

00-039

TRADE AND COMMERCE: TRANSACTING BUSINESS UNDER ASSUMED NAME.

CORPORATIONS: VIRGINIA STOCK CORPORATION ACT — VIRGINIA NONSTOCK CORPORATION ACT.

GENERAL PROVISIONS: COMMON LAW, STATUTES AND RULES OF CONSTRUCTION.

Foreign business trusts are recognized in Commonwealth; may file fictitious name certificate in Virginia. No requirement that foreign business trust obtain certificate of authority or certificate of registration from State Corporation Commission before filing fictitious name certificate. Statutory agent for foreign business trust filing such certificate with circuit court clerk is resident practicing attorney appointed to receive legal process and enter appearance in Virginia courts.

The Honorable John T. Frey
Clerk, Circuit Court of Fairfax County
June 12, 2000

You ask several questions regarding a foreign business trust that desires to file a fictitious name certificate in your office.¹ You first ask whether the Commonwealth recognizes foreign business trusts. If so, you next ask whether a foreign business trust may file a fictitious name certificate in the clerk's office of the courts of record in this Commonwealth. If so, you then ask whether a foreign business trust must obtain a certificate of registration or a certificate of authority from the State Corporation Commission before filing the fictitious name certificate. Finally, you request the identification of the statutory agent for foreign business trusts in the Commonwealth.

You report that you have received a fictitious name certificate titled "Assumed Name Certificate from the Provident Auto Leasing Company" for filing in your office. Provident Auto Leasing Company is a Delaware business trust. You advise that the fictitious name certificate contains no date for either a certificate of registration or a certificate of authority to transact business in the Commonwealth, nor is either certificate attached. You interpret § 59.1-69 of the *Code of Virginia* to require a copy of the certificate of registration or authority to transact business. You also advise that the fictitious name certificate does not contain the name and address of the registered agent. You interpret § 59.1-74 to imply that the certificate contain the name and address of the registered agent because the clerk must index the name of the statutory agent.

You report that you have declined to record the certificate. Provident Auto Leasing contends that it is exempt from the above requirements because it is not a corporation, limited liability company, partnership or limited partnership. Provident Auto Leasing further contends that no Virginia statute requires that a registered agent be appointed in order to register a foreign business trust with the State Corporation Commission. Finally, Provident Auto Leasing advises that it does not, nor will it in the future, have a place of business in Fairfax County.

Section 1-13.19 defines the word "person," as it is applied generally in the construction of the Virginia Code and all statutes,² to include "any individual, corporation, partnership, association, company, *business*, *trust*, joint venture or other legal entity." (Emphasis added.) The use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.³ In addition, stock corporations and nonstock corporations are two distinct entities in Virginia, organized for different purposes and subject to different statutes. A Virginia stock corporation is organized pursuant to the Virginia Stock Corporation Act, §§ 13.1-601 through 13.1-800. A Virginia nonstock corporation is organized pursuant to the Virginia Nonstock Corporation Act, §§ 13.1-801 through 13.1-980. Each act defines the terms used therein. Both

acts define the term "entity" to include "business trust."⁴ I, therefore, conclude that the Commonwealth does, in fact, recognize foreign business trusts.

You next ask whether a foreign business trust may file a fictitious name certificate in the Commonwealth.

Chapter 5 of Title 59.1, §§ 59.1-69 through 59.1-76, contains the statutory requirements for transacting business in the Commonwealth under an assumed name. "[T]he object of [Chapter 5] is to protect the public by giving information as to the person with which it deals and to afford it protection against possible fraud and deceit."⁵ Section 59.1-69(A) prohibits any "person" from conducting or transacting business in the Commonwealth "under any assumed or fictitious name unless such person" files a fictitious name certificate.⁶ Section 1-13.19 defines the term "person" to include any "business" and "trust." A rule of statutory construction provides that where the language of a statute is clear and unambiguous, effect must be given to its plain and ordinary meaning.⁷ Consequently, I am of the opinion that a foreign business trust, as a "person" within the meaning of § 59.1-69(A), may file a fictitious name certificate in the Commonwealth.

You next ask whether a foreign business trust must obtain a certificate of registration or a certificate of authority from the State Corporation Commission before filing the fictitious name certificate.

In determining whether a foreign entity is "doing business" in Virginia for regulatory purposes, courts within the Commonwealth generally require a "stronger showing of in-State activities."⁸ For these purposes under Virginia law, the term "doing business" does not mean "a performance of a single disconnected business act"; it means a "progression, continuity, or sustained activity."⁹ Sections 13.1-757(A) and 13.1-919(A) require that a foreign corporation obtain a "certificate of authority from the [State Corporation] Commission" before it may "transact business in this Commonwealth." Certificates of authority must also be obtained by foreign professional corporations,¹⁰ foreign limited liability companies,¹¹ and foreign professional limited liability companies.¹² Certificates of registration must be obtained from the State Corporation Commission by professional corporations,¹³ Virginia limited liability companies,¹⁴ and foreign professional limited liability companies.¹⁵

The statutory definition of the terms "foreign corporation" and "foreign limited liability company" in §§ 13.1-603 and 13.1-803 do not include business trusts and foreign business trusts. Because a foreign business trust is not included within such definitions of business entities required to obtain either a certificate of authority or certificate of registration, I conclude that a foreign business trust is not required to obtain a certificate of authority before filing a fictitious name certificate.¹⁶

Finally, you request the identification of the statutory agent for foreign business trusts filing fictitious name certificates in the Commonwealth.

Section 59.1-74 requires the clerk of the court with whom the fictitious name certificate is filed to "keep a register in which shall be entered in alphabetical order the name under which every such business is conducted, the name of the statutory agent, and the names of every person owning the same." You advise that Provident Auto Leasing Company is not a corporation, limited liability company, partnership or limited partnership. Consequently, there is no Virginia statute pertaining to the registration of a foreign business trust with the State Corporation Commission which requires the appointment of a registered agent. In addition, you indicate that § 59.1-69 contains no special requirements with respect to foreign business trusts. Further, the statute contains no requirement to list a registered agent before a fictitious name certificate may be filed.

The General Assembly has not defined the term "statutory agent" as it appears in § 59.1-74. The traditional function of a statutory agent, however, is to accept service of legal process on behalf of nonresidents of the Commonwealth.¹⁷

When a foreign [business] engages in the privilege of doing business in Virginia, it enjoys the benefits and protection of the laws of this Commonwealth. It thereby subjects itself to the jurisdiction of the courts of this State for the purpose of litigating liabilities created during its stay here.^[18]

In the context of Chapter 5 of Title 59.1, § 59.1-71 addresses the function of accepting service of legal process. "Persons" who must file a fictitious name certificate are required to appoint a "practicing attorney-at-law residing in the Commonwealth as its attorney or agent" to receive legal process and enter an appearance in the courts of the Commonwealth.¹⁹ Such appointment must be evidenced by a "written power of attorney," and a copy of the "power of attorney, together with an acknowledgment of acceptance" by the attorney, are required to be "recorded in the clerk's office in which deeds are recorded, of the county or city wherein the place of business is located."²⁰

A rule of statutory construction requires that "every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary."²¹ I have concluded that a foreign business trust is a "person" as that term is used in Chapter 5 of Title 59.1. Section 59.1-74 requires the clerk with whom the fictitious name certificate is recorded to keep a register in which the name of the statutory agent is entered. It is my opinion that the statutory agent for a foreign business trust filing a fictitious name certificate in the clerk's office where deeds are recorded is the practicing attorney identified for the purposes set forth in § 59.1-71.

¹"No person, partnership, limited liability company or corporation shall conduct or transact business in this Commonwealth under any assumed or fictitious name" unless and until a certificate meeting the requirements of § 59.1-69 is filed "in the office of the clerk of the court in which deeds are recorded in the county or city wherein the business is to be conducted." Va. Code Ann. § 59.1-69(A). Therefore, for the purposes of this opinion, I shall assume that the term "fictitious name certificate" is the certificate required by § 59.1-69(A).

²See § 1-13.

³See *Andrews v. Shepherd*, 201 Va. 412, 414-15, 111 S.E.2d 279, 281-82 (1959); see also *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); *Op. Va. Att'y Gen.*: 1998 at 56, 58; 1996 at 178, 178; 1991 at 238, 240; 1989 at 250, 251-52; 1985-1986 at 133, 134.

⁴Sections 13.1-603, 13.1-803.

⁵*Tate v. Atlanta Oak Flooring Co.*, 179 Va. 365, 367-68, 18 S.E.2d 903, 904 (1942).

⁶See *supra* note 1.

⁷See *Ambrogi v. Koontz*, 224 Va. 381, 297 S.E.2d 660 (1982); 1999 *Op. Va. Att'y Gen.* 164, 165.

⁸*Continental Properties, Inc. v. Ullman Co.*, 436 F. Supp. 538, 541 (E.D. Va. 1977). See, e.g., *Lake Carroll Holdings v. Bunning*, 11 Va. Cir. 26 (1986).

⁹Walton v. Commonwealth, 187 Va. 275, 282, 46 S.E.2d 373, 376 (1948) (quoting Lewellyn v. Pittsburgh, B & L. E. R. Co., 222 F. 177, 185 (3d Cir. 1932)) (construing terms "to engage 'in business'" and "doing business" in context of regulatory statute relating to undertakers).

¹⁰Section 13.1-544.2.

¹¹Section 13.1-1057(C).

¹²Section 13.1-1105.

¹³Section 13.1-549.2.

¹⁴Section 13.1-1053.

¹⁵Section 13.1-1105(B).

¹⁶I note that certificates of registration are issued by the State Corporation Commission only to Virginia professional corporations and foreign limited liability companies. See §§ 13.1-549.2, 13.1-1053. I note that certificates of registration are issued by the State Corporation Commission only to Virginia professional corporations and foreign limited liability companies. See §§ 13.1-549.2, 13.1-1053.

¹⁷See § 8.01-306 (service of process against unincorporated association, order, or common carriers); § 8.01-308 (service of process against nonresident motor vehicle operator); § 8.01-309 (service of process against nonresident operator or owner of aircraft); § 8.01-312 (effect of service of process on statutory agent and duties of such agent); § 8.01-313 (specific address for mailing of process by statutory agent); § 8.01-326.1 (service of process or notice on statutory agent and mailing of same by statutory agent to defendant with certificate of compliance filed with court).

¹⁸Eure v. Morgan Jones & Co., 195 Va. 678, 688; 79 S.E.2d 862, 868 (1954).

¹⁹Section 59.1-71.

²⁰*Id.*

²¹Sansom v. Board of Supervisors, 257 Va. 589, 595, 514 S.E.2d 345, 349 (1999) (quoting Hubbard v. Henrico Ltd. Partnership, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998)).