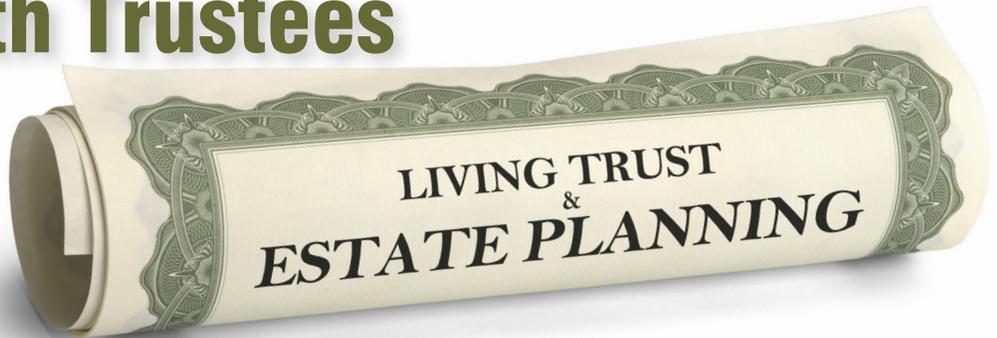


EXECUTING ON JANUS: Trouble With Trustees In Nevada

BY ASHLEY C. NIKKEL, ESQ.



Litigation involving trusts, trustees and trust assets poses a variety of challenges to both plaintiff and defense attorneys. In the course of such litigation, litigators sometimes overlook two of the most basic aspects of preliminary case development:

1. Identifying the potentially liable parties, and
2. Evaluating the potential assets that may be used to satisfy a judgment.

Particularly as it relates to the second point, an ounce of prevention is worth a pound of cure, as evidenced by the Nevada Supreme Court's recent opinion in *Mona v. Eighth Judicial District Court*, 132 Nev. ___, 380 P.3d 836 (2016). The case serves as a cautionary tale for litigators, so that they might avoid the unfortunate situation of succeeding at trial only to come up empty-handed at the end of a long and expensive collection process.

The underlying California suit in *Mona* involved a Far West Industries action against Michael Mona, both individually and in his capacity as trustee of the revocable Mona Family Trust for fraudulent land transfers. Michael's wife, Rhonda, was also a trustee, but Far West failed to name her as a defendant, either individually or in her capacity as co-trustee. At the conclusion of the California proceeding, Far West obtained a \$17.8 million judgment against Michael in both capacities. The California court also found the trust was Michael's alter ego, and both Michael and the trust were liable for the damages.

Far West domesticated the judgment in Nevada pursuant to NRS 17.350. In the period of time between the entry of the California judgment and its domestication, Michael and Rhonda

entered into a post-marital property settlement agreement, which the district court later concluded was a fraudulent transfer intended to obstruct Far West's collection efforts. In the course of the judgment debtor examination, pursuant to NRS 21.270, Michael failed to disclose the settlement agreement. Far West moved to examine Rhonda, as a trustee, which the district court permitted, while also ordering Michael and Rhonda to produce a variety of documents, including some of Rhonda's personal financial documents.

Rhonda failed to produce the documents, and Michael also failed to produce documents concerning three bank accounts that may have held community property, as the accounts were in Rhonda's name.

The district court eventually sanctioned Michael and Rhonda for their failure to produce the settlement agreement and disclose the bank records, finding the funds in Rhonda's three bank accounts were community property and therefore subject to execution. The district court also concluded that under NRS 21.280, and to the extent Rhonda was considered a third party, Michael and Rhonda were prohibited from disposing of or transferring their assets. Michael and Rhonda petitioned

the Nevada Supreme Court to vacate the sanctions order.

Because Rhonda was not a party to the Nevada enforcement action, she had no standing to appeal, making a writ petition the appropriate avenue for relief. The court agreed to consider the writ, reviewed the district court's imposition of discovery sanctions under NRCP 37(b)(2) for an abuse of discretion and concluded that:

1. Michael was not entitled to relief, and
2. The district court erred entering the sanctions order against Rhonda.

As a named defendant, Michael was subject to the judgment debtor examination provisions of NRS 21.270, plus NRCP 34 and NRCP 69.

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However, Far West had failed to bring a separate action or obtain a judgment against Rhonda before seeking to execute on her bank accounts. The inquiry-based provisions of NRCP 69(a) and NRS Chapter 21 do not entitle the judgment creditor to order a third party to pay money in satisfaction of a judgment, except where the third party admits the indebtedness and acknowledges possession or control of the amount due (or the party seeking enforcement establishes these facts by clear and indisputable evidence). The court-suggested appropriate course of

action is for the judgment creditor to institute a separate action under NRS 21.330 against the third parties with adverse claims to the judgment debtor's assets, while requesting that the district court prohibit transfer of the interest or debt at issue until the action is resolved.

The Nevada Supreme Court emphasized the fact that Rhonda was merely a co-trustee, and therefore a third party—not a judgment debtor. Having not previously addressed the difference between a person's individual capacity and his or her representative capacity as a trustee, the court clarified that the modern trend, and the law in Nevada, is to treat the two capacities as "two different legal personages." Because Rhonda in her individual capacity was a third party to the California judgment and the Nevada collection action, her personal assets could not be the subject of either a judgment debtor examination or execution. But, in her representative capacity, Rhonda was a managing agent of the trust, which was a named party to the California judgment; in such capacity, discovery (and subsequent sanctions for non-compliance) was permissible. In

sum, two separate legal personages arise when an individual serves as a trustee: an individual and a representative. Each must be treated as a distinct person for all purposes of litigation, ranging from personal service to execution.

In drafting the complaint, a plaintiff's attorney may not have access to enough information to determine the nature of the defendant's assets or whether they are held in trust, and the attorney certainly cannot foresee fraudulent transfers that could potentially be used to frustrate collection post-judgment. Further, documents concerning trust formation may be difficult to obtain, even with the aid of discovery. However, there are a handful of tools that can help attorneys ensure proper parties are named early in the case. In the event real estate assets may exist, a search of the local county recorder's records can reveal whether title to the property is held in the individual's name or by a trust.

Additionally, in the event an alter-ego theory is pursued, the attorney may seriously consider whether adequate facts exist to include a spouse as a defendant, depending on his or her level

of involvement in the business. Finally, the plaintiff may wish to aggressively use discovery early in the action to determine the number and identities of co-trustees, so that the complaint may be amended to include such individuals as defendants if necessary, while making clear the capacity in which they are being sued.

Mona, therefore, illustrates that a bit of attention early in the case to identifying potential assets for execution, as well as the legal owners of such assets, can guide case strategy to ensure that a successful plaintiff is not left with a mere pyrrhic victory after years of hard-fought litigation, particularly in cases involving trusts. Keeping in mind the dual nature of a trustee – who acts as both an individual and a representative – can aid practitioners in securing comprehensive and successful results for their clients. **NL**



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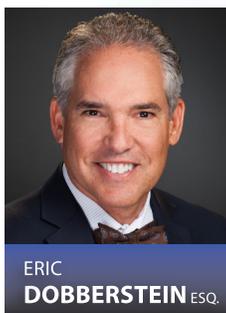
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