate. Often title companies want both the Executor and devisees to sign a deed. It is a “belt and suspenders” approach.

Trustees, whether of a living trust or in bankruptcy or in foreclosure, are fiduciaries that convey real estate subject to the document(s) and statutes applicable to the trust situation.

F. Power of Attorney
The Uniform Power of Attorney Act is very broad and authorized agents to act for the principal. The agent does not need to be identified as a grantor in the first paragraph of a deed “Jane Doe, agent for John Doe, Grantor” but must be identified as such in the signature line and notary clause. A Power of Attorney Agent Certification must be recorded when the agent is selling. This is the UPOAA version of the old “alive and well” affidavit which is no longer used.
III. **Warranties: General Warranty, Special Warranty and Quitclaim Deeds** (Appendix C)
The majority of deeds in the land records are general warranty deeds, as the majority of real estate contracts call for a general warranty deed from the seller. A general warranty deed warrants title forever.

Sellers in a fiduciary capacity typically provide a special warranty deed, regardless of the contract requirements, since they hold the real estate in a fiduciary capacity. They only want to warrant title during the time they have had legal possession of it.

Quitclaim deeds have a specific place and purpose in the transfer of title, but should not be used when the one signing the deed was a Grantee on the prior deed. Old Republic is not inclined to insure with a quitclaim deed from a seller, as no warranties are being made and the deed says, in essence, “I don’t know if I have any ownership interest or not, but if I do I’m conveying it to you.” Quitclaim deeds are properly used when prior deeds need to be corrected because they did not show a boundary line adjustment, or the additional of a small parcel of land, or when someone may have an ownership interest due to inheritance.

Grantors need to take care when conveying by special warranty or quitclaim, as such a conveyance may eliminate their title insurance coverage. Title insurance deals with issues that arose prior to ownership by the insured. If the insured is only warranting title since his time of ownership (SW) or makes no warranties at all (QC) title insurance may not protect him.

IV. **Survivorship language** (Appendix D)
When multiple owners take title, survivorship may be specified in the deed. If so, it controls and takes priority over wills, intestate laws or other considerations.

V. **Legal description issues**
Deeds must describe the real estate with enough clarity that any person could determine where the real estate is located. Older deeds often identify property as being bound one each side by other property owners and a road. Such a description can be insured, but exception must be taken to “Exact location of boundary lines and volume of land.” The owner has insurance that he owns something, but no insurance for the exact location of the boundary lines, or the amount of acreage owned.

A. When a metes and bounds description is used, the title examiner/underwriter must make sure the courses and distances actually close. Often they do not. A line in a prior deed may have been omitted from the current deed. If no closure occurs a survey may be needed to supply an insurable legal description.

B. If a survey is referenced in the legal description, make sure it is recorded where the deed says it is recorded. If it is not, and it cannot be located as being recorded somewhere else, then you do not have an insurable legal description. Supplying a
new deed will not work. You must go back in the chain to where the error occurred. If the referenced deed cannot be located, a deed of correction from the prior grantor will be needed.

C. Correcting errors

1. If a legal description has an obvious clerical error, for example, it say Lot 115, when there were only 25 lots in the subdivision, it may be possible to correct the problem with parenthetical language: "Lot 15 (erroneously shown as Lot 115 in the prior deed)." The parenthetical language should not be shown in subsequent deeds, but often is. Care must be taken to make sure that lot 15 was to be conveyed and not lot 11. Make sure the prior grantor only owned lot 15 and did not own lot 11 or any other lots in the subdivision at the time of transfer. No corrected deed is recorded when this method is used.

2. From the 1980s – 2000s settlement agents frequently would correct legal description, and other, errors by correcting the mistake, then re-recording it with a statement “Re-recorded to correct an error in the legal description.” These documents may or may not have been signed by a notary, but no notary function was performed. This method was not a proper way to correct problems, just a quick and easy way to try to do it.

An existing deed can be corrected and re-recorded, but the Grantors must resign and have their new signature notarized.

3. An additional manner to correct erroneous lot numbers is to use the scriveners error statute effective July 1, 2014. (Va. Code § 55-109.2.) The requirements are very specific and technical, but give an alternative when the prior Grantor cannot be located.

D. Access easements

The legal description may include an access easement. Once an easement appurtenant is granted, it is not legally necessary to include the language in subsequent deeds, but is a courtesy to do so. The appurtenant easement runs with the land and remains, whether granted in subsequent deeds or not. But with shortened title searches, and access being a major issue, it’s convenient when the access language is included.

A. Function of a Notary. To be recorded a deed must be notarized. An unnotarized deed may be effective between the grantor and the grantee, but would have no effect on third parties. The notary’s function is to make sure the person signing the deed is the person they claim to be, to be shown proof of identity satisfactory for the notary to notarize the signature.

B. Date. The date in the notary clause is the day the document was signed, and is critical in some documents, such as a substitution of trustee. This date is frequently more significant than the date on the first page of the deed.


D. Notary saving statute. (Va. Code § 55-106.2 http://law.lis.virginia.gov/vacode/title55/chapter6/section55-106.2 ) “A writing that is not properly notarized in accordance with the laws of the Commonwealth shall not invalidate the underlying document, however, any such writing shall not be in proper form for recordation. All writings admitted to record shall be presumed to be in proper form for recording after having been recorded, and conclusively presumed to be in proper form for recording after having been recorded for a period of three years, except in cases of fraud.”

VII. Special Types of Deeds and Circumstances

A. Deed of Correction /Confirmation: This solution is the most straightforward—just have the original parties to the incorrect deed sign a new deed to correct the old. Unfortunately, finding the original parties and securing their cooperation may prove impractical

B. Deed of Gift and Non-Owning Spouse Issues
1. By definition, a deed of gift is one offered for no consideration. It can be a General Warranty Deed, Special Warranty Deed, or Quitclaim Deed.

2. A deed of gift should state the marital status of the Grantor, and if married, the non-owning spouse should sign as an additional grantor; otherwise, concerns about augmented estate interests may be raised.

3. 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.

4. 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.

5. Special Circumstances:
   a) Some attorneys require non-owning spouses to sign deeds, etc. to release any interest they may have under augmented estate rules.
   b) 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.
   c) 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.
   d) These matters may need legal counsel guidance.

C. Deed of Trust

As we all know a deed of trust is the mortgage instrument used in Virginia. (Va. Code Sec 55-58 http://law.lis.virginia.gov/vacode/title55/chapter4/section55-58 )

It is released by a Certificate of Satisfaction (Va Code Sec 55-66.4 http://law.lis.virginia.gov/vacode/title55/chapter4/section55-66.4 ) or a Deed of Release. But, since 2006, the release may be rescinded if erroneously released (Va Code Sec 55-66.10 http://law.lis.virginia.gov/vacode/title55/chapter4/section55-66.10 )

D. Trustee’s Deed: Living Trust

The Uniform Trust Code was adopted in Virginia in 2005. Currently ownership of real property by a trust must be held by trustees for the trust.
E. Trustee’s Deed: Foreclosure (Appendix E)

F. Deeds in Lieu (of Foreclosure)

Creditors have the option of accepting title to real estate instead of going through foreclosure. Advantages exist with reducing cost and time. Estoppel certificates are signed by the debtors, the deed in lieu makes it clear the debt is not merged with ownership by the creditor, and rescission is possible if title problems subsequent are discovered.

G. Assumption Deeds

1. Seller’s loan balance is not paid off but assumed by purchaser
2. Very popular in high interest rate market
3. Loan balance and Deed Book, Page Number of seller’s DOT is recited in Deed.
4. Requires lender approval
5. Yet another reason why it is important to read the deed!

H. Deeds involving Life Estates

1. 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. Designed 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.
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 deed unless there is a court order authorizing a special commissioner to sign on his or her behalf

I. Deeds out of an Estate—who signs?
1. Contracts of Sale Signed, but not Performed, Prior to the Death of an Owner

a) When an owner signs a contract of sale, then dies prior to settlement, 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.

b) 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.

2. Testate Succession

a) Often the question arises, “Who signs the deed when there is a will? The Executor? The devisees? Both?” Certainly, you can’t go wrong with both. However, that may not be practical. A couple of facts determine the answer to this question.

b) A probated will may leave (devise) real estate to a specific person (devisee). A specific devise is the passage of title to a particular parcel(s) which may be reasonable described but identified with certainty to an individual or individuals who may also be reasonably described but identified with certainty.

c) 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.”

d) A specific devise may create any tenancy which may be created by a deed.

e) 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.”
f) A probated will may leave real estate to the Executor of the estate. The will may direct (command) the Executor to sell. 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.

g) Generally a will contains language with the powers of an Executor. 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.

h) Best practice: Have beneficiaries and executor sign the listing agreement / contract. The title company and attorney can decide who needs to sign the deed.

3. Intestate Succession

a) 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.

b) Ways inheriting under the intestate laws arise:

(1) decedent never had a will

(2) 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

(3) decedent’s will was not “self-proving” and witness could not be located at the time probate was necessary

(4) 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.

c) Problem with Intestate Succession = who are the heirs?

(1) 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.

(2) 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.
The Virginia Code provides two helpful, but not conclusive, documents bearing on the identifying heirs.

(a) § 64.1-134 requires that the personal representative of the estate (may be the Executor) file a list of heirs with the last known address for each. This is required simultaneously with the probate of a will, if one exists.

(b) § 64.1-135 allows anyone having an interest in the estate to record an affidavit of heirs with the same information.

(c) 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) List of heirs is frequently wrong because it is frequently based on the filer’s perception of who is family. Consult the course of descents! This is critical because it affect who signs the deed.

(f) Do not confuse the List of Heirs filed in an intestate matter with the List of Heirs in a testate matter. The former identifies heirs (and who signs the deed); the latter is merely necessary to probate the will.

d) Consult the course of descents sets out who is in line to inherit from the decedent (Va. Code § 64.2-200)

VIII. Technical Requirements to get a deed recorded (Appendix F) 55-106

A. Cover sheets

B. Preparer
C. Return to
D. Address of the grantee – tax purpose
E. Font, margins, color of paper/signature ink/font
F. Rejection by the Clerk’s office

IX. Correcting errors

A. Reformation
B. Deed of correction / confirmation

X. Special Circumstances

A. After acquired title case law
   http://www.courts.state.va.us/opinions/opnscvwp/1140978.pdf
   The Virginia Supreme Court determined that after acquired title doctrine ONLY applies between the parties to the deed (including deed of trust). It has no effect on third parties. For title insurance purposes, we now must correct all times documents are recorded out of order.

B. Tenancy by the entirety with signature of only one spouse
   http://www.courts.state.va.us/opinions/opnscvwp/1141277.pdf
   The Virginia Supreme Court determined that when a husband and wife own title as tenants by the entirety, and one spouse conveys to the other, without both joining in (i.e., signing it), the conveyance is valid. Many “issues” in the chain of title are “cured” with this ruling.

C. Recording deed after the death of the grantor
1. When an owner signs a contract of sale, then dies prior to settlement, Section 64.2-523 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 legible 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.

D. Transfer On Death (TOD) deeds (Va. Code § 64.2-620 et.seq.)
1. Owner/transferor keeps full control of the real estate. No life estate interest. No joint tenancy. No need to inform anyone they’ve a designated beneficiary. No need to worry if the correct will is located after death of the owner. The TOD deed is recorded, a matter of public record, but has no effect on the real estate until the owner dies.

2. A TOD deed is revocable, even if it is silent on the matter, and even if it says that it is not revocable. (Va. Code § 64.2-625).

3. The document must meet all the requirements of a deed in order to be recorded, except that there does not need to be any delivery to the beneficiary nor any consideration.

4. The TOD deed must be recorded prior to the transferor’s death.

5. If property is held as tenants by the entirety or as joint tenants with a right of survivorship, all co-tenants must sign for the TOD deed to be effective. This does not apply to property held by multiple parties as tenant in common.

6. Revocation of a TOD deed may be by: (Va. Code § 64.2-630)
   a) An inter vivos transfer of the property, i.e. the transferor (grantor) sells it or gives it to someone else by deed recorded before he/she dies. NOTE: if the owner has recorded a TOD deed, the owner then contracts to sell the property to a third party, but dies before the deed can be recorded Va. Code § 64.2-523 http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+64.2-523 prevails, converting the asset to personalty.
   b) A deed of revocation.
   c) A TOD name naming a subsequent beneficiary. NOTE: What if inconsistent TOD deeds are notarized the same day? Normally Virginia is a “race/notice” state, so we rush to get documents recorded. In this situation you’d want to be the latest/last deed recorded. The last deed recorded prior to death controls transfer of title.
   d) Except for item (a) above, any revocation document must be recorded prior to the death of the transferor.

7. Effect of the transfer on death deed during the transferor’s life: (Va. Code § 64.2-631)
   a) A TOD deed is only effective after the death of the transferor.
   b) A TOD deed has no effect on the right of the transferor to sell, gift or encumber the real estate, i.e., have a deed of trust recorded.
c) The fact a third party has actual knowledge of the TOD deed does not affect the ownership interest of the transferor, i.e., he can do what he wants with the real estate.

d) No interest is vested in the transferee during the life of the transferor. He has no legal or equitable interest. His creditors cannot attach any interest in the real estate.

8. Effect of the transfer on death deed after the transferor’s death: (Va. Code § 64.2-632)

a) Property interest conveys at the moment of death to the beneficiary in the most recent, recorded, unrevoked TOD deed.

b) The beneficiary must survive the transferor. NOTE: No requirement to survive by 120 days exists in URPTODA, as exists under the statutes relating to wills. Transfer occurs at the moment of death. The statutes are silent as to whether the TOD deed may add conditions.

c) Multiple beneficiaries take title in equal undivided shares with no right of survivorship. However, if one of multiple beneficiaries fails to take title for any reason (predeceased transferor, disclaims, slayer statute applies, etc.) then surviving named beneficiaries take that interest in proportional shares.

d) Divorce or annulment revokes a TOD deed, unless the deed specifically says otherwise.

e) Beneficiaries take title subject to “all conveyances, encumbrances, assignments, contacts, mortgages, liens, and other interests to which the property is subject at the transferor’s death.”

f) A TOD deed “transfers property without covenant or warranty of title even if the deed contains a contrary provision.”

9. A beneficiary may disclaim all or part of their interest following disclaimer rules set out in Va. Code § 64.2-2600, et seq. (Va. Code §64.2-633)

10. Property is subject to claims of creditors of the transfer, but a proceeding to enforce the liability must be “commenced not later than one year after the transferor’s death.” (Va. Code §64.2-634).

E. 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.

   a) 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.

F. Life Estates

1. 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. Designed 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.

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.

G. 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 64.2-301 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.
   b) 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.
   c) With sale of real estate to a bona fide purchaser (BFP) the non-owning spouse has no interest in it.
   d) A gift of real estate by one spouse requires the signature of the non-owning spouse for title insurance purposes.
Appendix A – Selected Virginia Code Statutes

§ 55-48. Form of a deed.

Every deed and corrected or amended deed may be made in the following form, or to the same effect: "This deed, made the ....... day of ........., in the year .........., between (here insert names of parties as grantors or grantees), witnesseth: that in consideration of (here state the consideration, nominal or actual), the said ....... does (or do) grant (or grant and convey) unto the said ........, all (here describe the property or interest therein to be conveyed, including the name of the city or county in which the property is located, and insert covenants or any other provisions). Witness the following signature (or signatures)."


§ 55-50. Appurtenances, etc., included in deed of land; relocation of easement.

Every deed conveying land shall be construed to include all buildings, privileges and appurtenances of every kind belonging to the lands therein embraced unless an exception therefor is made in the deed. The owner of land which is subject to an easement for the purpose of ingress and egress may relocate the easement, on the servient estate, by recording in the office of the clerk of the circuit court of the county or city wherein the easement or any part thereof is located, a written agreement evidencing the consent of all affected persons and setting forth the new location of the easement. In the absence of such written agreement, the owner of the land which is subject to such easement may seek relocation of the easement on the servient estate upon petition to the circuit court and notice to all parties in interest. The petition shall be granted if, after a hearing held, the court finds that (i) the relocation will not result in economic damage to the parties in interest, (ii) there will be no undue hardship created by the relocation, and (iii) the easement has been in existence for not less than ten years.

Code 1919, § 5168; 1992, c. 373.

§ 55-51. Deeds good between parties.

Any deed, or a part of a deed, which shall fail to take effect by virtue of this chapter shall, nevertheless, be as valid and effectual and as binding upon the parties thereto, so far as the rules of law and equity will permit, as if this chapter had not been enacted.

Code 1919, § 5169.
§ 55-52. Conveyance of property not owned but subsequently acquired.

When a deed purports to convey property, real or personal, describing it with reasonable certainty, which the grantor does not own at the time of the execution of the deed, but subsequently acquires, such deed shall, as between the parties thereto, have the same effect as if the title which the grantor subsequently acquires were vested in him at the time of the execution of such deed and thereby conveyed.

Appendix B

Who Owns It? The Basics

Kay M. Creasman

I. Multiple Owners, Types of Tenancy

A. Tenants in common

1. Default form of ownership; no special language needed in the deed; may take in unequal shares
2. All tenants must sign to convey or encumber full fee simple title
3. Any individual tenant 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. Listing agreement/contract must have signature of all owners to convey a fee simple interest

A. Joint Tenants

1. any two or more co-owners where deed makes it clear survivorship is intended.
2. All tenants 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 one or more joint tenant vests the remainder in the survivors.
5. Listing agreement/contract must have signatures of all joint tenants (co-owners) to convey a fee simple interest

B. 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
3. Both husband and wife must sign to convey to each other
4. Death of either spouse automatically vests title in the survivor
5. Final divorce decree terminates the tenancy, converting it to tenants in common
6. Listing agreement/contract must have signature of both husband and wife to convey a fee simple interest. If one conveyed to another LOOK AT THE DEED to determine if tenancy by the entirety is severed.

II. Death of an Owner

A. Overview

1. Real estate owned by the owner at death will pass by terms of the deed if tenancy is addressed. If it 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.

2. Regardless of where the will is probated (admitted to record for estate purposes), it must be recorded in the City or County in which the real estate is located to pass title to one who is names who would not inherit under the intestate laws.

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). A specific devise is the passage of title to a particular parcel(s) which may be reasonable described but identified with certainty to an individual or individuals 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.”

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.”

4. A probated will may leave real estate to the Executor of the estate. The will may direct (command) the Executor to sell. 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 with the powers of an Executor. Sometimes the Executor is given discretionary power to sell the real estate by specific language, or just given the general fiduciary powers of Section 64.2-105 (f/k/a 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.

6. Best practice: Have beneficiaries and executor sign the listing agreement / contract. The title company and attorney can decide who needs to sign the deed.

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
1) 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
2) decedent’s will was not “self-proving” and witness could not be located at the time probate was necessary
3) 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 identifying heirs.
      1) Section 64.2-509 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 64.2-510 allows anyone having an interest in the estate to record a real estate affidavit with the same information about heirs, for the purpose of passing title to real estate.
      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.

III. Trusts
   A. All trusts consist of several basic elements:
      1. Trust is usually created by written agreement/instrument by a trustor (creator, grantor, settlor). A trust in Virginia may be oral, but must be proven by clear and convincing evidence.
      2. The trust names a trustee who is the legal owners of trust property and the manager or controller 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.
      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. Only from July 1,
      2007 – July 1, 2010 was it proper in Virginia to title real estate in the name of
      the trust.
   3. A trustee’s powers are supplied by statute unless found in the deed conveying
      the real estate to the trustee, or in the terms of the written trust agreement.
   4. No statutes or case law decisions require that a trust agreement be recorded.
   5. Since 2005 when Virginia adopted the Uniform Trust Code a Certification of
      Trust may be required for title insurance purposes when powers of the trustee
      are not included in the deed conveying real estate to the trustee.

IV. Corporations
   A. Corporations are composed of shareholders, a Board of Directors, officers
      and employees.
      1. In closely held businesses shareholders (owners) may also serve as a director
         and officer. It is of significant importance that documents be signed in the
         proper capacity.
      2. The Board of Directors authorizes the sale of real estate by means of a
         corporate resolution which details acceptable terms.
      3. Officers carry out the authorization of the Board.
      b. In most circumstances having the listing agreement/contract 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.
      c. Often the Secretary of the corporation will need to send a copy of the resolution
         showing the sale is authorized and who may sign.
      d. 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, unless Articles of Dissolution state a process for
            handling such a matter.
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.

V. Partnerships
   A. Defined as “two or more persons carrying on business for profit.”
   B. 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.
      1. All partners need to sign with general partnerships unless there is a written partnership agreement that states otherwise.
      2. The act of any one general partner binds the partnership but that act must be in furtherance of the business of the partnership.
      3. 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

VI. Limited Liability Companies (LLC)
   1. LLCs are the current ultimate, convenient, 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.