TAKING TITLE TO TRUST ASSETS

by Robin L. Klomparens

Both accountants and lawyers are frequently asked how to title property which is in a trust. A trust is not a separate legal entity that can hold property. In contrast to a corporation, which the law often deems as its own person, a trust is not a person but rather a "fiduciary relationship with respect to property." (Ziegler v. Nickel, 64 Cal. App. 4th 545, 548 (1998).) The California Court of Appeals has stated that "legal title to property owned by a trust is held by the trustee." (Galdjie v. Darwish, 113 Cal. App. 4th 1331, 1343-1344.) Based on these rules, upon creation of a trust, title to trust property is split between the trustee and the beneficiaries. The trustee holds legal title to the property and the beneficiaries hold equitable title. Because the trustee holds legal title to the property, that property must be held in the trustee's name.

New Case Law that Might Have Serious Titling Implications

Portico Management Group v. Harrison, 202 Cal. App. 4th 464 (2011)

In Portico Management Group LLC v. Harrison, No. C062060, Portico Management Group ("Portico"), the California Court of Appeal recently ruled that an arbitrator's judgment against a trust could not be enforced when the judgment was entered against a trust, as opposed to its trustees. This decision was based upon the case law above, the fact that a trust is not an entity; it cannot sue or be sued, or hold title to property. Also, the Court noted that "a claim based on a contract entered into by a trustee in the trustee's representative capacity,…may be asserted against the trust by proceeding against the trustee in the trustee's representative capacity…" (Probate Code section 18004) A trust does not fall within the statutory definition of a judgment debtor that is defined as "the person against whom a judgment is rendered." (CCP § 680.250.) The court squarely held that the mistitling of the judgment, in the trust's name rather than in the name of the trustee of the trust, rendered it a nullity.

The ruling in Portico begs the question of whether the titling of trust assets solely in the name of the trust, or the signature on contracts entered into by trusts signed as "Moe and Larry Trust, dated January 1, 2011" are sufficient. What must be understood is that Portico offers a very narrow ruling, one that directly applies only to judgments by courts against trusts. It is important however to be aware of the broader implications it might have, thus the importance of correctly naming the trustee of the trust in titling assets in a trust and in any contract or lawsuit.

Proper Title

Titling trust assets has always been very important, not just due to the implications of Portico. If title to assets

is not proper, then on the death or incapacity of the trustor a court proceeding may be necessary to transfer title to the trust.

Real Property

As explained above, the appropriate party to hold title to trust property is the trustee, in his capacity as trustee. Assuming that when the assets were transferred into the trust, the trust took title to those assets as "Moe and Larry Trust, dated December 1, 2011," the ruling in Portico states that this is not proper. This transfer of property to the trust creates an imperfect transfer because the trustee, who should hold legal title to the property, is not named. It has been our firm's experience, that on death or incapacity, a proceeding will be needed, as title companies routinely do not accept the Moe and Larry Trust as properly vesting title in the name of the Trust.

Because this is a case of ownership of real property, and not the enforcement of a judgment against a trust, Portico, does not specifically address this. In some cases if the trustee signed the deed but title is vested as "Moe and Larry Trust, dated December 1, 2011," since the trustee was the person who signed the deed some title companies will ensure title. In this case, the title company will request that the trustee sign a declaration stating that he or she was the trustee at the time the deed was signed, or a declaration stating who the trustee was at the time and that that trustee did indeed sign the deed. Unfortunately this is the luck of the draw and many title companies will require a court proceeding to validate the deed as it is their call. In any event, the signature "John Smith, Trustee of the Moe and Larry Trust, dated December 1, 2011" is correct and will avoid any of these problems.

Accounts

The same issue will arise when a trust owns certain accounts and those are titled only in the name of "Moe and Larry Trust, dated December 1, 2011." Most institutions are savvy enough to catch improper title when an account is opened. But, this should not be relied upon and no one wants a joint account owner to argue later that the trust is not a proper owner because title is imperfect. Thus, all trust accounts need to be properly titled.

Contracts Entered into by the Trust

It is also important to correctly identify the trustee of the trust as the correct party when entering into any contracts on behalf of the trust. Probate Code section 18000 provides as follows:

"Unless otherwise provided in the contract or in this chapter, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administration of the trust unless the trustee fails to reveal the trustee's representative capacity or identify the trust in the contract."

Based on this Code section, the trustee should indicate on any contract or deed that he or she is signing in his or her capacity as trustee of the trust to avoid personal liability on such contract. Additionally, under a broad

reading of Portico, the trustee should ensure that any contract is entered into by the trustee of the trust to ensure that the contract is binding as to all parties.

Lawsuits

Under Portico, improperly identifying the trust itself without the trustee's capacity could cause dismissal of a lawsuit. Thus, care must be taken when bringing a lawsuit on behalf of a trust, or when suing a trust to ensure the proper parties are named. The trustee must be named to avoid any such problems.

Correcting Title

If it is discovered that title to real property, a contract, or parties in a lawsuit are not proper while the trustee is competent and living, title should be immediately corrected. If a trustor is incapacitated and they executed a power of attorney for finances, the agent can make this correction for the trustor. If a trustor is deceased and title is not properly titled in the trust's name then a proceeding in court will be needed to properly transfer title to the trust. It is likely that this can be done by filing a Probate Code Section 850 Petition, which generally requires just one petition and one hearing. In some instances, however a full blown probate will be necessary to transfer the assets to the trust. And, if the assets are real property and held out of state, unlike California, most states require the complete probate process to correct title. If improper parties are named to a lawsuit this may be fatal as in Portico, but clearly if this is the case, it should be corrected as soon as possible.

Summary

As discussed above, it is particularly important for any real or personal property in a revocable trust to be titled correctly for many reasons. Even though in a revocable trust, most trustees will be the same as the grantor/settlor, it is still important for the trustee to sign any and all deeds, "John Smith, Trustee for the Moe and Larry Trust, dated December 1, 2011." By, ensuring title is proper the result in Portico can be avoided. Additionally, contracts will not be deemed void, lawsuits will not face dismissal, judgments will not be invalid, and title insurance will remain. Furthermore, assets can be properly administered on death or incapacity without court involvement. Hence it is crucial to ensure the trustee of the trust is always named.