NIESAR & VESTAL LLP

Law Alert

June 3, 2019

A trust, *per se*, may be a partner in a partnership

(but it is not a good idea)

The Second Appellate District has recently held in *Han v. Hallberg* (2019) that a trust may be a partner in a partnership.

While a trust cannot act in its own name and must always act through its trustee, a trust is a "person" that may associate in a partnership under the Uniform Partnership Act ("UPA") of 1994, based on the plain language of the UPA's definition of "person". Justice Grimes noted that under the UPA, a partnership is an association of two or more persons and "person" is defined to include, among others, a "business trust, estate, trust". Cal. Corp. Code § 16101(13).

She found this language controlling despite a contrary holding by the Fourth District Court of Appeal in *Presta v. Tepper* (2009). In fact, in *Presta*, the Court reasoned that because a trust is not an entity legally capable of entering into a business relationship, a trust cannot be considered a partner in a partnership.

The *Han* court found no contradiction between the terms of the UPA and California trust law, and to the extent that the *Presta* decision suggested otherwise, the *Han* court respectfully disagreed. It also pointed out that the clear statutory language is reinforced by other provisions of the statute, as well as by its legislative history.

In this respect, the LLC world is identical, because the California Revised Uniform Limited Liability Company Act ("Act") defines a "person" as any individual or entity, including a trust. Therefore, a trust has the status of a person, and anything that the Act authorizes a person to do regarding an LLC can be done by a trust, and the Act defines a Member as a "person that has become a member of a limited liability company…and has not dissociated".

The corporate world is less clear. No specific provision of the General Corporation Law ("GCL") defines "person" and specifies that any person can be a shareholder. However, Section 605 of the GCL states that "Shares identified as held of record by a corporation, a partnership, a limited liability company, a trust, whether or not the trustees are named, or other organization shall be included as so held by one person." Because of the specific context of this provision in the GCL (determining whether there are 100 or more shareholders), it is unclear whether this constitutes a statement by the Legislature that shares may be held in the name of a trust. However, corporate practitioners generally consider that this is not the case because the trust is "simply a relationship, and not an entity".

Notwithstanding the foregoing, experienced trust attorneys recommend that the trustee, and not the trust, be named as the partner or the LLC member. Under California law, a trust can neither initiate nor defend a lawsuit; it is the trustee that must do this. This creates a potential litigation complication. For example, if a partnership or an LLC wishes to bring an action against a trust that is a partner or a member of the LLC, who would be named as the defendant? Likewise, how would a trust initiate a lawsuit if the court does not recognize it as a juridical person? This is even more true in the corporate world because the trust does not seem to be able to be the shareholder of record.

If you have questions concerning a trust as shareholder, partner or LLC member, or about any additional aspects addressed above, please feel free to contact Gerald Niesar (gniesar@nvlawllp.com), Alan Seher (aseher@nvlawllp.com) or Carolina Aricu (caricu@nvlawllp.com).

These publications are designed to provide Niesar & Vestal clients and contacts with information they can use to more effectively manage their businesses and access Niesar & Vestal's resources. The contents of these publications are for informational purposes only. Neither these publications nor the lawyers who authored them are rendering legal or other professional advice or opinions on specific facts or matters. Niesar & Vestal assumes no liability in connection with the use of these publications.