

General Considerations for Dissolving a LLC Organized in Florida

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A Limited Liability Company (“LLC”) is a business entity structure which is allowed by Chapter 608, Florida Statute. As a result, what the statute creates, the statute can also take away. A LLC allows its owners (called Members), to have limited personal liability for the debts and actions of the LLC and is typically governed by an Operating Agreement. There are certain steps that must be taken to ensure that an LLC is properly dissolved. In Florida, there are three different ways that a LLC can be dissolved: (1) Administratively, (2) Voluntarily, and (3) Judicially. Below is a general discussion concerning methods for dissolution and additional considerations for dissolution.

Administrative Dissolution

Administratively, a LLC can be dissolved: (1) upon the time set forth in the LLC’s Articles of Organization or Operating Agreement; (2) upon a specific event or occurrence of events set forth in the LLC’s Articles of Organization or Operating Agreement or (3) failing to follow statutory procedures.

The Department of State may administratively dissolve a LLC if: (1) the LLC does not file its annual report by 5:00 PM on the third Friday in September; (2) the LLC does not have a registered agent or a registered office in the state for more than thirty (30) days; (3) the LLC does not notify the Department of State within thirty (30) days that its registered agent or registered office has changed; (4) the LLC fails to answer the interrogatories propounded by the Department of State within the thirty (30) days or; (5) the LLC’s period of duration has expired. FL ST § 608.448.

A LLC that has been administratively dissolved continues its existence but may not carry on business except business that is necessary to wind up and liquidate its business and affairs. This includes: collecting assets, disposing of properties that will not be distributed in kind to members, discharging or making provision for discharging liabilities, distributing assets in accordance with FL ST § 608.444 (2011), and doing every other act necessary to wind up and liquidate the business and affairs. An administratively dissolved LLC continues to exist for a limited purpose: “to wind up its affairs.” *In re Air Safety Intern., L.C.*, 336 B.R. 843, 855 (S.D. Fla. Dec. 2, 2005) (finding that awarding the surplus of the LLC to the “debtor can constitute ‘collecting assets,’ which is a legitimate function of an administratively dissolved [LLC].”).

Voluntary Dissolution

Voluntarily, a LLC can be dissolved: (1) upon any act or time specified in the articles of organization or operating agreement; (2) upon the written consent of all the members of the LLC, or; (3) at the time there are no members. FL ST § 608.441. Unless addressed in the operating

agreement, the death, retirement, resignation, expulsion, bankruptcy, or dissolution of any member; or, the occurrence of any event that terminates the continued membership of any existing member will not dissolve the LLC. LLC's are intended to have perpetual existence. FL ST § 608.441(1)(a). Basically, the members can agree to voluntarily end the existence of the LLC.

Judicial Dissolution

LLCs can be dissolved upon the entry of a dissolution order by a circuit court if it is established by a preponderance of the evidence that it is not reasonably practical to continue the LLC as a business in conformity with the Articles of Organization or the Operating Agreement. FL ST § 608.441(3). A circuit court can dissolve a LLC in a proceeding brought by a member or manager of a LLC which demonstrates that the LLC's management is deadlocked, that the members are unable to break that deadlock, and irreparable injury is threatened or suffered *OR* that the LLC's assets are "misappropriated or wasted." FL ST § 608.449. However, the Third District Court of Appeal held that a founding member of an LLC cannot assert a claim for judicial dissolution after there is an alleged "deadlock" in the LLC's management, without more, because the majority of the LLC can continue to operate the entity. Kertesz v. Spa Floral, LLC, 994 So. 2d 473, 475 (Fla. 3d DCA 2008).

The venue for the circuit court dissolution proceedings shall be in the circuit court of the county where the LLC's principal office is or was last located, as shown by the records of the Department of State. *See* FL ST § 608.4491. However, the First District Court of Appeal held that a forum selection clause of the LLC's Operating Agreement took precedence over the Florida Statute and the contractual venue would control. Taurus Stornoway Investments, LLC v. Kerley, 38 So. 3d 840, 843 (Fla. 1st DCA 2010). The members of the LLC do not need to be parties to the proceeding unless relief is sought against them as individuals. The circuit court may issue injunctions, appoint a receiver or custodian *pendente lite* (Latin for "while the litigating is pending") with all powers and duties the court directs, take other action required to preserve the LLC's assets and carry on the business of the LLC until a full hearing can be held. *See* FL ST § 608.4491.

Disposal of Claims

A dissolved LLC may dispose of the known claims against it by fulfilling several requirements. The dissolved LLC must deliver a written notice of dissolution to each of its known claimants at any time after the dissolution's effective date. *See* FL ST § 608.4421. The written notice of dissolution must: (1) provide a reasonable description of the claim that the claimant may be entitled to assert, (2) state whether the claim is admitted or not admitted (in whole or in part), (3) provide a mailing address where a claim may be sent, (4) state the deadline (must be at least 120 days after the written notice's effective date) and which by confirmation of the claim must be delivered to the dissolved LLC, and (5) state that the LLC may make

distributions afterwards to other claimants and its members or former members without further notice. FL ST § 608.4421. Additionally, if the claim is admitted, the notice must state (1) the amount that is admitted (may be as of a given date), and (2) if there is any interest obligation if fixed by an instrument of indebtedness. FL ST § 608.4421.

Under Florida Law, a court “may order a judgment-debtor to surrender all right, title, and interest in the debtor’s single-member [LLC] to satisfy an outstanding judgment.” Olmstead v. F.T.C., 44 So. 3d 76, 78 (Fla. 2010). In Olmstead, court concluded that there is no reasonable basis for inferring that the provision authorizing the use of charging orders under section 608.433(4) established the sole remedy for a judgment creditor against a judgment debtor's interest in single-member LLC.

Post Dissolution Duties of Members

While the LLC is in the process of dissolving and after it has dissolved, the members have a Duty of Loyalty and a Duty of Care to the LLC and the other members. The members must account to the LLC, refrain from dealing with someone that may have an adverse interest to the LLC, and refrain from competing with the LLC. FL ST § 608.4425.

Each manager and managing members must discharge their duties to the LLC and its members, which is either required by Florida Statutes 608, or the Articles of Organization or Operating Agreement. This discharge must be done with the obligation of good faith toward the LLC and other members. The obligation of good faith and fair dealing is not violated merely because the manager’s or managing member’s conduct furthers that individual’s own interest. If the members of an LLC enter into a Settlement Agreement at the dissolution of the LLC, then the members have a duty to disclose material facts. If the members conceal material facts, then the member has breached his fiduciary duty and duty of loyalty.

Filing of Dissolution

The LLC shall deliver articles of dissolution to the Department of State for filing. After the LLC has been dissolved, the assets of the LLC must be distributed in the following order: (1) to creditors (including members who are creditors), (2) to members and former members in satisfaction of liabilities, and (3) to members pro rata in proportion to their then-current percentage, or other interests in the profits, of the LLC. *See* FL ST § 608.444.