

CALIFORNIA LIMITED LIABILITY COMPANY REVIEW

TRUSTS AS LLC MEMBERS

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Up until 2009, it seemed clear that a trust could be a member of a California LLC. After all, under California's LLC act a "member" refers to a "person" and a "person" is an individual, trust, etc.

However, in late 2009, in *Presta v. Tepper*, 179 Cal. App. 4th 909, the Court of Appeal of California concluded that the trustees, but not the trusts, were partners of a California general partnership under California's Revised Uniform Partnership Act (RUPA). The *Presta* court held that buy/sell provisions which by their terms applied to the death of a "partner" applied to the death of a trustee.

I would like to believe that the court's discussion of RUPA was mere dicta, since the court found the parties intended the provisions to apply to the individuals who served as trustees. The court did not need the RUPA analysis, but does seem to rely upon it primarily.

Specifically, the court held that the language of "person means an individual, corporation, business trust, trust, estate ... or any other legal ... entity" did not refer to an ordinary express trust formed under Section 15200 of the California Probate Code. The court concluded

that "trusts" in that language referred only to trusts that were legal entities and since ordinary express trusts in California were merely relationships, not legal entities, "trusts" could not refer to them.

The court did not (i) analyze the plain and ordinary meaning of "trust," (ii) reconcile why "trusts," next to "individuals" in the statute, referred to legal entities when "individuals" clearly did not, (iii) seek to find any legislative history regarding the RUPA provision, (iv) acknowledge that similar provisions were in Corporation Code provisions for LLCs and limited partnerships, as well as probably a multitude of other uniform acts, including Section 56 of the California Probate Code, or (v) let on to how its holding worked with co-trustees, successor trustees, capital calls, rights of beneficiaries or settlors, loans or any other aspect of either the partnership or the trust, other than recognizing differences in income tax treatment. The court knew what it knew and that was enough for its decision and to get it published.

So what are the implications of *Presta* for LLCs? I believe the answer is operating agreements need clear drafting. The parties should be able to include the trust itself, or exclude the trustees,

where the operating agreement needs to, including for buy/sell provisions. Section 17005 of the California Corporations Code allows the parties to vary most default provisions of the LLC act, including the transfer provisions in Section 17301. For many provisions, the trustees have to act on behalf of the trust anyway, such as for meetings, voting and signing the operating agreement, so a distinction between the trustees and the trust does not matter.

Presta itself suggests that if the parties want the trust to be the intended member, rather than the trustee, the parties should name the trust and then follow it with words such as "through its trustee _____." However, that suggestion does not seem to square with its holding that an ordinary express trust cannot be a partner/member since it is not a "person." We will have to wait and see how subsequent courts handle *Presta*.

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