A Broker's Guide to Virginia Real Estate Law

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Chapter 12

Entities

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Chapter Twelve

Types of Entities

Sole Proprietorship

The sole proprietorship is the oldest, simplest, and most widely used form of business enterprise. It is organized informally, and is subject to minimal regulation. It has no meaningful management or control problems. The individual owner retains all of the profits and bears all of the losses. It ends with the owner's death or retirement and can be transferred by the owner very easily. It is taxed directly to the owner.

> ***An example of liability:*** *John Jones trades as Fantastic Cleaners and has drivers delivering the cleaning. One day, one of the drivers runs over a pedestrian. The pedestrian can, of course, sue the driver for negligence and can also sue the owner of the business, John Jones. Without insurance to pay the damages, every asset of John Jones may be sold to pay the claim. This includes every other business or attachable asset that John Jones may own.*

If a sole proprietor operates in a name other than his own, then his trade name (fictitious name) must be registered under Virginia's Fictitious Name statute. Failure to properly register is a misdemeanor. The registration must be made at the county in which the business is conducted.

Partnership

Overview

A partnership is a business operated by two or more persons. The partners can be individuals or entities. This is not a one person entity.

There are two types of partnerships. The first is the *general partnership* and the second is the *limited partnership*.

In a general partnership, all partners are personally liable for all of the partnership obligations. In a limited partnership, the general partners are liable for the obligations of the organization while the limited partners have liability which is limited to the investment they have actually made in the company and the contributions that they have promised to put into the company in the future. Beyond those sums, a limited partner has no liability for partnership debts.

There are other differences between the two which center around control issues and the

right to participate in management.

There are provisions in the Virginia partnership statutes that permit the partners to register the partnership as a limited liability partnership, thereby giving limited liability protection to all partners.

Moreover, any partnership may convert to a limited liability company conferring all of its benefits on its members also.

The General Partnership

The general partnership is an entity governed by the Uniform General Partnership Act, which Virginia has adopted.[261] Most partnerships arise informally without a written agreement between the partners, but are governed by this law regardless. The issue of whether the parties have actually formed a partnership is governed by their conduct and their intent to operate a business for profit.

The partners of a general partnership are liable for all partnership debt, whether they authorized it or not. This means that their liability protection is no better than if they were sole proprietors — in other words, there is no liability protection for any general partner. This also means that if the assets of the partnership are not sufficient to satisfy a partnership obligation, the assets of the individual partners may be taken to satisfy it.

The management of a general partnership is by a majority vote of its partners unless they have agreed to some other arrangement.

Because partnerships are based on personal relationships, new partners cannot be admitted to the partnership without the consent of all of the partners, unless they have agreed to some other arrangement. Any partner can withdraw at any time, and if one does withdraw, then the partnership terminates and its assets will have to be sold so that the withdrawing partner may recover his partnership interest. These rights can be modified in a written partnership agreement or an agreed to buy out of the withdrawing partner.

Death of a partner will also terminate a general partnership, unless the remaining partners elect to continue it. The estate of the deceased partner is entitled to recover the deceased's partnership interest. This too, can be modified by written agreement.

The income of a general partnership is taxed as a partnership, which is an information tax return at the federal level, with each partner receiving an IRS Form K-1 that allocates their profit or loss share for that year's activities for inclusion in the partner's individual tax

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[261] § 50-73.79 Va. Code.

return.[262]

Various states, including Virginia, have provided a special registration that, once made, gives the general partnership, and its partners, limited liability as if they were a corporation or limited liability company. [263] For partnership debts incurred before the registration, the partners remain personally liable, but after the registration, the partners are only liable for those debts of the company for which they have accepted personal liability (such as guaranteeing a lease or other contract obligation) or for which they would otherwise have personal liability, such as their own negligent conduct.

Even though creditors of a partnership may always pursue partnership assets including the personal assets of each general partner, there is an important asset protection feature offered by a partnership. The creditor of an individual partner (as opposed to a creditor of the partnership itself) may not simply attach and take over a general partner's partnership interest in the company. The creditor must obtain a "charging order" from court. A charging order directs the partnership to pay over to the partner's creditor all sums that would otherwise have been distributed to the debtor/partner until the creditor is paid in full. If no distributions are made by the partnership, then the creditor receives nothing. Moreover, the creditor does not have the right to compel distributions, nor may the creditor vote the partner's share nor force the sale of the partnership interest unless the court exercises its power to "foreclose" the partnership interest. This is significantly different from seizing and selling a debtor's corporate stock ownership in a corporation. Courts rarely exercise the forfeiture power.

The Limited Partnership

A limited partnership is another form of partnership which is strictly a creature of statute. This partnership gives its limited partners limited liability protection while leaving its general partner or partners fully exposed to liable for all company debts.[264]

The limited partnership may have one or more general partners, but there must be at least two partners in order to form a limited partnership. Virginia adopted the Virginia Revised Uniform Limited Partnership Act. While there are many similarities of this with a general partnership, there are some important differences.

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[262] There is the possibility that the partnership may elect to be taxed otherwise under the "check-the-box" regulations (IRS form 8832; Treas. Reg.§301-7701-1). A discussion of this is beyond the scope of this book. If more information is desired, one should consult with their accountant or attorney or read the regulations.

[263] §§ 50-73.75 and 50-73.78 Va. Code.

[264] § 50-73.1 Va. Code.

Management of a limited partnership is confined to its general partners. If a limited partner undertakes too much management activity, the limited partner could lose his status and limited liability protection as a limited partner and, as a matter of law, become a general partner. The result of this unfortunate turn of events is that the person who was the limited partner, and shielded from the company's creditors, is now a general partner and the creditors will seek him out to collect their money. In actuality, it usually is the creditor who makes this claim in court in order to convert the limited partner to a general partner in order to collect from him. There are specific rules that govern this aspect of the entity in the act. They permit certain activities by a limited partner without losing his limited partnership status.

In order to achieve limited liability status, the limited partner must pay all of the contributions that were promised. To the extent that there is an unpaid contribution due to the company, the creditors of the company can pursue the limited partner up to the amount of the unpaid promised capital contribution.

Limited partners may withdraw from the company with the right to receive his interest in the company within a six-month period, and the withdrawal of a limited partner will not terminate the company. The same rules are not available to the general partner. Most partnership agreements restrict withdrawal rights in some fashion for all of its partners.

Partnership rights are divided into two parts; governing rights and financial rights. In this regard, a limited partner may assign or transfer his interest in the company to another, but the transfer will only be of the financial rights and the transferee will not become a full limited partner without the consent of the general partners. The transferee in this situation may only receive the financial rights of the limited partner. The governing rights of the limited partner are terminated in this situation and the transferee may only obtain the governing rights by being accepted by all of the partners as a substituted partner. If the consent for substitution is not given, then the assignee has no voting rights and the assignor loses all of his rights in the company, too. As the holder of the financial rights of the assigning partner, the assignee will only be entitled to receive distributions that the transferor would have otherwise been entitled to receive.

The charging order protection that exists in a general partnership also exists in a limited partnership as well, but with an important difference. The difference is that a creditor does not have the right to obtain an order of forfeiture of a limited partnership interest. A creditor with a charging order, may only receive those distributions that the partnership has authorized be made. The creditor has no vote in the matter and may not exercise any of the partner's rights in the company.

Various states, including Virginia, have provided a special registration, that once made, gives the partnership and its general partners limited liability protection as if they were in a corporation or limited liability company. For partnership debts incurred before the

registration, the general partners remain personally liable, but after the registration, the general partners are only liable for those debts of the company for which they have accepted personal liability for which they are otherwise liable.[265]

Limited partnerships are taxed the same as general partnerships. Income is passed through directly to the partnerships.

Once formed, the limited partnership business can be conducted in other states. For example, a limited partnership formed in Delaware is not limited to doing business in Delaware. It may have offices in Virginia, Oklahoma or Alaska. If it does transact its business in a state other than its state of organization, it will be required to be registered as a foreign limited partnership in that state where it will have to maintain a registered agent, as well as make annual filings and pay annual franchise fees, if any, in that state.

Limited Liability Company

The limited liability company (LLC), was enacted in 1992 in Virginia as was the first new business entity in the U.S. since the Subchapter S Corporation tax election was authorized in the 1950's. It offers property owners, businessmen and investors a valuable alternative business form.[266] The LLC is a hybrid entity which combines the limited liability protection of a corporation with the flexibility in management and tax treatment of a partnership. It was first created in the U.S. in 1977 in Wyoming to serve mineral developers with foreign investors.

Unlike a partnership, there is no requirement that it have two or more members to be formed. It may be formed with only one member. The identity of its members is not required to be disclosed which is contrary to the requirement that the general partners of a partnership be publically identified.

General partnerships and limited partnerships are authorized to convert to an LLC in order to obtain the benefit of its limited liability protection without losing the benefits of being taxed as a partnership.[267] The IRS has issued a number of rulings that a conversion from a general or limited partnership to an LLC is not a taxable event. On the other hand, a conversion from a corporation to an LLC, must be carefully evaluated because such a conversion could very

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[265] § 50-73.148 Va. Code.

[266] § 13.1-1000 Va. Code.

[267] § 13.1-1010.1 Va. Code; Rev.Rul. 95-37;Rev.Rul. 86-101; Priv.Ltr. Rul.96-37-030.

well generate a taxable event for the corporation.[268]

An LLC is owned by its members who vote by majority vote unless otherwise agreed to the operating agreement of the company. An LLC member may withdraw and receive the return of his interest in the company. His withdraw will not terminate the company unless the remaining members elect to discontinue it. Death will not terminate the company unless the agreement so provides.

The beauty of this entity is its flexibility in management. The members can appoint a manager or group of managers to conduct the business or they can run the company themselves. The members and managers are free from liability for the company's debts unless they have personally assumed the debt or are otherwise held liable by law (such as for their own negligent act).

While creditors of the LLC can go after LLC assets, the personal assets of each member are shielded. Creditors of an individual member of the LLC however, can only get to the LLC through a charging order. A charging order directs the LLC to pay over to the member's creditor all sums that would have otherwise been distributed to the member until the creditor is paid. If no distributions are made, the creditor does not have the right to compel distributions. Moreover, the creditor can neither vote the member's share nor force the sale of it. Unlike a general partnership charging order, the court does not have the authority to foreclose a member's LLC interest. This is a very strong form of asset protection for the LLC member and makes the LLC a favored entity for this reason.

The LLC is taxed as a general partnership pass-through unless the members have elected a different form of tax treatment under the "check-the-box" tax regulations mentioned above.

In comparison with an S Corporation, the LLC offers major advantages. The LLC is not limited in the number of owners such the seventy-five shareholders to which an S Corporation is limited. Moreover, the LLC is not limited to having natural persons or certain permitted trusts as its members, to which an S Corporation is limited. The LLC does not limit its members to being U.S. citizens or U.S. residents as is required by an S Corporation. The LLC does not limit the class of membership to one class as an S Corporation does. The LLC's assets have the same basis as in a partnership rather than as in an S Corporation, in which situation the basis of its assets is those of a corporation, not a partnership.

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[268] A partnership that has registered as a limited liability partnership does not need to covert to an LLC. The real benefit of converting a general partnership to an LLC would be ability to have a single member owner as well as better rights with regard to the charging order. With a general partnership, the court can forfeit a general partner's interest whereas with an LLC, the court cannot force its sale.

Once formed, the LLC's business can be conducted in other states. For example an LLC formed in Delaware is not limited to doing business in Delaware. It may have offices in Virginia, Oklahoma or Alaska. If it does transact its business in a state other than its state of organization, it will be required to be registered as a foreign limited liability company in that state where it will have a registered agent, as well as pay an annual filing or franchise fee in the state where it is registered.

Corporation

A corporation is a legal entity that gets its life and powers from the statute in existence in the state where it is incorporated. When formed in accordance with a state statute, it is an entity with a legal existence of its very own, independent of its owners, officers and directors.

There are a number of types of corporations.

Public corporations are created for a public purpose only. They are generally related to some governmental function such as a municipal corporation, a city or town, an incorporated school district, a housing development fund organized as a corporation, a corporation funded or established by a state, city or local government and under the control of the public entity. An example is the District of Columbia which is a municipal corporation.

There is another kind of public corporation, *"quasi-public."* This type is created to perform a public function by a private group. An example of this would be a utility company which could even have the power of eminent domain; that is taking private property by condemnation.

Private corporations are used for private profit and not-for-profit activity; i.e., *stock corporations* and *nonstock corporations.* A small business is usually a stock corporation which then elects small business tax treatment under the Internal Revenue Code; this is called an "S election." Hence the name, "S-corporation" or "Sub S-corporation."

A corporation, whether stock or nonstock, offers limited liability protection to its agents, officers, directors and stockholders. It is structured so that when the corporation incurs debts, only the assets owned by the corporation are subject to attachment by the creditors to satisfy its debts. Its owners, officers and directors are not personally liable for the payment of the corporation's debts. This means that the assets of the shareholders, officers and directors cannot be attached to satisfy an unpaid corporate debt. It is this limited liability protection for its owners and operators that is its most important feature.

The corporation's owners are its shareholders. Each year, unless some other time is called for in the bylaws, the shareholders elect the corporation's board of directors. The directors serve as the company's brains and decision makers. They, in turn, elect the officers of the company. The officers of the corporation will carry out the will and directives of the board of directors in much the same manner as a person's arms and hands carry out the brain's

instructions. The officers will negotiate and sign contacts even though it is the board of directors who decides what the terms of the contract will be and will authorize the officers to enter into the negotiations or sign a contract.

A non-stock corporation is operated by its board of directors which is elected either by the preceding board of directors or by its members. This type of corporation is used for civil associations, clubs, business associations, and other non-profit activities.

Once formed, the corporation's business can be conducted in other states. For example a corporation formed in Delaware is not limited to doing business in Delaware. It may have offices in Virginia, Oklahoma or Alaska. If it does transact its business in a state other than its state of incorporation, it will be required to be registered as a foreign corporation in that state where it will have a registered agent, as well as pay an annual filing or franchise fee in the state where it is registered.

Virginia authorizes one person to hold the position as the sole shareholder, the sole officer and sole director. Moreover, Virginia authorizes a stock corporation to exist without actually issuing stock certificates ("uncertificated shares").

A corporation will usually have a perpetual existence. A shorter life span can be established in the document of formation if its organizers so desire.

A corporation's ownership is freely transferable. Fee transferability means that its owners (shareholders) are free to sell, give, or to will (at their death) their ownership interest in the corporation to anyone they wish, without the consent or permission of anyone else. This free transferability of its ownership is an important feature. In those cases where the owners want to limit their ability to transfer shares of stock, a written shareholder's agreement may restrict each shareholder's right to transfer as those limitations or rights. In that situation, the shareholders will usually print or type a statement on the actual stock certificates that says that the transfer of the stock is restricted by a shareholder's agreement. This puts potential buyers on notice of the restrictions on resale.

Double taxation is always a real danger for a corporation. It occurs when the income of the corporation is taxed to it when earned and again to the shareholder when the money is paid out as a dividend.

S-Corporation

A S-corporation is defined to be "a small business corporation for which an election under

[the Internal Revenue Code] is in effect for such year." [269] A S-corporation is nothing more than a tax election made to obtain the pass-through tax treatment of a corporation rather than face the danger of double taxation of a corporation under Subchapter C of the Internal Revenue Code.

In order to obtain the benefits of the pass-through taxation of a corporation, the corporation must meet specific requirements:

- A S-Corporation must be organized in the United States or pursuant to the law of the U.S.;
- The corporation must be formed and be in existence on the day that the S-Corporation election is made;
- A S-Corporation may have up to, but no more than 75 shareholders;
- All of the shareholders must be either an individual or certain trusts and estates that the Internal Revenue code permits.
    - The types of trusts permitted include a grantor trust which is the type of trust which the IRS ignores for tax purposes. This is commonly known as a revocable living trust created and controlled by its creator (grantor). Such a trust is referred to as a Qualified Sub-Chapter S Trust (QSST). In this trust there may only be one income beneficiary who is a citizen or resident of the U.S. On the termination of the trust, that beneficiary must also receive all of the money in the trust. This is a type of trust often seen in estate planning.
    - Another type of trust permitted is the Electing Small Business Trust (ESBT). This trust may have more than one beneficiary and income may be sprinkled among them with the principal going to someone other than the income beneficiary.
        - This trust must be formed in the U.S. and will be taxed at a flat rate of 39.6% and a capital gain rate of 28%. This trust is designed for estate planning with the family's business in a S-Corporation;
- There may only be one class of stock actually issued. An exception to this rule is that there may be different voting rights among the shareholders;
- Certain type of debt may be considered by the IRS to be a separate class of stock and thereby terminate the S-Corporation election. In other words, the debt must be what the IRS calls "straight debt." This means a commitment to pay the debt on demand or at a specified time. Its interest rate is not tied to profits, the borrower's discretion or the like; it is not convertible into stock of the company; and the creditor is an individual, an estate or a trust of a type that is permitted by the Internal Revenue Code

[269] 26 USCA § 1361(a).

to be a stockholder of a S-Corporation.

- There is an advantage to being a S-Corporation in the tax basis of its assets. The tax basis is what the IRS considers to be the value that its owner holds the asset at. When compared with its sale price, the gain on sale for an asset in a S-Corporation versus a C-Corporation could be meaningful. This tax advantage is one of the benefits of a S-Corporation over a C-Corporation;
- Insurance companies, oil and gas companies are restricted in making a S-Corporation election. A domestic international sale corporation is not eligible either.

Close or One-person Corporations

Some states have a special category of informal corporation known as the "close corporation." It does not have the formal requirements of elections, meetings and stock certificates. Maryland, for example, has a close corporation statute. Its principal advantage is that the lack of formality cannot be used by creditors as a weapon to try and pierce the corporate veil in order to impose liability on its owners. Virginia authorizes one-person corporations, but does not have a close corporation statute.

Trusts

In General

Trusts are an ancient entity with its origin in Roman law. They were well established in the ecclesiastical courts of England and elsewhere in the ancient world. They were initially known as "uses." Much of the development of trusts as we have come to know them came from England.

It is a device that splits ownership into its constituent parts. The legal title to property is held by the trustee and the beneficial interest held by the beneficiaries. This type of arrangement affords privacy and favorable tax treatment as a pass-through entity. Its asset protection features depend on a number of factors. A business trust properly formed may give complete asset protection to its trustee and beneficiaries. A personal trust, on the other hand, may give asset protection where it is not controlled by the self-settled trust doctrine (DISCUSSED IN PERSONAL TRUSTS BELOW).

A trust formed during one's lifetime is known as an *inter vivos trust* or living trust. A trust formed in the will of a deceased is known as a *testamentary trust.* In a trust situation, legal title is held by the trustee with the beneficial interest being held by the beneficiaries. Thus, in a

real estate transaction, title is not held by the Smith Family Trust, but by Robert Smith, Trustee for the use and benefit of the Smith Family Trust. The beneficiaries of the Smith Family Trust have no management rights or say in the operation of the trust, unless by its terms, they are granted such rights.

A trust where the beneficiaries are permitted to act as the managers instead of the trustee, is the Illinois Land Trust. Virginia recognizes this trust form and its asset protection quality.[269]

Business Trusts

The business or commercial trust is a sophisticated and distinctive entity through which individuals combine their resources to operate a business for profit. It closely resembles both a partnership and a corporation. This form is not to be confused with a non-business trust which is commonly seen in estate planning and lifetime care for the young and the old.

Business trusts are entities for the conduct of business by a trustee for the benefit of the beneficiaries and which are taxed as pass-through entities. The internal operation of a business trust appears to be more like a corporation in terms of management.

Several states, including Virginia, have enacted statutes that recognize the business trust. This trust gives its trustee and beneficiaries limited liability protection. [270]

Personal Trusts

A trust is an agreement between its creator and its owner, the trustee to manage and hold property in trust for the benefit of the beneficiaries. Where the funds for the trust come from

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[269] Curtis v. Lee Land Trust, 235 Va. 491, 369 S.E.2d 853 (1988). Virginia authorizes a Virginia land trust in §55-17.1 Va. Code to hold title to real property. A beneficiary's interest in the trust is personalty, not real property. The Virginia land trust is patterned after the Illinois Land Trust. For a discussion of the Virginia Land Trust, in addition to *Curtis v. Lee Land Trust*, see Arnston, *The Virginia Land Trust- An Overlooked Title Holding Device For Investment, Business and Estate Planning Purposes*, 30 WASH. & LEE L. REV. 73 (1973).

[270] In addition to Virginia, whose business trust statute will be effective October 1, 2003 (Va. Business Trust Act §13.1-1200 Va. Code) the following 15 states have a business trust act: Alabama, Alaska, Arizona, Delaware, Indiana, Kansas, Kentucky, Montana, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, and West Virginia.

the creator of the trust, such as a revocable living trust, the trust will be governed by the common law *self-settled trust doctrine* and the contents of the trust will be denied asset protection for its creator. In other words, one cannot create their own trust with their money and thereby put their assets out of their creditor's reach.

Alaska, Delaware, Missouri, Nevada, and Rhode Island have authorized the creation of self-settled trusts and abolishing the self-settled trust doctrine. Under those laws, a trust created in those states which meets the requirements established in those statutes, will have asset protection without regard to the self-settled trust doctrine. Whether Virginia will give full faith and credit to those statutes under the U.S. Constitution or will claim that they violate Virginia's public policy, remains to be seen. Virginia follows the self-settled trust doctrine.

Spendthrift Trust

A spendthrift trust is one that contains a provision that prohibits a beneficiary from pledging the assets being held for his benefit. The creditor of a beneficiary cannot attach the assets of the trust or enforce an assignment of the trust by the beneficiary. Thus, the beneficiary is unable to alienate his interest in the trust unless the trust otherwise provides for that right. Virginia recognizes the spendthrift protection without any dollar limit.[272]

A spendthrift trust provision will not protect a beneficiary from the application of the self-settled trust doctrine. Accordingly, a person who creates his own trust with his own funds for his own benefit may not shield this trust asset from his creditors under the spendthrift trust provision.

Constructive & Resulting Trust

There are two forms of trust that are implied by law and require court action to establish.

A *constructive trust* is constructed by a court in order to prevent what would otherwise be an injustice, a fraud, an acquisition of property by improper means, or where it would be inequitable to permit the person to retain the claimant's funds. The funds being subject to the constructive trust must be distinctly traced as coming from the claimant. In order to establish a constructive trust, the evidence of the wrongdoing must be clear and convincing.

A constructive trust would be imposed where a person used fraud to obtain money from

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[272] § 55-19 Va. Code. This protection does not apply to employee benefit plans as defined in 28 USCA § 1002(3) or where a person may claim an exemption under § 34-34 Va. Code, both of which provide their own exemptions from creditors.

another and invested the money into something of value. The victim may impress the investment with a constructive trust if he can show that it was his money that was put into the investment and that the trust is necessary in order to correct the wrong. The intent of the parties is not a factor in the analysis.[273]

A *resulting trust* is another trust that is implied by operation of law. Its distinction from a constructive trust is that a resulting trust is based on a presumed intent or inference of law deduced from the facts and circumstances. Hence, where several people buy a piece of real estate together but put the title in only one name with the intent of sharing expenses and profits from it, the court may imply a resulting trust with the unnamed party as the trust beneficiary, thereby concluding that it was the intent of the parties to do so. When the one in whose name the title was put has decided to keep the property and the benefits of the other's investment, a resulting trust may be constructed if the court deems it necessary in order to right the wrong.[274]

Uniform Transfer to Minors Act

The Uniform Transfer to Minors Act creates an irrevocable statutory trust with full fiduciary obligations on the trustee for the protection of the beneficiary. The terms of the trust are set forth in the statute with the right to make the trust terminate when the beneficiary turns twenty-one years of age or at the default age of eighteen years.

This law applies to any transfer if, at the time of the transfer, the transferor, the minor, or the custodian is a resident of this Commonwealth or the custodial property is located in this Commonwealth. The custodianship thus created remains subject to this law even where there is a subsequent change in residence of transferor, the minor, or the custodian, or the removal of custodial property from the Commonwealth.[275] This law permits anyone to gift over to such an account, funds or property for the benefit of a person who is less than eighteen years of age (a minor) or leave it to such account by will or trust.

Custodial property is created and transfer is made whenever an uncertificated security or a certificated security is either:

- Registered in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for .....(name of minor) under the Virginia Uniform Transfers to Minors Act"; or

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[273] Overly v. White, 245 Va. 446, 429 S.E.2d 17 (1993).

[274] Morris v. Morris, 248 Va. 590, 449 S.E. 2d 816 (1994).

[275] § 31-38 Va. Code.

- Delivered, if in certificated form, or any document necessary for the transfer of an uncertificated security is delivered, together with any necessary endorsement to an adult other than the transferor or to a trust company as custodian, accompanied by an instrument in substantially this form:

TRANSFER UNDER THE VIRGINIA UNIFORM TRANSFERS TO MINORS ACT

I, _____ (name of transferor or name and representative capacity if a fiduciary) hereby transfer to _____ (name of custodian), as custodian for _____ (name of minor) under Virginia Uniform Transfers to Minors Act, The following: (insert a description of the custodial property sufficient to identify it.)

Dated:_____ _____
(Signature)

_____ (name of Custodian) acknowledges receipt of the property described above as custodian for the minor named above under the Virginia Uniform Transfers to Minors Act.

Dated_____

A custodian, acting in a custodial capacity, has all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property, which includes statutory powers set forth in § 64.1-57 Va. Code, as of the date the custodian acts, but a custodian may only exercise such rights, powers, and authority. The custodian may be held liable for breach of a fiduciary duty.

When the beneficiary reaches eighteen years, the property is to be transferred to the beneficiary's unless the age at the time the trust was created was set at twenty-one years.[276]

[276] § 31-56 Va. Code.

Real Estate Investment Trust (REIT)

A corporation,[277] trust (business trust or otherwise) or association that specializes in investments in real estate and real estate mortgages, and which meets certain status requirements as to ownership and purpose, and which satisfies gross income and diversification requirements may elect to be taxed as real estate investment trust (REIT).[278] A foreign corporation cannot be a REIT.

A REIT is a tax pass-through entity. Income from a REIT, is taxed to the beneficiaries as ordinary income unless it is the distribution of what would be taxed as capital gains, in which case, it is taxed to the beneficiaries as a long term capital gain.

A number of test must be met to be qualified as a REIT. An overview of the primary rules follows:

- The REIT must have at least 100 members;
- It may not have 50 percent interest in the REIT owned, directly or indirectly, by five or fewer individuals (known as the personal holding company stock ownership test);
- At least 95 percent of its gross income must come from dividends, interest, and rent from real property and other income related to certain real estate transactions; and
- At least 75 percent of its gross income must come from rents, interest on mortgages, gain from sales of realty and mortgage interests, income from other qualified REITs, abatements and refunds of real property taxes, and income from other enumerated real estate related transactions;
- A REIT must distribute at least 90 percent each year --- this requirement used to be 95% before December 31, 2001.

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[277] Other than a bank or insurance company.

[278] 26 USCA § 856.