
To: Members of the House Economic Matters Committee

From: MSBA Estate & Trust Law Section

Date: February 9, 2022

Subject: House Bill 342: Corporations and Associations – Limited Liability Companies and Partnerships – Operating Agreements and Partnership Agreements.

Position: Support

For the members of a limited liability company (“LLC”) or a general or limited partnership, a well-crafted plan for the transfer of interests is essential to the smooth operation of the business. This is especially true when a member or partner dies. Provisions in the governing document providing rules for the disposition of the decedent’s business interest help alleviate the natural strain and disruption caused by such an event. They also give the decedent, their heirs, and their estate confidence in dealing with the disposition of those interests. In light of these considerations, LLC Operating Agreements and Partnership Agreements routinely include provisions governing disposition of a member’s interest upon death.

Problem with Current Law

The Court of Special Appeals’ decision in *Potter v. Potter*, 250 Md. App, 569 (2021), calls into question the effectiveness of those disposition on death provisions. In that case, the Court held that an operating agreement provision directing the distribution of a member's interest on death was testamentary in nature, and was not valid unless it complied with the formalities required by Estates & Trusts § 4-102. That means that, for its disposition on death provisions to be valid under the *Potter* decision, each member’s signature on an Operating or Partnership Agreement must include an attestation clause, and be witnessed by two people – requirements that are unnecessary for a contractual arrangement like an Operating Agreement.

Not only does the *Potter* decision throw procedural roadblocks in the way of completing Operating and Partnership Agreements, it calls into question the disposition on death provisions of every existing Agreement in Maryland. This uncertainty could cause chaos in the orderly transition of businesses and the disposition of their owners’ estates.

How HB 342 Solves the Problem

House Bill 342 solves these problems by specifying in the Corporations and Associations Article that the members of an LLC or partnership (general or limited) are free to agree amongst themselves what happens to their membership or partnership interests at death, and to memorialize those decisions in the relevant agreements. The bill also amends § 1-401 of the Estates and Trusts article to specify that, like other transfer on death arrangements, the disposition on death arrangements contained in Operating or Partnership Agreements are not testamentary in nature, and therefore are not subject to the formal requirements of § 4-102.

House Bill 342 restores the law surrounding disposition on death provisions in Operating and Partnership Agreements to its status before the *Potter* decision. This will remove uncertainty about existing Agreements, and will enable members to move forward with ordering their business arrangements without encountering cumbersome procedural hurdles. For these reasons, we urge a **favorable** report.

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