

Trusts as Members of NJ LLCs

by Gianfranco A. Pietrafesa

This article examines the issue of whether a trust or a trustee is the member of a limited liability company (LLC), how a membership interest should be titled, and the consequences to a membership interest on the death of the settlor or trustee of a trust.

LLC Member

The New Jersey Revised Uniform Limited Liability Company Act (NJ-RULLCA) defines a ‘member’ as a person that has become a member of an LLC¹ and defines a ‘person’ to include a trust.² Therefore, a trust may be a member of an LLC.

However, although a trust may be a member of an LLC, it does not hold title to the membership interest in an LLC. Instead, the trustee of the trust holds title in his or her capacity as trustee. In this regard, the New Jersey Uniform Trust Code provides that a trustee holds title to the trust’s property (such as a membership interest) in his or her name as trustee of the trust.³ This is because a trust is a fiduciary relationship rather than a separate legal entity.⁴ The New Jersey Uniform Trust Code emphasizes this point by further providing that “A written instrument which creates a trust or transfers property to a trust shall not be invalid or ineffective because the transferee is identified as the trust rather than the trustee thereof.”⁵

As a result, although it may be semantics, while a trust may be a member of an LLC, it does not hold title to the membership interest in the LLC. Instead, title to the membership interest is held by the trustee in his or her capacity as trustee of the trust (using the trust’s employer identification number). For example, the trust’s membership would be reflected in the LLC’s records as “John Doe as Trustee of the Robert Roe Trust dated July 4, 1976” or “John Doe as Trustee of the Robert Roe Trust under Trust Agreement dated July 4, 1976.”

Death of Trustee

What happens when the trustee of a trust dies? NJ-RULLCA provides that a “person is dissociated as a member from a limited liability company when:...In the

case of a person that is a trust or is acting as a member by virtue of being a trustee of a trust, the trust’s entire transferable interest in the company is distributed.”⁶ Therefore, a trust is not dissociated on the death of a trustee. A trust is dissociated only when its entire interest in the LLC is distributed to its beneficiary. The Uniform Law Commission’s commentary to this provision states that a “change in trustee...does not cause dissociation.”⁷ Therefore, if a trustee dies, the successor trustee is substituted for the deceased trustee to hold title to the membership interest as trustee.

Death of Settlor

What happens when the settlor of a trust dies? The answer depends on whether the trust continues or terminates as a result of the settlor’s death. If the trust continues, the trustee of the trust continues to hold the membership interest as trustee. If the settlor is also the trustee of the trust, upon the death of the settlor/trustee, a successor trustee would be appointed and the successor trustee would be substituted for the deceased settlor/trustee to hold title to the membership interest as trustee. As a result, if the trust continues upon the death of a settlor, there is no event of dissociation. If a trust is a revocable trust and becomes an irrevocable trust upon the settlor’s death, the result is the same. The change in the trust from revocable to irrevocable has no bearing on the status of the trustee or successor trustee holding title to the membership interest of the LLC.⁸

If the trust is terminated, the trustee distributes the entire transferable interest from the trust to its beneficiary. As a result, the trustee no longer holds title to the membership interest and the beneficiary is a mere transferee of the membership interest (unless the members of the LLC admit the beneficiary as a member of the LLC). As noted, NJ-RULLCA provides that a trustee is dissociated as a member when the trust’s entire transferable interest is distributed.⁹

Conclusion

The above analysis can be summarized in the following table:

If, as to the Settlor	And, as to the Trust	And, as to the Trustee	The Result as to the Member is
Settlor lives	Trust continues	Trustee dies	Successor trustee holds title
Settlor dies	Trust continues	Trustee lives	Trustee still holds title
Settlor dies	Trust continues	Trustee dies	Successor trustee holds title
Settlor dies	Trust terminates and distributes assets to beneficiary	Trustee lives	None; beneficiary is mere transferee
Settlor dies	Trust terminates and distributes assets to beneficiary	Trustee dies	None; beneficiary is mere transferee

Gianfranco A. Pietrafesa is a partner of Archer & Greiner, P.C. in its Hackensack office, where he is a member of its business counseling group. He is a director and past chair of the Business Law Section and served on the select committee that drafted NJ-RULLCA.

Endnotes

1. N.J.S.A. 42:2C-2 (definition of member).
2. N.J.S.A. 42:2C-2 (definition of person).
3. N.J.S.A. 3B:31-18(a)&(b) (“A trust may be created by (a) transfer of property under a written instrument to another person as trustee during the settlor’s lifetime or by will or other written disposition taking effect upon the settlor’s death [or] (b) written declaration by the owner of property that the owner holds identifiable property as trustee.”) (emphasis added). See also *Restatement (Third) of Trusts*, §2 (definition of trust); *Restatement (Second) of Trusts*, §2 (definition of trust); comment d to *Restatement (Second) of Trusts*, §2.
4. See *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012, 1016 (2016) (“Traditionally, a trust was not considered a distinct legal entity, but a fiduciary relationship between multiple people.”) (internal quotations omitted; citations omitted). But see Reporter’s Notes to comments a and i to *Restatement (Third) of Trusts*, §2 (noting the development of the concept that a trust is a separate entity).
5. N.J.S.A. 3B:31-19(d). The New Jersey Uniform Trust Code also includes a provision dealing with the personal liability of a trustee who holds an interest as a general partner, N.J.S.A. 3B:31-80. The key language in this provision is the phrase “a trustee who holds an interest as a general partner in a general or limited partnership.” By analogy, a trustee holds an interest as a member of an LLC. Although not enacted in New Jersey, another section of the Uniform Trust Code provides that “a trustee may..., with respect to an interest in [an LLC],...take any action that may be taken by...[its] members....” Uniform Trust Code, §816(6).
6. N.J.S.A. 42:2C-46(h).
7. Uniform Law Commission August 19, 2015 Comment to RULLCA §602(9), which is the basis for N.J.S.A. 42:2C-46(h).

8. If a general partnership elected to become a limited liability partnership or a corporation elected to convert to an LLC, would anyone argue that its status changed from a member to a dissociated member? The form of the legal entity may have changed, but the company and its owners remained the same. By analogy, the trustee and the beneficiary remain the same when a revocable living trust becomes an irrevocable trust upon the death of a settlor.
9. N.J.S.A. 42:2C-46(h). Obviously, the same result would occur for an *inter-vivos* transfer. That is, the transfer of an entire transferable interest from the trust to its beneficiary before the death of the settlor or the termination of the trust. In such a scenario, the trustee would be dissociated as a member and the beneficiary would be a mere transferee.