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THE VIRGINIA LAND TRUST—AN OVERLOOKED TITLE HOLDING DEVICE FOR INVESTMENT, BUSINESS AND ESTATE PLANNING PURPOSES

PETER A. ARNTSON*

Ten years ago, the General Assembly by statute validated the Illinois Land Trust in Virginia. As might be expected following the introduction of any new method of holding title to real estate, it met with mixed reactions. The land trust was welcomed by the banks and trust companies which hoped that it would quickly become accepted as a method of syndication. Almost immediately, possible legal problems were raised which naturally hindered its growth; probably as a result of the questions raised, the Virginia land trust has, during the first ten years of its existence, failed to win the acceptance by real estate developers and investors that had been anticipated by its proponents. With some planning, however, and possibly later through statutory amendment, the problems can be overcome or removed, and the Virginia land trust may serve the purposes for which it was designed.

This type of trust might well be considered a "hybrid" since, in an orthodox common-law realty trust, legal title is vested in the trustee and

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No trust relating to real estate shall fail nor shall any use relating to real estate be defeated because no beneficiaries are specified by name in the recorded deed of conveyance to the trustee or because no duties are imposed upon the trustee. The power conferred by any such instrument on a trustee to sell, lease, encumber or otherwise dispose of property therein described shall be effective and no person dealing with such a trustee shall be required to make further inquiry as to the right of such trustee to act nor shall he be required to inquire as to the disposition of any proceeds.

Nothing in this section shall be construed (1) to affect any right which a creditor may otherwise have against a trustee or beneficiary, (2) to enlarge upon the power of a corporation to act as trustee under § 6, 9 [§ 6.1-5] or (3) to affect the rule against perpetuities.

Id. The land trust under § 55-17.1 should not be confused with Real Estate Investment Trusts, VA. CODE ANN. §§ 6.1-343-51 (Repl. vol. 1966), more commonly referred to as REITs. See footnote 90 infra.


3 See Continuing Legal Education Committee of the Bar Association of the City of Richmond, Real Estate Syndications, Sept. 21, 1962, at 7.

equitable title is held by the beneficiaries. Presumably in a land trust the complete title is vested in the trustee; the beneficial interest is personalty, and full power of management and control is retained by the beneficiaries. A land trust is a device utilized for holding and disposing of real estate. Briefly, it consists of two documents: a deed in trust which is recorded, and a trust agreement executed by the beneficiaries and trustee which is not recorded. A brief general description of these two instruments might be helpful.

Trust Agreement

The trust is created by an agreement executed by the trustee and beneficiaries which defines the relationship between the parties; it states that the trustee has or is about to receive title to certain designated real property which it will hold in trust for the named beneficiaries according to their respective interests. The important features of the agreement are that the interest of the beneficiaries consists solely of the power of direction (1) to convey or otherwise deal with the title to the trust property, (2) to manage and control the property and (3) to receive the proceeds and avails from the rental, sale, mortgage or other disposition of the property. The agreement provides, in addition, that the beneficiaries' interests shall be personal property and may be assigned and transferred as such, and that no beneficiary has any legal or equitable title in the trust res. Further, the agreement generally provides that the beneficiaries reserve the right to amend or revoke the trust agreement; it should also cover the resignation or removal of the trustee and the appointment of a successor. Under the agreement the trustee is to execute all instruments affecting the title to the trust property when directed to do so by the beneficiaries or such persons as shall be designated in writing by the beneficiaries. The trustee is required to sell all of the real estate then remaining at the end of a fixed period of time, usually twenty years. As a protection to the trustee, the agreement usually stipulates that no beneficiary shall have the authority to contract for or in the name of the trustee or to bind the trustee personally. Finally, the agreement provides that it is not to be recorded but, if it is, that the recoradation shall not be notice in derogation of the trustee's title or powers.

Deed in Trust

The beneficiaries then convey, or cause to be conveyed to the trustee, title to the specified real estate by a deed in trust. Generally, the instrument grants the trustee for the uses and purposes set forth in the deed in trust agreement full powers to improve, manage, contract, sell, convey, mortgage, pledge and lease the real estate. In addition, it grants further assurance that any person dealing with the trustee in relation to the property shall not be obliged to see to the application of any funds or to
inquire into the necessity or propriety of the trustee's act. The interest of the beneficiaries and of all persons claiming under them is stated to be only in the earnings, avails and proceeds arising from the sale or disposition of the real estate and is declared to be personal property. Therefore, so far as the public land records are concerned, the trustee's powers are complete.\(^6\)

1. **Brief History**

The "land trust" originated in Illinois and is commonly referred to as the "Illinois Land Trust." The Massachusetts Business Trust\(^6\) apparently served as the inspiration for the land trust, one of the earliest of which was created in Chicago in 1891.\(^7\) The first court decision involving a land trust appeared in 1920.\(^8\) The deed in trust and trust agreement there involved were substantially the same as those presently in use in Illinois, and the court upheld the basic theory of the land trust. The land trust is a common device for holding title to real estate in Chicago and the areas surrounding Cook County. It is known but not widely used in downstate Illinois. Its growth in other states\(^9\) has been slow and without the aid of statute changing certain common law concepts it has encountered problems.\(^10\) These difficulties were overcome by legislation in Florida in 1963.\(^11\) In 1967, North Dakota adopted a land trust statute modeled after the Virginia statute,\(^12\) and there has been evidence of increasing

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\(^{6}\)Suggested land trust forms may be obtained from the trust department of the Central National Bank of Richmond; standard forms are also published in the pamphlet, Garrett, **LAND TRUSTS**, which may be obtained from Chicago Title and Trust Company.

\(^{7}\)Real Estate Trusts grew popular in Massachusetts in the latter part of the nineteenth century when the state law prohibited a corporation from dealing in and developing real estate. See Comment, *Massachusetts Trusts*, 37 Yale L.J. 1103, 1105 (1928). This is probably the reason for the early growth of land trusts in Illinois since prior to 1933 the corporate laws of that state, Ill. Rev. Stat. § 157.7 (Smith-Hurd 1954), provided that a corporation could not hold real estate except for corporate purposes. Turner, *Some Legal Aspects of Beneficial Interests Under Illinois Land Trusts*, 39 Ill. L. Rev. 216, 220 (1945) (hereinafter cited as Turner).

\(^{8}\)One of the first such trusts appears to have been created in that year. The trustee was Cook County Abstract & Trust Company, one of the predecessors of Chicago Title & Trust Company, which has been quite active in this field. Garrett, *Land Trusts*, 1955 U. Ill. L.F. 655, 657 (hereinafter cited as Garrett).


\(^{11}\)Elvins v. Seestedt, 141 Fla. 266, 193 So. 54 (1940); Janura v. Fenc, 261 Wis. 179, 52 N.W.2d 144 (1952) (passive trusts executed by Statute of Uses); Resnick v. Goldman, 133 So. 2d 770 (Fla. App. 1961) (marketability of trustee's title).


interest in land trusts in several other states.\textsuperscript{13}

Possibly one reason for the willingness of early purchasers in Illinois to take title to property from land trust trustees may have been that the pioneers in land trust use, as evidenced by a review of the cases involving land trusts, appear to have been abstract and title insurance companies. These organizations would have been willing to insure their own titles.

While there have been no reported cases in Virginia regarding its own land trust statute, there are numerous decisions in Illinois and some in Florida which would undoubtedly be given due consideration by Virginia courts. In general, the laws of trusts, personal property and contracts are available to chart the probable reaction of the courts as to a specific problem that might arise under a land trust.

2. Characteristics and Advantages of Land Trusts

The characteristics of land trusts, at least as they have been construed by the courts of Illinois and Florida, are such as would normally be expected to result in their use by investors, and in estate and business planning as a means for holding title to real estate. For example, where ownership of land is shared by several persons, there is necessarily a complexity in dealing with the title to the property. For conveyances, the signatures of each owner and spouse must be obtained; this burden is increased where some of the owners reside at some distance or in other states. The problems become increasingly complicated or impossible if one or more of the owners should become incompetent, die, become bankrupt or if a judgment is obtained against him. If a land trust is used the trustee alone executes the instruments, regardless of how numerous its beneficiaries or how complicated the affairs of one single beneficiary. A grantee of the real estate does not have to be concerned about the beneficiaries, and the real estate held in trust is immune from the problems which may arise from the affairs of the beneficiaries. If properly drafted the trust will not be treated as an association taxable as a corporation subject to federal corporate income tax, and State and local real estate recording taxes may be minimized. Since the real estate is held by the trustee with the power to sell it at any time and with the mandatory direction to sell at the end of a period not usually exceeding twenty years, the courts in Illinois have repeatedly held that an equitable conversion

occurs at the time of the establishment of the trust, and the beneficial interests therefore are considered to be personal property. This same result has been reached on the basis of the express stipulation of the parties in the trust agreement.

Assuming, as has been determined by the courts in Illinois and by statute in Florida, that the beneficiaries' interest is personalty, no beneficiaries' spouse would be entitled to dower or curtesy in the land; the land would not be subject to the personal debts of the beneficiaries, nor could one or more of the beneficiaries or a creditor maintain an action for partition. Further, since only the deed in trust is recorded and the Virginia statute specifically provides that it is not necessary to set forth the names of the beneficiaries in the recorded trust instrument, the identity of the beneficiaries may remain undisclosed; anonymity may be important in the assembly of a trust of land. Also through the trust agreement, the beneficiaries may provide for the succession of ownership of their beneficial interests at their death thereby eliminating such beneficial interests as parts of their probate estates. Such a transfer by *inter vivos* trust is not testamentary. Inheritance taxes, although regarded as a lien against all property of which a decedent dies seized or possessed, would not be a lien upon the real estate; moreover, the possibility of the probate of a later will within one year of date of death would not affect the title of a purchaser from the land trustee since the decedent's beneficial interest in the trust is personalty and not real estate. An obvious problem when non-residents own real estate or interests therein is that upon death ancillary probate, and possibly administration, may be necessary in order to pass title to the land. If title to the property is held in a land trust, however, then presumably the beneficial interest of the beneficiary will be treated as personal property. Consequently, the need for ancillary proceedings with its delays will be removed, at least with respect to that asset.

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3Horney v. Hayes, 11 Ill. 2d 178, 142 N.E.2d 94 (1957); Aronson v. Olsen, 348 Ill. 26, 180 N.E. 565 (1932); Duncanson v. Lill, 322 Ill. 528, 153 N.E. 618 (1926).
4VA. CODE ANN. § 64.1-19 (Repl. vol. 1968).
10VA. CODE ANN. §§ 64.1-95, 96 (Repl. vol. 1968).
11As to the advantages of using the land trust, as well as discussions of most of the
3. Problems Restricting the Growth of Land Trusts

Despite its many apparent advantages, the land trust has developed and flourished only in Illinois until recently, when its use spread by statute to Florida, North Dakota and Virginia.

Application of Statute of Uses

One of the major obstacles to the use of the land trust has been the effect of the English Statute of Uses. Since 1545 the Statute has been held to be inapplicable to an active use or trust; however, its effect upon a passive trust is to vest the legal title in the holder of the beneficial interest. Therefore, in many states, the utilization of a land trust depends upon whether the duties of the trustee are sufficiently active under the local decisions to prevent the application of the Statute. Illinois has the Statute, however the courts there have taken a liberal attitude towards its operation holding that the duty imposed upon the trustee to sell the trust property at the end of a period of years is sufficiently active to remove the trust from the operation of the Statute. While there are decisions to the contrary, the majority view is that a duty conferred upon the trustee to convey, with nothing more, is sufficient to take the trust out of the Statute. Any lingering doubt as to the application of the Virginia Statute of Uses to the land trust was specifically removed by the enactment of Section 55-17.1.

characteristics mentioned above, see Garrett, supra note 7; Turner, supra note 6; see also the articles listed at note 13 supra.

2 Statute of Uses, 27 Hen. VIII ch. 10 (1535).

26 In general, see 1 AMERICAN LAW OF PROPERTY § 1.16 et seq. (A.J. Casner ed. 1952); 2 POWELL, REAL PROPERTY §§ 266-268 (1971).


29 Janura v. Fencl, 261 Wis. 179, 52 N.W.2d 144 (1952); Elvins v. Seestedt, 141 Fla. 266, 193 So. 54 (1940).

30 RESTATEMENT (SECOND) OF TRUSTS § 69 (1959).

31 The English Statute of Uses, 27 Hen. VIII ch. 10 (1535), was repealed by the Virginia General Assembly in 1792; in 1819, Virginia adopted a Limited Statute of Uses which executes only declarations of trust wherever there are no duties imposed upon the Trustee. Under the Statute of Uses where the trust beneficiaries have the whole beneficial use and management of a trust estate and the trustee has no active duty to perform, the trust will fail and full title passes to the beneficiaries. Sims v. Sims, 94 Va. 580, 27 S.E. 436 (1897). Although not having to decide the issue, the court in Jones v. Tatum, 19 Gratt. 720, 734, 60 Va. 260, 265 (1870) indicated that where the sole duty of the trustee was to convey land to children upon the death of their mother, that while the English Statute would transfer title in that situation, that it was doubtful whether the Virginia Statute would have the same result. See also Blake v. O'Neal, 63 W. Va. 483, 61 S.E. 410 (1908). Since a land Trust involves a transfer of title to a trustee, it would not be within the scope of the Virginia
Marketability of Title

One problem which impeded the use of the land trust in Florida concerned the marketability of the title conveyed by the trustee. The law of trusts adheres to a bona fide purchaser rule. The normal, recorded deed in trust portion of the land trust, while making reference to the trust agreement which is not recorded, grants to the trustee full power of sale. Further recitals in the deed of trust generally assure that anyone deriving title from the trustee need not inquire either into the trustee's authority to act or into the disposition of the proceeds. In Illinois these recitals have been considered sufficient to vest marketable title in the trustee and the trustee's title is insurable as such. In Florida, however, a trustee's title derived under a deed in trust containing all of the applicable recitals was held not to be marketable because the trust agreement was neither recorded nor offered for inspection; therefore, the purchaser had no way of knowing whether the trustee had acted within his authority. This problem was eliminated in Florida by a statute which is specifically remedial in nature and which has subsequently been favorably construed. Section 55-17.1 of the Virginia Code assures the marketability of the land trust trustee's title by providing that:

The power conferred by any such instrument [trust relating to real estate] on a Trustee to sell, lease, encumber or otherwise dispose of property therein described shall be effective and no person dealing with such Trustee shall be required to make further inquiry as to the right of such Trustee to act nor shall he be required to inquire as to the disposition of any proceeds.

The statute also reaffirms the Virginia position that a trust is not necessarily void for indefiniteness solely because the recorded deed in trust does not list the beneficiaries by name.


G. BOGERT, TRUSTS AND TRUSTEES §§ 881-97 (2d ed. 1962). The bona fide purchaser rule provides that if a purchaser acquires for value a legal interest in property without notice of an outstanding trust or other equitable interest, he may hold it free from the equitable interest.


An identifiable beneficiary is essential to the existence of a private trust, otherwise there is no one in a position to enforce the trust. And since Virginia has never adopted the seventh section of the English Statute of Frauds, Jackson v. Greenhow, 155 Va. 758, 764, 156 S.E. 377, 379 (1931), the Virginia Courts have consistently held that an express trust in real estate may be created and established by parol evidence. The declaration must be unequivocal and explicit, and the evidence clear and convincing, Young v. Holland, 117 Va. 433, 84 S.E. 637 (1915); and where the recorded deed in trust did not name the beneficiaries,
Beneficial Interest—Realty or Personalty

Almost all of the advantages to be realized from the utilization of a land trust are based upon the premise that the interest of the beneficiaries in the trust property is personalty and not realty. In Illinois there can be no question that such is the result.

The rule has been long and well established in this state that the form of deed and trust agreement before us creates a valid and subsisting trust under which the interest of the beneficiary is personal property only and not real estate.6

The Illinois courts sometimes find that the relationship of the beneficiaries under the agreement is one of partnership and consequently that the partner’s interest in the partnership realty held for profit is one of personalty.37 Often the court fails to state the theory upon which its decision is based and merely recites the provision of the trust agreement that the beneficial interest is personalty.38 The decisions place great emphasis upon the fact that the parties have agreed and stipulated among themselves that there interests shall be personalty. The question whether realty can be converted to personalty by mere agreement does not appear to be discussed. Notwithstanding this liberal view there would seem to be some doubt whether conversion, at least with respect to third parties, can be accomplished by agreement alone if the courts refuse to apply the doctrine of equitable conversion, or if the deed in trust does not include a direction to the trustee to sell at the end of a specific period of time.39 A few of the land trust decisions refer directly to the doctrine of equitable conversion.40 Many of the earlier Illinois cases cited in the land trust decisions involved testamentary trusts which directed the trustee to sell the trust property consisting of real estate and to distribute the proceeds among designated beneficiaries after termination of an intervening life estate.41 While the doctrine is well recognized in Virginia,42 the question

as is the situation in a land trust, parol evidence has been held to be admissible for the purpose of clarifying their identity. Virginia Trust Co. v. Minar, 179 Va. 377, 18 S.E.2d 879 (1942). All of the major title insurance companies have indicated their willingness to issue policies on land trust titles.


4Id.; see also VA. CODE ANN. § 50-26 (Repl. vol. 1972).

5See cases cited at note 16 supra.

6See 2 G. BOGERT, TRUSTS AND TRUSTEES § 250 (1953).


8Lash v. Lash, 209 Ill. 595, 70 N.E. 1049 (1904); Moll v. Gardner, 214 Ill. 248, 73 N.E. 442 (1905); see 3 POMEROY, EQUITY JURISPRUDENCE § 1162 (5th ed. 1941).

remains as to whether the conversion will be deemed to occur at the time of the instrument’s execution or at the time of sale.\textsuperscript{43}

Florida has eliminated all question of the nature of the beneficial interest by providing that if the recorded instrument states that the beneficial interests are to be personal property that such provision shall control for all purposes.\textsuperscript{44} It is submitted that in adopting land trust statutes the legislatures of Virginia and North Dakota also embraced the land trust as a convenient method of holding title to real estate; these statutes, however, are only half-measures when compared to the Florida statute which attacked the problem head-on. The Florida legislature provided the attorney with the certainty which large investments in real estate demand. In Virginia, unless this question is removed by legislation, it would appear that the growth of the land trust as a means of holding title to real estate shall remain very slow at least until the question is finally determined by litigation.

\textit{Application of the Rule Against Perpetuities}

One restriction upon the utilization of the land trust is that in practice its duration has become limited to not more than twenty years while the economic life of a modern city business building, apartment, shopping center, etc. may be over forty years. This limitation is generally based upon the erroneous belief that the duration of all private trusts must be restricted to a period not in excess of the Rule Against Perpetuities.\textsuperscript{45} The rule, however, should constitute no obstacle to the use of land trusts extending beyond twenty years since the rule does not apply to “vested” interests.\textsuperscript{46} In fact the rule requires only that the interest must “vest” not later than twenty-one years after some life in being at the creation of the interest.\textsuperscript{47} Therefore, if the deed in trust, which is recorded, specifies that all of the beneficial interests are “vested” then the rule would not apply,

\textsuperscript{43}Baker v. Commissioner, 353 Mass. 130, 148 N.E. 593 (1925). In Harcum's Adm'r v. Hudnall, 14 Gratt. 369, 55 Va. 508 (1858), the court in dicta stated that equitable conversion might not take place until the happening of a contingent event even though the direction to sell the land at some time was absolute.

\textsuperscript{44}Id.

\textsuperscript{45}FLA. STAT. ANN. § 689.071(4) (1969).

In all cases where said recorded instrument as hereinabove provided, contains a provision defining and declaring the interest of beneficiaries thereunder to be personal property only, such provision shall be controlling for all purposes where such determination shall become an issue under the laws or in the courts of this state.

\textsuperscript{46}Id.


\textsuperscript{48}Evans v. Walker, 3 Ch. D. 211 (1876); see generally Hatfield, Perpetuities in Land Trusts, 40 ILL. L. REV. 84 (1945).

\textsuperscript{49}J. Gray, The Rule Against Perpetuities § 201 (3d ed. 1915).
the period would never begin to run, and no specific date, or at least no date within twenty years or less, would have to be set forth in the deed.

At present at least two reasons remain for including a direction to the trustee to sell at the end of a specified period. In Illinois, where the existence of land trusts rests upon favorable court decisions, such direction remains necessary so that the trust will not be passive and thereby executed by the Statute of Uses. The second reason for such direction lies in the present reliance upon the doctrine of equitable conversion to convert the beneficiaries’ interest from realty to personalty.

It should be noted that though the period is included, the deed in trust may be amended to extend the period. Furthermore, the deed in trust as well as the trust agreement may authorize the trustee to enter into leases or other contracts which extend beyond the date stated in the deed in trust.

4. Other Frequently Utilized Methods of Holding Title

Because of the many problems involved when title to real estate is held by more than one individual, investors generally turn to various forms of syndication such as corporations and cooperatives, general partnerships and joint ventures, limited partnerships and real estate investment trusts. While each of the above methods of syndication may be appropriate under certain circumstances, it is suggested that an alternative device which so far has been used only sparingly in Virginia is the land trust. The question as to whether real estate should be owned by a corporation or directly by the interested individuals in some noncorporate form is usually answered by comparing the federal income tax consequences under each type of ownership.

Corporations

A corporation provides an easy method of holding title to real estate. It is a traditional vehicle, familiar to lawyers, bankers, realtors and investors; it provides continuity of ownership and easy transferability of interests in the entity holding the real estate through sale or transfer of shares of stock in the corporation. Federal corporate income tax provisions,
however, cause tax problems which in general overshadow the corporate advantages. There is the problem of income tax at the corporate level, and the corporation may be subject to personal holding company tax or, in the alternative, the accumulated earnings tax. If the real estate is rental property the corporation may not be eligible to elect to be taxed pursuant to Sub-Chapter S. Further, if the property is held for investment there is always the danger that in the event of a possible sale of the property followed by liquidation, or even the sale or exchange of the stock of the corporation, it might be treated as a collapsible corporation for federal corporate income tax purposes. In that case the gain realized would be considered as gain from the sale or exchange of a non-capital asset.

A corporation is generally recognized as an entity separate from its stockholders for business purposes; this is also the general rule for federal income tax purposes. There is a line of cases, however, which hold that where there is no real business purpose, and the purpose of the corporation is the mere holding of title to real estate for the convenience of stockholders or for other personal reasons, the corporate entity may be disregarded for federal income tax purposes. Many decisions ignore the corporate entity where a “dummy” real estate corporation is utilized. Even where a corporation may be a mere dummy for most purposes, however, if it engages in any slight business activity such as borrowing money, executing mortgages or making leases, such activity may be sufficient to balance the scales in favor of recognition of the corporate entity.

The adoption of by-laws, holding meetings, electing officers and direc-

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22Id. § 535.
23Id. §§ 541-47.
24Id. § 1372(e)(5).
25Id. § 341(a).
27Brager Bldg. & Land Corp. v. United States, 124 F.2d 349 (4th Cir. 1941); John A. Mulligan, 16 T.C. 1489 (1951); Thomas K. Glenn, 3 T.C. 328 (1944); Thomas C. Wilwerth, 24 P-H Tax Ct. Mem. 825 (1955).
tors, and issuing stock and other securities, though necessary steps in preparation for the carrying on of business activities, are merely formal acts of organization and are not substantive income producing activities. But the carrying on of actual business in addition to serving the personal convenience of the shareholders will result in the corporation remaining a separate taxable entity; and the rule is not changed merely by the fact that the transferors of the property own all of the stock of the corporation. Where there is any uncertainty or fault in the documentation or in the actual operation of the corporation it is deemed to be the owner of the property. Therefore, from the standpoint of possible Federal income tax liability, it is unwise to utilize a "dummy" real estate corporation to acquire property if such ownership will require or involve business activity on the part of the corporation.

Most of the tax cases have been based upon the theory that the corporation acted as agent for the beneficial owners, and the same result has also been reached upon the basis that the title holding corporation was acting as trustee. Real estate in Virginia, however, should not be transferred to a corporation as a trustee since the only corporations authorized to act as trustee are banks and trust companies organized under the laws of Virginia and national banks located within the state.

A corporation cannot serve as a convenient means of holding title to the real estate for a changing group of investors since for income tax purposes each new investor will have purchased stock and have a new basis for his stock, equal to its cost. This basis, however, is not attributable to the real estate unless the purchase is soon followed by a liquidation so that it is clear that the Kimbell-Diamond or asset purchase rule applies. The judicial Kimbell-Diamond rule, as opposed to the statutory

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6Aldon Homes, Inc., 33 T.C. 582 (1959); Shaw Constr. Co. v. Commissioner, 35 T.C. 1102 (1961), aff'd, 323 F.2d 316 (9th Cir. 1963).
5O'Neill v. Commissioner, 170 F.2d 596 (2d Cir. 1948).
4See, e.g., Fellows Sales Co. v. United States, 200 F. Supp. 347 (S.D.S.D. 1961). As a general rule, an agent does not ordinarily have title to the property of its principal while a trustee does have title. Handy v. C.I.T. Corp., 291 Mass. 157, 197 N.E. 64 (1935). Where a person undertakes to act on behalf of another, subject to the other's control, he becomes an agent. If he is also vested with the title to the property, he is a trustee. Brown v. Christman, 126 F.2d 625 (D.C. Cir. 1942). In such a situation, the agency relation predominates, and the principles of agency rather than the principles of trust are applicable. As to the distinction between trustees and agents see A. SCOTT, TRUSTS § 8 (1967). See also RESTATEMENT (SECOND) OF TRUSTS § 8, Comments a and h (1959).
4INT. REV. CODE OF 1954, § 1012.
5Kimbell-Diamond Milling Co. v. Commissioner, 14 T.C. 74 (1950), aff'd per curiam, 187 F.2d 718 (5th Cir. 1951). See generally Lewis, Cost of Stock Basis for Assets Received from Acquired Corporations, 19 U. MIAMI L. REV. 159 (1964).
rule under section 334(b)(2) of the Internal Revenue Code which is applicable solely to corporate purchasers, applies only where there was an intention on the part of the purchasers at the time the stock was acquired to liquidate the corporation.68

**Joint Ventures, Partnerships and Limited Partnerships**

Other forms of legal arrangements frequently utilized for real estate syndications are joint ventures, general partnerships and limited partnerships. In general a joint venture is treated both for tax purposes as well as otherwise as a partnership.70 By statute the legal nature of a partner's interest in the partnership is personalty; partnership realty therefore is not subject to dower, curtesy or allowances to widows, heirs or next of kin.72 While legal title to realty may be held and transferred by a partnership, a partnership is not a separate legal entity from the particular group of persons whose association together constitutes its existence.75

The partnership of A, B and C, is different from the partnership of A, B


69**INT. REV. CODE OF 1954**, § 761(a).


72**VA. CODE ANN.** § 50-25(e) (Repl. vol. 1972).

73At common-law a partnership was not considered a legal entity for the purpose of holding title to real estate. Legal title was in the partners regardless of whether the deed was taken in their own names, or in the names of one or more of them, or in the name of the partnership. Deeds to partnership realty therefore had to be executed by each partner and their spouses were required to join in order to convey dower, curtesy and homestead. Upon the death of a partner his interest in the partnership realty passed to his heirs subject to the equitable rights of the creditors of the partnership. And upon dissolution of the partnership, the former partners became simply tenants in common as to realty. See generally 7 G. THOMPSON, REAL PROPERTY § 3221 (Repl. vol. 1962). The Uniform Partnership Act, **VA. CODE ANN.** §§ 50-1 to 43 (Repl. vol. 1972), adopted by Virginia in 1918 gives a partnership sufficient aura of a legal entity to enable it to acquire, own, hold and transfer real estate in its own right. Title to realty may be held in the name of the partnership, in the names of one or more of the partners, or in the name of all of the partners. **Id.** § 50-10. Property acquired in the partnership name, however, may be conveyed only in the partnership name. 7 G. THOMPSON, REAL PROPERTY § 3222 (Repl. vol. 1962).

74The Partnership Act as originally drafted would have treated the partnership as an entity. See Lewis, *The Uniform Partnership Act—A Reply to Mr. Carne's Criticism*, 29 HARV. L. REV. 158 (1915). When finally drafted and approved, however, the completed Act was based on the aggregate theory as at common-law. J. BARRETT & E. SEAGO, PARTNERS AND PARTNERSHIPS: LAW AND TAXATION at 154 (1956) (hereinafter cited as J. BARRETT & E. SEAGO). While basically the Act is founded upon the aggregate theory, it does include some aspects of the entity theory. See **VA. CODE ANN.** §§ 50-2(5), 50-8(3) and 50-9(1) (Repl. vol. 1972).

75**VA. CODE ANN.** § 50-6 (Repl. vol. 1972).
and D, and for the latter to be able to transfer good title to realty originally acquired by the first partnership there must be some evidence that title has been transferred from the first partnership to the second. While the assignment of a partner's interest does not of itself dissolve the partnership, there can be no question that a technical dissolution occurs whenever there is a change in the relation of the partners. One partnership has dissolved and a new one has begun even though there has been a continuation of the business without a liquidation of the partnership affairs. One of the practical problems in connection with the sale or transfer of a general partner's interest in a partnership, therefore, concerns the title to the property of the old partnership.

While the transfer of legal title to most partnership property from the dissolved partnership to the partnership continuing the business may be accomplished by a short bill of sale, or possibly by amendment to the partnership's agreement and the certificate recorded in the partnership books, it is clear that transfer of title to partnership real property to the new partnership is necessary and can only be accomplished by deed. Another drawback to

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(1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of a deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business. Id. (Emphasis added). However, by statute the retirement, death or insanity (but not the assignment of a general partner's interest to a new general partner) does not dissolve a limited partnership if the business is continued as provided in the partnership certificate or upon the consent of all partners. VA. CODE ANN. § 50-63 (Repl. vol. 1972).

8J. BARRETT & E. SEAGO, supra note 74, 340-41; for an interesting decision interpreting the Virginia Uniform Partnership Act with regard to a partner's power to assign his right in specific partnership property, see In re Decker, 295 F. Supp. 501 (W.D. Va. 1969).

9VA. CODE ANN. § 55-2 (Repl. vol. 1969). It is hornbook law that when a corporation is a party to a merger or consolidation its property automatically passes to the surviving corporation; the Virginia Code, however, recognizes that even in such a situation the chain of title should be clearly reflected in the land records. In the merger or consolidation of corporations, the Virginia Code specifically provides that all property including real property belonging to or due each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in the surviving corporation without further act or deed. Id. § 13.1-74(d) (Repl. vol. 1964). In further recognition that the title to real estate is to be determined from the real estate records, the statute provides that whenever by merger, consolidation or amendment to the articles of incorporation the name of any corporation is changed or another corporation succeeded to the ownership of its property, a certificate reciting such change or succession will be issued by the Clerk of the State Corporation Commission which may be admitted to record in any recording office within the jurisdiction of which the property of the corporation is located in order to maintain the
the use of the general partnership or joint venture as a means of holding title to real estate is that none of the participants are protected by limited liability.\textsuperscript{81}

Probably because it does provide limited liability\textsuperscript{82} to some of the participants as well as a degree of centralized management,\textsuperscript{83} the limited partnership has for many years been the favorite vehicle of syndication. In addition, this flexible device allows limited partners to transfer\textsuperscript{4} freely their partnership interests subject only to such restrictions as may be provided in the partnership agreement, as evidenced by the recorded certificate of limited partnership.\textsuperscript{85} So long as the guidelines set forth in

continuity of the title records. \textit{Id.} § 13.1-127. In either event no tax is due. Further, the statute adds that when the charter of a corporation is amended and the only effect is to change the corporate name of the corporation that a deed conveying to such corporation under its changed name all of its real property held immediately prior thereto shall be fifty cents. \textit{Id.} § 58-54 (Cum. Supp. 1972). No provision similar to those applicable to real estate held by corporations appear among the partnership provisions.

\textsuperscript{Va. Code Ann.} § 50-15 (Repl. vol. 1972). However, as a practical matter the risk may be substantially reduced if the lender will agree to look solely to the property upon which the debt is secured if sufficient insurance coverage is maintained; still investors shy away from the exposure.


\textsuperscript{Interestingly, the Kintner Regulations state that centralization of management exists in an organization when " . . . any person (or any group of persons which does not include all the members) has continuing exclusive authority to make the management decisions necessary to the conduct of the business for which the organization was formed." Treas. Regs. § 301.7701-2(c)(1) (1960). A limited partnership must include at least one general and one limited partner, \textit{Va. Code Ann.} § 50-44 (Repl. vol. 1972); all of the rights and powers of the partnership are vested in the general partners, \textit{Id.} § 50-52, and a limited partner is specifically excluded from participation in the management of partnership business, \textit{Id.} § 50-50; therefore, by definition, some group less than all of the members has the continuing exclusive authority to manage the partnership's business. The Kintner Regulations, however, provide that centralization of management does not generally exist in a limited partnership unless substantially all the interests in the partnership are owned by the limited partners. Treas. Reg. § 301.7701-2(g)(4) (1960).

\textsuperscript{Va. Code Ann.} § 50-62 (Repl. vol. 1972). Some other advantages are that a limited partner may not bind any other partner without their consent, and no technical dissolution occurs upon the death of a limited partner. \textit{Id.} § 50-64. Further, unlike a general partnership, death of a general partner need not dissolve the partnership. \textit{Id.} § 50-63. On the negative side, the general partners are subject to personal liability, and the death of all general partners dissolves the partnership. \textit{Id.} § 50-44. Limited partners, moreover, should not participate in control of the business. \textit{Id.} § 50-50; \textit{see note} 82 \textit{supra}.

the Kintner Regulations are followed, there should be no danger of the partnership being treated as an association taxable as a corporation. While limited partnership interests may be transferred without changing the character of the limited partnership, this is not so with regard to changes of general partners. The one drawback from the utilization of the limited partnership as a title holding device is the possible need to change general partners, either to admit a new general partner or to transfer the interest of one general partner to a new general partner. Here the same chain of title problem arises as in the case of the general partnership.

The transfer of title to real estate would not be a problem if the recording of a deed were not so expensive. In Virginia, however, the recording tax is computed at a rate of fifteen cents on every hundred dollars or fraction thereof on the fair market value of the property transferred, and an additional tax is imposed at the rate of fifty cents for each five hundred dollars or fraction thereof. Recording taxes become a con-

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87A partnership with limited liability of some of the partners exists only because of the authority of statute. The Virginia Limited Partnership Act, contains no statutory specifications as to acquisition, ownership and sales of real estate other than to provide that a limited partnership may carry on any business which a general partnership may conduct except as specified by statute. VA. CODE ANN. § 50-46 (Repl. vol. 1972). Presumably, and in actual practice, the methods of execution of deeds by limited partnerships are the same as those of general partnerships under the Virginia Partnership Act with the general, not the limited, partners doing the executing.
88See note 80 supra. Some tax practitioners are apparently of the opinion that the same rule that applies to limited partners, note 84 supra, also is applicable to general partners and that, in checking the land records to determine who has authority to execute a deed transferring title to realty held by a limited partnership, the title examiner need merely go to the partnership books to determine the identity of the current general partners, and that such persons may then sign a valid deed. Such a practice ignores the fact that a limited partnership with A, B and C as general partners is different from a limited partnership with A, B and D as general partners and that legal title to realty may only be transferred by deed or will. VA. CODE ANN. § 55-2 (1969). To the extent that the general partner of a limited partnership is a corporation, the need to change general partners because of death or disability might be avoided. The Service will treat such an arrangement as a partnership, as opposed to an association taxable as a corporation, provided it passes the substance over form requirements recently outlined in Rev. Proc. 72-13, 1972-2 CUM. BULL. 2, and it has not more than two of the corporate attributes described in Treas. Reg. § 301.7701 (1960). Since the Regulations state that a limited partnership organized under the Uniform Limited Partnership Act lacks continuity of life, Treas. Reg. § 301.7701-2(b) (1960), the required tax status may be provided by making certain that the partnership lacks any one of the other corporate attributes; usually this is accomplished by restricting transfer of limited partnership interests. See generally Fraser, Taxing the Limited Partnership as a Corporation, 50 TAXES 333 (1972); Weiler, Limited Partnerships with Corporate General Partners: Beyond Rev. Proc. 72-13, 1972 J. TAX. 306.
89VA. CODE ANN. § 58-54.1 (Cum. Supp. 1972). Further, a county or city may impose a recodarion tax. Id. § 58-65.1. The tax mounts up quickly where the property is a $3,000,000 shopping center or apartment complex. From a practical standpoint, this problem is probably avoided since title insurance companies are apparently willing to insure such
sideration in those situations where title will be held for many years
during which it may reasonably be anticipated that there may be several
transfers of general partnership interests.

Real Estate Investment Trusts

When they can be used, Real Estate Investment Trusts, real estate
investment trusts, or REITs, have the advantage over all other means of syndication of combining the
favorable corporate attributes of free transferability of interests, limited
liability, continuity of life and centralization of management while avoid-
ing tax at the trust or syndicate level. Investors in a REIT are able to
enjoy the same tax benefits as persons who invest in securities through
mutual funds. However, while the REIT is an ideal vehicle for large
publicly owned and diversified syndicates the federal requirement that it
have at least one hundred beneficiaries makes it unavailable for use in
small syndications, and therefore, outside the scope of this article.

1Like the land trust statute, the Virginia Real Estate Investment Trust Act, VA. CODE
ANN. §§ 6.1-343-51 (Repl. vol. 1966), was enacted by the General Assembly in 1962. The
Virginia REIT statute was adopted to make the federal REIT provisions, INT. REV. CODE

2H.R. Rep. No. 2020, 86th Cong., 2d Sess. 3 (1960). Because there is little or no
income tax at the entity level, REITs make it practicable for small investors to pool their
funds and thereby participate in large as well as diversified projects with the assistance of
expert investment counsel. This procedure had previously been initiated with regard to
stocks and securities through regulated investment companies, INT. REV. CODE
OF 1954, §§ 851-55, registered under the Investment Company Act of 1940. The federal tax
Treaty of a REIT is similar to that of a mutual fund, it acts as a conduit for income and
capital gains. However, unlike a partnership there is no pass through of losses and the
REIT is denied the loss carry overs or carry backs available to corporations.

2INT. REV. CODE OF 1954, § 856(a)(3). Some of the other requirements are that the
REIT be an unincorporated trust or association, id. § 856(a) which, except for the REIT
provisions would be taxed as a corporation, id. § 856(a)(3); that it be managed by one or
more trustees, id. § 856(a)(1) (REITs formed in Virginia must have a minimum of two
trustees a majority of whom are residents of Virginia, VA. CODE ANN. §§ 6.1-349(2) and
344(1)(b) (Cum. Supp. 1972)); have its ownership evidenced by transferable shares, INT.
REV. CODE OF 1954, § 856(a)(2), not be a personal holding company, id. § 856(a)(6) and
not hold property primarily for sale to customers in the ordinary course of its trade or
business, id. § 856(a)(4). In order to qualify for favorable treatment for a taxable year the
REIT must meet certain gross income and diversification of investment requirements: it
must distribute 90 percent of its ordinary income after deduction of allowable expenses,
id. § 957(a)(1); at least 90 percent of the REIT’s gross income must be derived from
dividends, interest, rents from real property, gain from sales or other dispositions of stock,
securities and real estate, id. § 856(c)(2); and 75 percent must come from passive real estate
investments, id. § 856(c)(3). The REITs’ gross income from short term capital gains on
stock or securities and its gain from the sale of real property held for less than four years
may not exceed 30 percent of the REIT’s gross income. See generally Symposium—Real
5. Tax Considerations

In the utilization of a land trust as in the setting up of any real estate syndication, no matter the type of title holding entity, serious consideration must be given to the problem of whether what is created will be considered as an association taxable as a corporation under federal income tax laws.

In 1937, in A.A. Lewis & Co. v. Commissioner, the United States Supreme Court held that an Illinois subdivision land trust was not taxable as an association. Vacant land was conveyed to a trustee to hold for the benefit of the grantor and Lewis, who was the exclusive sales agent and manager of the trust. The trustee had the duties of executing conveyances upon the agents' directions and collecting and disbursing the payments made by the contract purchases in order to facilitate the subdivision and the sale of the realty. The Court held that the trust answered the description of an ordinary trust in that it was created by virtue of a declaration by which a designated piece of real property was conveyed to the trustee on specific trusts for the benefit of definitely named persons. The duties of the trustees were found to be purely ministerial; there was nothing analogous to a corporate organization. Since the duties of the trustee under such a subdivision trust are broader and more extensive than under the normal land trust, it should follow that the decision in Lewis exempts such trusts from taxability as associations. In an earlier case decided by the Seventh Circuit, Commissioner v. McCormack, title to the Chicago Stock Exchange building was placed in a land trust, management was vested exclusively in the agent of the beneficiaries, and the duty of the trustees was solely to hold title. The court held that the trust was not taxable as an association.

Through the Kintner Regulations, the Internal Revenue Service has removed much of the confusion which previously existed by setting forth the guidelines which it will utilize in determining whether a trust, partnership or limited partnership, or other association will be taxed as a corporation. The characteristics are (1) associates, (2) an objective to carry on business and divide the gains therefrom, (3) continuity of life, (4) centralization of management, (5) limited liability, and (6) freely transferable interests; the last four attributes are considered to be corporate characteristics. Any organization having more than half of the corporate characteristics will be treated as an association taxable as a corporation for federal income tax purposes.

More recently the Service ruled for the purposes of determining the appropriate treatment for purposes of the Self-Employment Contribu-

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8 U.S. 385 (1937).
9 68 F.2d 653 (7th Cir. 1934).
Treas. Regs. §§ 301.7701-02 (1960).
tions Act that where the arrangement encompassed the holding of legal title to real estate by a trustee with management, control, and operation of the property vested in the beneficiaries, that the organization was properly classified as a joint venture or a partnership for federal income and self-employment tax purposes. The Service applied the rules of section 301.7701 of the regulations on procedure and administration in order to determine whether the arrangement should be classified for federal tax purposes as a partnership, corporation or trust. Under the specific facts set forth in the Ruling, the Internal Revenue Service found that the land trust had two corporate characteristics, free transferability of interests and continuity of life, but did not have the corporate characteristics of centralization of management and limited liability; therefore it did not have more corporate characteristics than non-corporate characteristics.

A trustee of a land trust is required to file with the Internal Revenue Service a notice of fiduciary relationship with respect to each beneficiary under the land trust whether the beneficiary is designated in the original instrument creating the trust or secures his interest by assignment from another. However, since the trustee normally never physically receives any of the rents, issues or profits, he need not file any fiduciary income tax returns and in fact cannot since he has no income and makes no distributions to the beneficiaries. In addition, while the grantor retains the power to re vest title to any part of the corpus of the trust, either alone or together with any person not having a substantial adverse interest in the disposition of the corpus or the income therefrom, the income of the trust shall be included in computing the net income of the grantor.

For the purposes of Virginia income taxes, it appears that the term "corporation" would not apply to land trusts. The fiduciary income tax provisions would also not appear to be applicable so long as the trustee does not receive any of the income from the property.

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100Int. Rev. Code of 1954, §§ 671-678. Moreover, partnerships as such are not subject to federal income tax, although they must file returns of income under the provisions of section 6031 and the regulations thereunder. Thereafter, each partner's distributive share of income, gain, loss, deduction, depreciation or credit will generally be determined by the partnership agreement. Internal Revenue Code of 1954, § 704(a).
101Prior Virginia Law, Va. Code Ann. § 58-77(2) (1966), treated as corporations for the purpose of the Virginia corporate income tax . . . associations and all enterprises operated by trustees . . . [where] the interest in . . . [the organization was] evidenced by shares of stock, whether with or without par, face or nominal value." The new Virginia income tax law adopts almost verbatim the federal definition of a corporation; compare Va. Code Ann. § 58-151.02(d) (Cum. Supp. 1972) with Int. Rev. Code of 1954, § 7701(a)(3). It would appear, therefore, that Virginia will follow the federal government's lead and be guided by its regulations and rulings.
Conclusion

The land trust, if properly utilized, is an attractive alternative for handling syndications in Virginia for the purpose of holding title to real estate. This is true whether the real estate held in the trust represents a speculative venture or is a business investment, such as a shopping center, or is part of a large estate in which the owner desires to distribute interests among various members of his family. These objectives can be accomplished through the utilization of both a land trust and a limited partnership. Title to the real property might be placed in a land trust, and the beneficial interest in the trust would then be transferred to and held by a limited partnership. Under the terms of the assignment, the land trust trustee would then look only to the general partners of the limited partnership for directions. By using this combination of devices, there is no question of the marketability of the title to the real property, and investors are able to continue dealing with a device with which they have become familiar. Assignments of limited partnership interests would not need to be communicated to the trustee since such transfers, by statute, do not change the partnership. Changes, however, of general partnership interests would require that the beneficial interest be transferred from the old partnership to the new partnership. Such an assignment, however, would only require a simple instrument directed to the trustee; no deed would be necessary, and hence there would be no question of recording cost expenses.

While benefits of the utilization of a limited partnership with a land trust for syndication purposes is obvious, this combination may be just as helpful in income tax as well as gift and estate planning. Individuals owning a large income producing property may wish to shift some of the income to children or grandchildren. This may be accomplished by placing title to the property in a land trust and forming a general or preferably a limited partnership for the purpose of holding the beneficial interest. Limited partnership interests may then be given to the various beneficiaries and be added to annually in order to avoid unnecessary gift taxes. Such transfers might also accomplish estate planning objectives and facilitate the eventual sale of the property since the general partners would be able to direct the trustee as to sale; the proceeds would then be distributed pro rata among all partners in accordance with their interests in the partnership.

Since the advantages of the land trust appear to be so apparent, one wonders why its development in Virginia as well as elsewhere has been so slow. One observation is the natural inertia of attorneys against adopting a new device. Another is that banks and trust companies in Virginia generally have not publicized the advantages because the land trust decreases the volume of business accruing to attorneys, real estate brokers and title insurance companies. Another possible reason is that until there
have been some Virginia decisions confirming that the interest of beneficiaries under a land trust is personalty, there may remain some doubt in skeptical minds. As was mentioned previously, this doubt could easily be removed by amending the land trust statute to include a provision similar to that included in the Florida statute.\textsuperscript{101} Currently the problem may be overcome by utilizing a limited partnership to hold the beneficial interests since the legal interest of a partner in partnership property is personalty, no matter how it may be characterized in the particular land trust.

Finally, while land trust printed blank forms may be easily obtainable, it is extremely important that those interested in land trusts realize that this device is something more than merely the proper filling in of printed blank forms. Each trust agreement, as well as the deed in trust, must be designed for its particular situation; the drafter, just as in the case of limited partnerships or any other means of syndication, must design the land trust so as to carry out the desires and objectives of the beneficiaries. Further, he must take special pains to insure that he does not stray outside the guidelines set forth in the Kintner Regulations. Eventually, as the legal and practical advantages as well as the limitations of land trusts become more widely understood and appreciated, its proper use will increase.

\textsuperscript{101}See note 44 supra.
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