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CORPORATIONS, PARTNERSHIPS, AND ASSOCIATIONS

Partnership: Provide Definitions; Provide Procedures for Limited Liability Partnership Elections; Provide Amendment of Certificate to Comply with Name Requirements Liability to Third Parties

CODE SECTIONS: O.C.G.A. §§ 14-8-62 (amended), 14-9-206.2 (new), 14-11-101, -212, -303 (amended)
BILL NUMBER: HB 349
ACT NUMBER: 424
GEORGIA LAWS: 1997 Ga. Laws 1380
SUMMARY: The Act relates to corporations and provides procedures and requirements for a new or existing partnership to become or continue to be a limited liability partnership. The Act further provides for a determination of when a limited partnership becomes a limited liability partnership. The Act provides for changes that occur in a partnership, including real property transfers and agreements for obligations. The Act also provides for one member partnerships. The Act simplifies some election parameters, clarifies tax treatment, and streamlines paperwork.
EFFECTIVE DATE: July 1, 1997

History

Currently, a Georgia entity can convert to a Limited Liability Company (LLC) from a corporation and a Partnership can convert to a Limited Liability Partnership (LLP). The conversion of an existing corporation into an LLC can be accomplished in several ways.¹ The corporation could be merged into an LLC, the corporation's assets could be contributed to the LLC in return for membership interests, which would then be distributed to the shareholders in complete liquidation of the corporation, or the corporation could distribute its assets in complete liquidation and the shareholders exchange their interests for membership interests in the LLC.² Alternatively, the corporation could

1. See Charles R. Beaudrot, Jr., *To L.L.C. or Not to L.L.C.—'Check the Box,' Self Employment Taxes and Other Recent Developments Affecting Choice of Entity* (available in Georgia State University College of Law Library).

2. See *id.* at 7.

elect LLC tax status under Code section 11-14-212.³ Tax consequences often arise, however, as a result of merging or converting a corporation with assets into an LLC.⁴

The Corporate and Banking Law Section of the State Bar of Georgia approved and recommended a number of changes to the Georgia Limited Liability Company Act (LLCA), the Georgia Revised Uniform Limited Partnership Act (GRULPA), and the Uniform Partnership Act (UPA).⁵ These amendments were enacted as HB 349, which became effective on July 1, 1997.⁶ Under the Act, an entity can still convert to an LLP or LLC, and the procedure is now simplified.⁷

HB 349

HB 349 was sponsored by the State Bar of Georgia.⁸ The primary purpose of the Act is to clarify language and provisions in existing statutes pertaining to corporations and set forth the steps for a current corporation to become an LLP.⁹ The Georgia General Assembly referred HB 349 to the House Judiciary Committee.¹⁰ The Committee made several minor changes and the bill passed the House and Senate with no further alteration.¹¹ The Act amends four Code sections pertaining to corporations¹² and adds one new Code section.¹³

Limited Liability Partnerships

HB 349 amends Code section 14-8-62(g) as it relates to LLP elections, recording, procedures and effect, cancellation, dissolution of

3. See *id.*; 1993 Ga. Laws 123, § 1 (formerly found at O.C.G.A. § 14-11-212 (1996)).

4. See Beaudrot, *supra* note 1, at 8. A corporation merging into an LLC may recognize significant income when the corporation owns appreciated assets. Additionally, each shareholder of a corporation merging or converting into an LLC will recognize gain on the distribution to the extent the fair market value of the property received exceeds the shareholder's basis in the stock surrendered. See *id.*

5. See *id.* at 12-13.

6. See *id.*

7. See Telephone Interview with Charles R. Beaudrot, Jr. (June 17, 1997) [hereinafter Beaudrot Interview]; Telephone Interview with Rep. Ben Allen, House District No. 117 (June 17, 1997) [hereinafter Allen Interview].

8. See Allen Interview, *supra* note 7.

9. See *id.*

10. See Final Composite Status Sheet, Mar. 28, 1997; HB 349, as introduced, 1997 Ga. Gen. Assem.

11. See Final Composite Status Sheet, Mar. 28, 1997.

12. 1995 Ga. Laws 470, § 11, at 474 (formerly found at O.C.G.A. § 14-8-62(g) (1996)); 1993 Ga. Laws 123, § 1, at 126 (formerly found at O.C.G.A. § 14-11-101(12), (18) (1996)); *id.* § 1, at 156-58 (formerly found at O.C.G.A. § 14-11-212 (1996)); *id.* § 1, at 159-60 (formerly found at O.C.G.A. § 14-11-303 (1996)).

13. O.C.G.A. § 14-11-206.2 (Supp. 1997).

partnership, and amendment of certificates.¹⁴ Previously, in order to become an LLP, an entity first had to organize as a GRULPA limited partnership then file its LLP election with the Secretary of State.¹⁵ The result of this requirement was double filing and double payment.¹⁶ In order to prevent this from happening, the Act allows an entity to initially be organized as an LLP rather than first forming as a limited partnership, then making the LLP election.¹⁷ Thus, the process has been pared down to one step. In order to become and continue as an LLP, a limited partnership must first specify its name¹⁸ and include in its certificate of limited partnership a statement that the limited partnership is an LLP.¹⁹ An existing limited partnership will become an LLP, subject to any contrary agreement among the partners, when its certificate complies with these requirements and will continue to function as an LLP until its certificate is amended to remove the limited liability language.²⁰

The Act creates new Code section 14-9-206.2 to allow an existing corporation, LLC, or general partnership to become a limited partnership following the same procedure for converting to LLC status.²¹ Prior to the Act, there was no comparable provision to this Code section contained in the UPA or the GRULPA.²² In order for a corporation to do this, the board of directors must adopt the plan and its shareholders must approve the plan of election.²³ An LLC and a general partnership must have approval of all of its members or partners, or other approval as required under applicable law.²⁴ Once the entity has been approved, the election is officially made by delivering a certificate to the Secretary of State for filing.²⁵ The certificate must include the entity's name, the desire to become a

14. See HB 349, as introduced, 1997 Ga. Gen. Assem.

15. See Beaudrot, *supra* note 1, at 13.

16. See *id.*

17. See *id.*; O.C.G.A. § 14-8-62(g) (Supp. 1997).

18. The name must comply with the name requirements of Code section 14-8-63. See generally 1995 Ga. Laws 475, § 11 (codified at O.C.G.A. § 14-8-63 (1996)). The "name of a limited partnership that is a limited liability partnership shall contain the words 'limited liability partnership,' it being permitted to abbreviate the word 'limited' as 'ltd.,' or the abbreviation 'L.L.P.' or the designation 'LLP' as the last words or letters of its last name." *Id.* The name must also comply with the terms concerning partnership name. See 1990 Ga. Laws 257, § 34 (codified at O.C.G.A. § 14-9-102 (1996)).

19. See O.C.G.A. § 14-8-62(g) (Supp. 1997).

20. See *id.*

21. *Id.* § 14-9-206.2; see Beaudrot, *supra* note 1, at 13.

22. See Beaudrot, *supra* note 1, at 13.

23. See O.C.G.A. § 14-9-206.2(a) (Supp. 1997).

24. *Id.* § 14-9-206.2(a)(2) to (3).

25. See *id.* § 14-9-206.2(b).

limited partnership, the effective date and time of such an election (if such a date is later than the date and time the certificate of election is filed),²⁶ and a statement that the election has been approved pursuant to subsection (a) of Code section 14-9-206.2.²⁷ The entity must also file a certificate of limited partnership that satisfies the name requirements set forth in Code sections 14-9-102 and -201.²⁸

Additionally, the entity must tender a statement concerning the manner and basis for converting the shares of the corporation, the membership interests of the members of the LLC, or the interests of the partners in the general partnership into interests as members of the limited partnership.²⁹ Alternatives such as proof that a written partnership agreement has been entered into among the persons who will be the members of the limited partnership, that the partnership agreement will be effective immediately upon the election, and that the partnership agreement provides for the manner and basis of the election are all sufficient.³⁰

Once the certificate of election (the Certificate of Limited Partnership) is filed, the articles of organization of the limited partnership are formed and remain in effect unless and until they are amended.³¹ Upon the fulfillment of these requirements, the limited partnership will possess all of the rights, privileges, immunities, franchises, and powers of the previous entity.³² This includes any debts due that entity, and title to any real estate, or any interest in real estate.³³

Recording Real Estate Records and Claims Against the LLP

In addition to these benefits, the new entity will continue to be responsible for all the liabilities and obligations of the entity it replaces.³⁴ The House Judiciary Committee added a clause providing that any existing claim or action pending against the entity is still to be

26. *See id.* § 14-9-206.2(b)(3).

27. *Id.* § 14-9-206.2(b)(4). Subsection (a) requires approval of the members and partners. *Id.* § 14-9-206.2(a)(2) to (3).

28. *Id.* § 14-9-206.2(b)(5); *see* 1996 Ga. Laws 787, § 5 (codified at O.C.G.A. § 14-9-201 (1996)); 1990 Ga. Laws 281, § 34 (codified at O.C.G.A. § 14-9-102 (1996)).

29. *See* O.C.G.A. § 14-9-206.2(b)(6)(A) (Supp. 1997).

30. *See id.* § 14-9-206.2(b)(6)(B)(i).

31. *See id.* § 14-9-206.2(c)(3) to (4). Once the certificate of election is filed, the articles of incorporation and bylaws of the corporation, the articles of organization and operating agreement of the limited liability company, or partnership agreement and statement of partnership, if any, of the general partnership are no longer in effect. *See id.*

32. *See id.* § 14-9-206.2(c)(5).

33. *See id.*

34. *See id.* § 14-9-206.2(c)(6).

prosecuted in a manner as if the election had not become effective, so that the rights of creditors or liens upon the property owned by that entity will be secured.³⁵

Previously, there was no provision setting forth the procedure for recording documents in the real estate records that reflected the conversion of a corporation, limited partnership, or general partnership into an LLC.³⁶ To clarify issues that might arise as to title to real estate held by the entities that were converting, the Act adds new Code section 14-11-212(d).³⁷ Under this new Code section, if real property is owned by the entity electing to become a limited partnership, the limited partnership may file a copy of the election with the office of the clerk of the superior court of the county where the real property is located, and no real estate transfer tax will be due.³⁸ The Judiciary Committee further added subsection (e) to the Code section, which permits the Secretary of State to charge such filing fees that are necessary.³⁹ The fee amount was not included in the bill.⁴⁰

One Person LLCs

Another important aspect of HB 349 is the amendment of subsections (12) and (18) of Code section 14-11-101.⁴¹ Subsection (12) previously read, " 'limited liability company' means a limited liability company formed under this chapter."⁴² The Act adds language that an LLC is a limited liability company formed by one or more members.⁴³ Under the Act, it is now implicit that an LLC may be formed by one member.⁴⁴ Subsection (12) of Code section 14-11-212 is also amended to provide that in the instance of an operating agreement⁴⁵ when there is only one member of the LLC, the person must sign a writing stating that the

35. *See id.*; HB 349 (HCS), 1997 Ga. Gen. Assem.

36. *See* Beaudrot, *supra* note 1, at 14.

37. O.C.G.A. § 14-11-212(d) (Supp. 1997); *see* Beaudrot, *supra* note 1, at 14.

38. *See* O.C.G.A. § 14-9-206.2(d) (Supp. 1997).

39. *Id.* § 14-9-206.2(e).

40. *See id.* The fee amount was not included in the bill, but will likely remain about \$95. Record of Proceedings in the House Judiciary Committee (remarks by Cathy Cox, on behalf of the Secretary of State) (available in Georgia State University College of Law Library). The amount was not included in the bill because the amount may change at a later date.

41. 1993 Ga. Laws 123, § 1 (formerly found at O.C.G.A. § 14-11-101(12), (18) (1996)).

42. *Id.* § 2, at 227 (formerly found at O.C.G.A. § 14-11-101(12) (1996)).

43. *See* O.C.G.A. § 14-11-101(12) (Supp. 1997).

44. *Id.*; *see* Beaudrot, *supra* note 1, at 13.

45. "Operating Agreement" is any agreement, written or oral, as to the conduct of the business and affairs of a limited liability company that is binding upon all of the members. *See* 1993 Ga. Laws 123, § 1 (codified at O.C.G.A. § 14-11-101(18) (1996)).

agreement is intended to be a written operating agreement.⁴⁶ This Code section clarifies that a single-member LLC can have a written operating agreement within the meaning of the LLCA, and specifies that a writing adopted by the sole shareholder of a single-member LLC constitutes an operating agreement for all purposes of the statute.⁴⁷

Liability to Third Parties

A person's status as a member, manager, agent, or employee of an LLC does not render one liable for a judgment, decree, or order of the court, or in any other manner, for a debt, obligation, or liability of the LLC.⁴⁸ This shield from liability applies to actions arising in contract or tort, or for the acts or omissions of any other member, manager, agent, or employee of the LLC.⁴⁹ Thus, the statute only shields the non-liable partner, not the tortfeasor, but the assets of the firm are liable.⁵⁰ However, a member can assume liability through execution of a guaranty or an indemnity agreement.⁵¹ Under a written operating agreement, or under another written agreement, a member or manager may agree to be held personally liable for any or all of the debts, obligations, and liabilities of the LLC.⁵² In some instances, it is desirable for tax and other business purposes for LLC members to partially or fully waive the benefits of limited liability.⁵³

Amy E. Bergeron

46. O.C.G.A. § 14-11-101(18) (Supp. 1997); see Beaudrot Interview, *supra* note 7.

47. O.C.G.A. § 14-11-101(18) (Supp. 1997); Beaudrot, *supra* note 1, at 13.

48. See O.C.G.A. § 14-11-303(a) (Supp. 1997).

49. See *id.*

50. See Beaudrot Interview, *supra* note 7.

51. See Beaudrot, *supra* note 1, at 14.

52. See O.C.G.A. § 14-11-303(b) (Supp. 1997).

53. See Beaudrot, *supra* note 1, at 14. This section corresponds to Delaware Code § 18-303(b) and explicitly permits LLC members to become personally obligated for debts of the company. See *id.*