

MARYLAND LIMITED LIABILITY COMPANY REVISION ACT OF 2011

AN ACT concerning

Corporations and Associations—Maryland Limited Liability Company Act

FOR the purpose of clarifying certain provisions of the Maryland Limited Liability Company Act, including provisions relating to operating agreements and the rights and obligations of limited liability company members and their assignees.

BY adding to

Article – Corporations and Associations

Title 4A. Limited Liability Company Act

Sections 4A-101; 4A-102; 4A-402; 4A-404; 4A-601; 4A-603; 4A-604; 4A-607; 4A-902

Annotated Code of Maryland

(2008 Replacement Volume and 2010 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
That the Laws of Maryland read as follows:

Article – Corporations and Associations
Title 4A. Limited Liability Company Act

Subtitle 1. Definitions and Construction

§ 4A-101. Definitions

(a) *In general.* In this title the following terms have the meanings indicated.

(b) "Articles of organization" means the articles of organization filed with the Department for the purpose of forming a limited liability company as specified in § 4A-204 of this title and includes all amendments and restatements of them.

(c) "Authorized person" means any person, whether or not a member, who is authorized by the articles of organization, by an operating agreement, or otherwise, to execute or file a document required or permitted to be executed or filed on behalf of a limited liability company or foreign limited liability company under this title, or to otherwise act as an agent of the limited liability company.

(d) "Bankrupt" means bankrupt under the federal Bankruptcy Code as amended or insolvent under any state insolvency act.

(e) "Business trust" has the meaning stated in § 1-101(e) of this article.

(~~e~~f) "Capital contribution" means anything of value that a person contributes as capital to the limited liability company in that person's capacity as a member, including cash, property,

services rendered or a promissory note or other binding obligation to contribute cash or property or to perform services.

(fg) "Capital interest" means the fair market value, as of the date contributed, of a member's capital contribution, whether or not returned to the member.

(gh) "Corporation" means a Maryland corporation or a foreign corporation as defined in § 1-101 of this article.

(hi) "Court" includes every court having jurisdiction in the case.

(ij) "Foreign limited liability company" means a limited liability company formed under the laws of a state other than the State of Maryland.

(jk) "Interest" means a member's share of the profits and losses of the limited liability company and the right to receive distributions from the limited liability company.

(kl) "Limited liability company" or "domestic limited liability company" means a permitted form of unincorporated business organization which is organized and existing under this title.

(lm) "Limited partnership" means a Maryland limited partnership or foreign limited partnership as defined in § 10-101 of this article.

(mn) Member.

(1) "Member" means a person with an interest in a limited liability company with the rights and obligations specified under this title.

(2) "Member" includes a person who has been admitted as a member of a limited liability company organized in the State or a foreign limited liability company.

(no) "Operating agreement" means the agreement and any amendments thereto, of the members as to the affairs of a limited liability company and the conduct of its business.

(op) "Partnership" means a partnership formed under the laws of this State, any other state, or under the laws of a foreign country.

(pq) Professional service.

(1) "Professional service" has the meaning stated in § 5-101 of this article.

(2) "Professional service" includes a service provided by:

(i) An architect;

(ii) An attorney;

- (iii) A certified public accountant;
- (iv) A chiropractor;
- (v) A dentist;
- (vi) An osteopath;
- (vii) A physician;
- (viii) A podiatrist;
- (ix) A professional engineer;
- (x) A psychologist;
- (xi) A licensed real estate broker, licensed associate real estate broker, or licensed real estate salesperson; or
- (xii) A veterinarian.

(¶) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

§ 4A-102. Construction

(a) Unless otherwise specifically provided in this title, the policy of this title is to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements.

(b) Any provision of this title that may be changed by the terms of the operating agreement also may be changed by the terms of the articles of organization.

§ 4A-402. Operating agreement.

(a) *In general.* Except for the requirement set forth in § 4A-404 of this subtitle that certain consents be in writing, members may enter into an operating agreement to regulate or establish any aspect of the affairs of the limited liability company or the relations of its members, including provisions establishing:

(1) The manner in which the business and affairs of the limited liability company shall be managed, controlled, and operated, which may include the granting of exclusive authority to manage, control, and operate the limited liability company to persons who are not members;

(2) The manner in which the members will share the assets and earnings of the limited liability company;

(3) The rights of the members to assign all or a portion of their interests in the limited liability company;

(4) The circumstances in which any assignee of a member's interest may be admitted as a member of the limited liability company;

(5) (i) The right to have and a procedure for having a member's interest in the limited liability company evidenced by a certificate issued by the limited liability company, which certificate may be issued in bearer form only if specifically permitted by the operating agreement;

(ii) The procedure for assignment, pledge, or transfer of any interest represented by the certificate; and

(iii) Any other provisions dealing with the certificate; ~~and~~

(6) The method by which the operating agreement may from time to time be amended, including requiring that an amendment be approved by a person who is not party to the operating agreement or who is not a member of the limited liability company, or upon the satisfaction of other conditions specified in the operating agreement; and

(7) The rights of any person, including any person who is not a party to the operating agreement or who is not a member of the limited liability company, to the extent set forth in the operating agreement.

(b) *Initial operating agreement.*

(1) ~~(1)~~ The initial operating agreement shall be agreed to by all persons who are then members.

~~(2)~~ Unless the articles of organization specifically require otherwise, the initial operating agreement need not be in writing.

(c) *Amendments to operating agreement.*

~~(1)~~ If the operating agreement does not provide for the method by which ~~the operating agreement~~ it may be amended, then all of the members must agree to any amendment of the operating agreement.

(2) To the extent that an operating agreement provides for the manner in which it may be amended, the operating agreement may be amended only in that manner or as otherwise permitted by law, provided that the approval of a person may be waived by the person and that conditions may be waived by all persons for whose benefit the conditions were intended.

~~(3) An~~ Unless the operating agreement specifically requires otherwise, an amendment to an operating agreement need not be in writing; provided, however, an amendment to an operating agreement must be evidenced by a writing signed by an authorized person of the limited liability company if:

(i) The amendment was adopted without the unanimous consent of the members; or

(ii) An interest in the limited liability company has been assigned to a person who has not been admitted as a member.

(4) A copy of any written amendment to the operating agreement shall be delivered to each member who did not consent to the amendment and to each assignee who has not been admitted as a member.

(ed) *Enforcement.*

(1) A court may enforce an operating agreement by injunction or by granting such other relief which the court in its discretion determines to be fair and appropriate in the circumstances.

(2) As an alternative to injunctive or other equitable relief, when the provisions of § 4A-903 of this title are applicable, the court may order dissolution of the limited liability company.

(3) An operating agreement of a limited liability company with one member is not unenforceable by reason of there being only one person who is party to the operating agreement.

(4) A limited liability company is not required to execute its operating agreement, and a limited liability company is bound by its operating agreement whether or not the limited liability company has executed the operating agreement.

(5) An operating agreement that is duly adopted or amended is binding upon each person who is or becomes a member of the limited liability company, and each person who is or becomes an assignee of a member of the limited liability company, in either case whether or not the person has executed the operating agreement or amendment.

§ 4A-404. Unanimous consent of members.

Wherever this title requires the unanimous consent of the members to allow the limited liability company to act:

(1) The consent shall be in writing; ~~and~~

(2) The operating agreement may provide that the action may be taken on consent of less than all of the members ~~or~~ that the consent of certain members or classes of members is not required to take the action, or that no consent of any member or members is required to take the action; and-

(3) The operating agreement may provide that the action may only be taken with the consent of one or more persons who are not members of the limited liability company, in which case the consent of that person shall be required in order for the limited liability company to take the action.

§ 4A-601. Admission of members.

(a) *When effective.* A person becomes a member of a limited liability company:

- (1) At the time the limited liability company is formed; ~~or~~
- (2) At any later time specified in the operating agreement; or
- (3) At the time specified in § 4A-902(b)(1).

(b) *Conditions for admission.* After the formation of a limited liability company, a person may be admitted as a member:

(1) In the case of a person acquiring a membership interest directly from the limited liability company, upon compliance with the operating agreement or, if the operating agreement does not so provide, upon the unanimous consent of the members; ~~or~~

(2) In the case of an assignee of an interest of a member ~~who has the power, only~~ as provided in § 4A-604(a) of this subtitle ~~to grant the assignee the right to become a member, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of that power; or~~

(3) In the case of a personal representative or successor to the last remaining member who is not an assignee of the last remaining member, as provided in § 4A-902(b)(1).

(c) *Admission without contribution or interest.* Unless otherwise provided in the articles of organization or the operating agreement of a limited liability company, a person may be admitted as a member of a limited liability company and may be the sole member of a limited liability company without:

- (1) Making a contribution to the limited liability company;
- (2) Being obligated to make a contribution to the limited liability company; or
- (3) Acquiring an interest in the limited liability company.

§ 4(A)-603. Assignment of Interest.

(a) Unless otherwise provided in the operating agreement, an interest in a limited liability company is assignable in whole or in part.

(b) An assignment of an interest in a limited liability company does not:

- (1) Dissolve the limited liability company; or
- (2) Unless the operating agreement provides otherwise, entitle the assignee to:
 - (i) Become a member; or

(ii) Exercise any rights of a member.

(c) Unless otherwise provided in the operating agreement, an assignment entitles the assignee to receive, to the extent assigned, only the assignor's share of profits, losses and distributions to which the assignor would be entitled.

(d) If an assignee of an interest in a limited liability company becomes a member, the assignor is not released from the assignor's liability under § 4A-502 of this title to the limited liability company unless otherwise provided in the operating agreement.

(e) Unless otherwise provided in the operating agreement, a member ceases to be a member and to have the power to exercise any rights or powers of a member upon assignment of all of the member's interest in a limited liability company under this § 4A-603. Unless otherwise provided in the operating agreement, the pledge of, or granting of a security interest, lien or other encumbrance in or against, any or all of an interest of a member shall not cause the member to cease to be a member or to have the power to exercise any rights or powers of a member.

§ 4A-604. Right of assignee to become a member.

(a) *In general.* An assignee of an interest in a limited liability company may become a member of ~~and to the extent that~~ the limited liability company under any of the following circumstances:

(1) In accordance with the terms of the operating agreement providing for the admission of a member~~The assignor gives the assignee that right under authority described in the operating agreement;~~

(2) The members unanimously consent; or

(3) If there are no remaining members of the limited liability company at the time of the assignee obtaining the interest, upon such terms as the assignee may determine in accordance with § 4A-902(b)(1) of this title~~Except as otherwise provided in the operating agreement, if the limited liability company has no members, all of the assignees of members may elect to become members.~~

(b) *Rights and obligations of assignee.* An assignee who becomes a member:

(1) Has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a member under the operating agreement and this title; and

(2) Is liable for any obligations of his assignor to make capital contributions.

~~(c) *Assignor's liability for contribution.* If an assignee of an interest in a limited liability company becomes a member, the assignor is not released from the assignor's liability under § 4A-502 of this title to the limited liability company.~~

§ 4A-607. ~~Rights of a Creditors~~Interest Subject to Charging Order.

~~(a) Charge against member's interest~~Persons entitled to charging order. On application to a court of competent jurisdiction by any judgment creditor of a ~~member person holding an interest in a limited liability company, a court having jurisdiction may charge the interest of the judgment debtor~~ the court may charge the interest of the member in the limited liability company with the payment of the unsatisfied amount of the judgment with interest. The court may appoint a receiver for the distributions due or to become due to the the judgment debtor in respect of the limited liability company, and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances of the case may require.

~~(b) Creditor as assignee.—To the extent so charged, the judgment creditor shall have only the rights of an assignee of the member's interest in the limited liability company.~~Charging order constitutes a lien.

(1) A charging order constitutes a lien on the interest of the judgment debtor in the limited liability company.

(2) The court may order foreclosure of the interest subject to the charging order at any time. The purchaser at the foreclosure sale has only the rights of an assignee as provided in § 4A-603 and § 4A-604.

(c) Redemption. At any time before foreclosure, an interest charged may be redeemed:

(1) With property other than property of the limited liability company, by the judgment debtor;

(2) With property other than property of the limited liability company, by one or more of the members other than the judgment debtor; or

(3) With property of the limited liability company, with the consent of all of the members whose interests are not so charged.

(d) Exemption. This title does not deprive a member of the benefit of any judgment debtor of a right under exemption laws with respect to the judgment debtor's interest in the limited liability company applicable to the member's interest in the limited liability company.

(e) Exclusivity. This section provides the exclusive remedy by which a judgment creditor of a person holding an interest in a limited liability company may attach the interest or otherwise affect a member's rights in the limited liability company.

(f) Definitions. The terms "judgment debtor" and "judgment creditor" have the following meanings for purposes of this section:

(1) Judgment debtor means a "debtor", a "judgment defendant" or a "defendant on judgment" as those terms are used in Maryland Courts & Judicial Proceedings Article,

§ 3-301 through § 3-305.

(2) Judgment creditor means a person having rights to attachment under Maryland Courts & Judicial Proceedings Article, § 3-301 through § 3-305.

§ 4A-902. Causes of dissolution; continuation

(a) Causes of dissolution. A limited liability company is dissolved and shall commence the winding up of its affairs on the first to occur of the following:

- (1) At the time or on the happening of the events specified in the articles of organization or the operating agreement;
- (2) At the time specified by the unanimous consent of the members;
- (3) At the time of the entry of a decree of judicial dissolution under § 4A-903 of this subtitle; or
- (4) Except as otherwise provided in the operating agreement or as provided in subsection (b) of this section, at the time the limited liability company has had no members for a period of 90 consecutive days.

(b) Continuation after no remaining members. A limited liability company may not be dissolved or required to wind up its affairs if within 90 days after there are no remaining members of the limited liability company or within the period of time provided in the operating agreement:

- (1) The last remaining member's personal representative, ~~or~~ successor or assignee agrees in writing to continue the limited liability company and to be admitted as a member or to appoint a designee as a member to be effective as of the time the last remaining member ceased to be a member; or
- (2) A member is admitted to the limited liability company in the manner set forth in the operating agreement to be effective as of the time the last remaining member ceased to be a member under a provision in the operating agreement that provides for the admission of a member after there are no remaining members.

(c) Continuation by personal representative, ~~or~~ successor or assignee. An operating agreement may provide that the last remaining member's personal representative, ~~or~~ successor or assignee shall be obligated to agree in writing to continue the limited liability company and to be admitted as a member or to appoint a designee as a member to be effective as of the time the last remaining member ceased to be a member.

(d) Continuation after termination of membership. Except as otherwise provided in the operating agreement and subject to the provisions of subsection (b) of this section, the termination of a person's membership may not cause a limited liability company to be dissolved or to wind up its

affairs and the limited liability company shall continue in existence following the termination of a person's membership.

Commentary to Proposed Amendments

Amendments to Subtitle 1

Subtitle 1 is expanded to include one additional definition and certain rules of construction applicable to this title. The heading of this subtitle is therefore changed to “Definitions and Construction.”

A definition of “business trust” is added as subsection (e) of § 4A-101, with subsequent subsections redesignated accordingly. The phrase “business trust” is used in the title but not otherwise defined. The new subsection cross-references the definition of business trust in § 1-101(e) of this article to maintain consistency throughout the article.

In addition, § 4A-102 is added to this subtitle to clarify certain rules of construction. Subsection (a) is added to underscore the contractual nature of limited liability companies. A core purpose of this title is to provide a set of default rules to govern the operation of a limited liability company in the absence of an operating agreement entered into by the members of the limited liability company. Accordingly, unless the title specifically provides otherwise and subject to other applicable law, members of a limited liability company may establish the terms governing the financing, control, operation and other aspects of the limited liability company by agreement in the operating agreement. Subsection (b) is added to clarify that any provision of the title that may be changed by the terms of the operating agreement also may be changed by the terms of the articles of organization.

Amendments to § 4A-402

Subsection (a)(5) is amended to clarify that certificates representing a member’s interest in a limited liability company may be issued in bearer form only if specifically permitted by the operating agreement. This default rule of prohibiting certificates in bearer form reflects the close, personal relationships that frequently give rise to individuals or entities wanting to pursue a business endeavor together in the form of a limited liability company. Such parties likely would not want or expect the free transferability and other aspects commonly associated with instruments (like a membership certificate) in bearer form. This approach also is consistent with the restrictions on assignment of a member’s interest under § 4A-603 of this subtitle. Members may vary this default rule by incorporating a specific provision permitting certificates in bearer form in the operating agreement.

Frequently lenders or other third party beneficiaries of a limited liability company operating agreement will require certain approval rights or the satisfaction of conditions before an operating agreement may be amended. Subsections (a)(6) and (a)(7) are amended to clarify that these rights and conditions, and the rights of any person not a member of the company, will be respected to the extent set forth in the operating agreement.

Former Subsection (b) has been divided into new Subsections (b) and (c) to separate provisions dealing with the initial operating agreement from those dealing with amendments to the operating agreement.

Subsection (c)(2) has been added to clarify that if the operating agreement provides the manner in which it may be amended, as permitted by Subsection (a)(6), then it may only be amended in that manner or as otherwise permitted by law. However, the approval of a person whose consent is required to amend the operating agreement may be waived, and conditions may be waived by all persons for whose benefit the conditions were intended.

Subsection (c)(3) has been amended to make that Subsection, concerning amendments, consistent with Subsection (b)(2), concerning the initial operating agreement.

The operating agreement of a limited liability company with only one member is frequently signed only by that person, in her capacity as a member of the limited liability company and as the manager of the limited liability company. Subsection (d)(3) is added to clarify that the operating agreement is not unenforceable by reason of there being only one person who is a party to the agreement.

Subsection (d)(4) is added to clarify that a limited liability company is bound by its operating agreement even if it is not a signatory to the agreement. This approach is implicit in the existing language of the subtitle and assumed to be the general rule in practice. The proposed amendment will avoid any unnecessary confusion or uncertainty regarding the enforceability of the operating agreement by and against the limited liability company.

Subsection (d)(5) is added to clarify that all members and assignees of members are bound by the company's operating agreement regardless of whether they agree to be bound by the operating agreement and, in the case of an assignee, regardless of whether admitted as a member. This approach is consistent with the contractual nature of a limited liability company, and it gives certainty to the other members and to third parties dealing with the limited liability company that a new member or the assignee of a member is also bound by the operating agreement.

Amendments to § 4A-404

Subsection (2) is amended to clarify that the operating agreement may provide that any action otherwise requiring unanimous consent may be taken without the consent of any member. For example, an action may require only the consent of the manager of the limited liability company or a third party lender. This is consistent with the first clause of Subsection (2), which states that the operating agreement may provide that any action otherwise requiring unanimous consent may be taken on consent of less than all of the members.

Subsection (3) is added to provide that the operating agreement may require the consent of third-party non-members to take an action requiring unanimous consent of the members. This is consistent with Subsection (7) of § 4A-402.

Amendments to § 4A-601

Subsection (b)(2) is amended to clarify that the admission of an assignee as a member of the limited liability company is governed by the assignment provisions of § 4A-604(a).

Amendments to § 4A-603

Subsection (d) addresses an assignor's liability to the limited liability company upon the assignee becoming a member of the limited liability company. This subsection is moved from § 4A-604(c) and redesignated as § 4A-603(d) because it discusses the consequences of an assignment under § 4A-603. The subsection is otherwise unchanged.

Subsection (e) is added to clarify the consequences of an assignment of a member's interest under § 4A-603. Unless otherwise provided in the operating agreement or under § 4A-604 of this subtitle, an assignment of a member's interest in a limited liability company is limited to an assignment of the assignor's economic interest in the limited liability company and entitles the assignee only to "the distributions to which the assignor would be entitled" under § 4A-603(c). If an assignment is a complete assignment of the member's economic interest, the subsection provides that the assignor ceases to be a member of the limited liability company. The intent of this subsection is that, unless otherwise provided in the operating agreement, a partial assignment of a member's economic interest would allow the member to retain the same non-economic rights in the limited liability company held previously by the member. This subsection further provides that a pledge of or granting of a security interest, lien or other encumbrance in or against, any or all of a member's interest does not affect a member's non-economic rights. These provisions may be changed by the operating agreement. This subsection does not speak to the rights of members outside of the assignment context. Accordingly, for example, it does not affect the rights of members who do not acquire an economic interest in the limited liability company under § 4A-601(c).

Amendments to § 4A-604

Subsection (a)(2) is amended to allow members to provide in the operating agreement conditions for the admission of an assignee as a member of the company. If the operating agreement is silent the unanimous consent of the members is required, which was the default rule before this amendment. This is consistent with the policy of allowing the members to establish the terms governing the operation of the limited liability company. In addition, the amendment clarifies that, if there are no remaining members of the limited liability company at the time of the assignee obtaining the interest, the assignee may establish the terms for the admission of the assignee as a member in the context of the assignee agreeing to continue the limited liability company under § 4A-902(b)(1) of this title. Subsection (c) is moved to § 4A-603(d); see commentary to § 4A-603 for further discussion.

Amendments to § 4A-607

The title of § 4A-607 is changed to identify the type of remedy available to creditors under this title. The title now reads, “Interest Subject to Charging Order.” The section has been revised to be more consistent in general with the provisions of the Uniform Partnership Act, § 9A-504 of the Maryland Corporations and Associations Article.

Subsection (a) of § 4A-607 is amended to clarify the persons covered by the section. The amended section uses the terms “judgment debtor” and “judgment creditor,” which are defined in new subsection (f). These terms are defined by cross-references to Maryland Courts & Judicial Proceedings Article, § 3-301 through § 3-305. The cross-references are intended to make it clear that anyone who has a right to attach property of a debtor or obligor also has the right to seek a charging order against that debtor’s or obligor’s interest in a limited liability company. In addition, the phrase “a person holding an interest in a limited liability company” found in § 4A-607(a) is intended to make it clear that a person can obtain a charging order against an interest in a limited liability company even if the holder of the interest is not a member of the limited liability company, but is, for instance, merely a person who holds economic rights in the limited liability company.

Subsection (b)(2) of § 4A-607 is intended to give courts the discretion to direct that the limited liability company interest be foreclosed upon. *Compare 91st Street Joint Venture v. Goldstein*, 114 Md. App. 561 (1997) citing favorably Professor J. Gordon Gose’s observation that “the charging order statute [in the Uniform Partnership Act] provides two basic collection methods: (1) the diversion of the debtor partner’s profits to the judgment creditor; and (2) the ultimate transfer of the debtor partner’s interest should the first collection method prove unsatisfactory.” *Id.*, 114 Md. App. at 278. As noted in the *91st Street Joint Venture* opinion, however, the use of the power of the court to order foreclosure is within the court’s discretion. Thus, as the opinion states, “[o]rdinarily, the trial court should consider whether the judgment can be satisfied out of the [debtor’s] profits prior to resort to the more drastic method of sale of the [debtor’s] interest.” *Id.*, 114 Md. App. at 283.

In addition, § 4A-607(b)(2) cross-references § 4A-604 to make it clear that, under appropriate circumstances, a party that acquires an interest in a limited liability company at foreclosure may become a member of the limited liability company. This may be of particular significance in the case of single member limited liability companies where the assets held by the limited liability company are valuable, but do not generate cash flow that is sufficient to liquidate the claim against the judgment debtor in a reasonable period of time. If otherwise appropriate, a court could allow the foreclosure of the interest held by the judgment debtor and the purchaser at the foreclosure sale could become the sole member of the limited liability company and liquidate the limited liability company’s assets. Thus, the modification discourages the use of limited liability companies solely as a means to put assets that would otherwise be subject to the claims of creditors outside the reach of those creditors.

Subsection (c) of § 4A-607 is amended to address the circumstances under which an interest subject to a charging order may be redeemed by the judgment debtor or a member of the limited

liability company other than the judgment debtor. As a result of this new subsection, the provision addressing a judgment debtor's exemption rights is now § 4A-607(d).

Finally, subsection (e) is added to § 4A-607 to clarify that the section provides the exclusive remedy available to judgment creditors of any person holding an interest in a limited liability company. Such judgment creditors may attach an interest in a limited liability company or otherwise affect a member's rights in the limited liability company only in accordance with, and subject to the terms of, § 4A-607.

Amendments to § 4A-902

Subsections (b)(1) and (c) are amended to clarify that those subsections also apply to an assignee of the last remaining member of the limited liability company.