

Limited Liability Companies; HB 2398

HB 2398 makes numerous changes to the Kansas Revised Limited Liability Act; however, many of these amendments do not substantively alter the law. The bill gives a limited liability company (LLC) the power and authority to grant, hold, or exercise a power of attorney, including a revocable power of attorney, unless otherwise provided in the operating agreement. The bill provides more specific information about irrevocable powers of attorney with respect to the organization, internal affairs, and termination of an LLC.

Pursuant to the bill, meetings of members and managers can be held by means of a conference call or other means of communication that allows all persons participating to hear each other. Participation in such a meeting constitutes in-person presence at the meeting. Further, the bill allows proxy to be granted by electronic transmission.

If not otherwise provided for in the operating agreement, the bill requires a unanimous vote of the members to amend the operating agreement. This requirement does not apply to LLCs whose original articles of organization were filed before July 1, 2014.

The bill strikes language requiring a manager to be chosen “by the members” to read that managers will be chosen as provided in the operating agreement. The bill also strikes language governing members’ ability to enter into contracts on behalf of an LLC.

The bill provides that a liquidating trustee is fully protected in relying in good faith upon the records of the LLC and such information, opinions, reports or statements presented by a person the liquidating trustee reasonably believes are within such other person’s professional or expert competence and who has been selected with reasonable care by or on behalf of the LLC. This protection already existed for members and managers of an LLC.

The bill prohibits a member from resigning from an LLC prior to the dissolution and winding up of the LLC and provides that, unless otherwise provided in an operating agreement, within a reasonable time after resignation the member is entitled to receive the fair value of such member’s LLC interest as of the date of resignation. Previous law allowed resignation and stated members were not entitled to the fair value upon resignation. These amendments do not apply to LLCs whose original articles of organization were filed before July 1, 2014.

The bill strikes language that gives the assignee of a member’s LLC interest the right to participate in the management of the business and affairs of the LLC as a member when the assignor is the only member of the LLC at the time of the assignment. The bill also amends the rights of a judgment creditor of a member or of a member’s assignee.

Concerning dissolution and winding up of an LLC, the bill increases from 1/2 to 2/3 the then-current percentage or other interest in the profits of the LLC members must own for a vote to dissolve an LLC. Further, the bill expands on the provision that dissolves an LLC if at any time there are no members. Upon dissolution, the bill requires the LLC to make such provision as will be reasonably likely to provide compensation for any claim against the LLC that is the subject of a pending action, suit, or proceeding to which the LLC is a party; and for claims that have not been made known to the LLC or that have not arisen but that, based on facts known to the LLC, are likely to arise or to become known to the LLC within ten years of dissolution. Additionally, a member who receives a distribution in violation of the law governing distribution

of assets upon winding up of an LLC is liable to the LLC for the amount of the distribution for up to three years after the date of distribution.

The bill allows for the expansion or elimination of a member's, manager's, or other person's duties in the operating agreement, except that the bill prohibits the elimination of the implied contractual covenant of good faith and fair dealing. Pursuant to the bill, a member, manager, or other person is not liable to an LLC or another member, manager, or another person who is a party to or is otherwise bound by an operating agreement for breach of a fiduciary duty for the member's, manager's, or other person's good faith reliance on the provision of the operating agreement. Similarly, an operating agreement can provide for the elimination of any and all liabilities for breach of contract and breach of duties, including fiduciary duties, except that the bill prohibits the limitation or elimination of liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

The bill also includes new sections that allow the district court to appoint one or more trustees or receivers to wind up the affairs of an LLC after dissolution, allow members of an LLC that has been dissolved other than by judicial decree to revoke the dissolution and continue the business by unanimous vote, and allow retroactive reinstatement of LLCs that have had their articles of organization or authority to do business canceled or forfeited for failure to file annual reports or failure to be current in their appointment of resident agents.