# Adding Insult to Death

*By Thomas E. Rutledge**

*Death is the one eventuality for which all individuals must account. Even as limited liability companies ("LLCs") are now the most commonly used form for new business organizations, most participants therein fail to appreciate that absent express agreement set forth in the operating agreement, upon death their heirs do not succeed to any rights to participate in management even as those heirs seldom have an opportunity to liquidate the investment. This article will review the default treatment under the various LLC acts and explore a variety of approaches that may be taken in an operating agreement to alter the default treatment.*

A famous adage teaches us that neither death nor taxes may be avoided.[1] Whether this is true is open to debate. One can at least conceptualize a life that does not generate taxable income and where an exemption from property taxation exists.

Conversely, death is truly unavoidable. With respect to natural persons, it appears that life spans cannot extend beyond some 125 years.[2] While business organizations as well are subject to varieties of death including voluntary, judicial, and administrative dissolution as well as bankruptcy, the focus of this article is upon the death of a business owner and the resultant impact on the owner's relationship to the organization.[3]

This article proceeds from an initial discussion of assignees under corporate and unincorporated association law to address certain statutes that afford estates

* Thomas E. Rutledge is a member of Stoll Keenon Ogden PLLC resident in its Louisville, Kentucky, office. He is as well an adjunct professor at the University of Kentucky College of Law. A frequent commentator on the law of business organizations, he is an elected member of the American Law Institute. In 2018, he joined *Ribstein and Keatinge on Limited Liability Companies* as a co-author in place of the late Larry Ribstein.

1. *See* Daniel Defoe, The Political History of the Devil, as Well Ancient as Modern: In Two Parts 269 (1726) ("Things as certain as death and taxes, can be more firmly believ'd . . . ."); Benjamin Franklin, Letter to Jean Baptist Le Roy (Nov. 13, 1789), *in* 10 The Writings of Benjamin Franklin 68, 69 (Albert Henry Smyth ed., 1907) ("Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes.").

2. *See* Xiao Dong, Brandon Milholland & Jan Vijg, *Evidence for a Limit to Human Lifespan*, Nature, Oct. 13, 2016, at 257, 258 ("[W]e found that the probability of an MRAD [maximum reported age at death] exceeding 125 in any given year is less than 1 in 10,000.").

3. The tax implications of a member's death are not considered. Those tax implications are discussed in Susan Kalinka, *Death of a Member of an LLC*, 57 La. L. Rev. 451 (1997), and Thomas J. Dickerson, James A. Fellows & Michael A. Yuhas, *Income Tax Issues on the Death of a Member of a Professional Service LLC*, 99 J. Tax'n 358 (2003).

continuing rights vis-à-vis the limited liability company ("LLC") greater than those of a mere assignee. It will then consider the effect of the death of a sole member and various springing member statutes, turning then to the effects of a death in a multiple-member LLC. Last, it considers the confusing consequences of electing for death not to be a disassociation event. Working from the supposition that these impacts have not been adequately considered by most business owners, and that relevant documents, particularly LLC operating agreements, have not been customized to address those effects, suggestions for clarification are also included.

The purpose of this article is exposition and review of the consequences, under various statutes, of the death of a natural person who is a member of an LLC or, to a lesser degree, a general or a limited partner. That exposition is cautionary; many persons have organized businesses as LLCs without a full appreciation of what will happen following the death of one or more of those owners. They will often be surprised by the precarious position of the member's estate and heirs. Surprise will lead to questions, including why legal counsel did not take measures to alter the default rules to protect estates and heirs. From there, the purpose of this article is admonitional; attorneys drafting operating agreements need to be aware of the consequences of a member's death and craft alternative language when seeking an outcome different from the statutory default rules. Various alternative formats are described along with notes as to some of the pitfalls involved in adopting any of those different approaches. Even as there may be a desire to adopt alternative rules, doing so will be an involved process requiring deliberate drafting.

## Assignees and the Corporate-Versus-Unincorporated Divide

The impact of an owner's death likely will be different based on whether the venture is incorporated or unincorporated. Typically, in a corporation, first a decedent's estate and then the heirs, either pursuant to will or at law, will become the owners of the decedent's shares and, in so doing, become shareholders.[4] Thus, the death of a shareholder will precipitate a transfer of title to the shares without any diminution in the rights attendant to the shares.

In the realm of unincorporated business organizations, a grouping that includes general partnerships, limited partnerships, and LLCs, a different paradigm is employed under which, while the right to receive the economic benefits of the venture is freely assignable,[5] upon assignment, the assignee does not come into

4. According to the corporate law of the past, the relationship of the shareholders was personal and unique, and the transfer of shares did not vest in that transferee the status of a shareholder. *See, e.g.*, 1 T. Carl Spelling, A Treatise on the Law of Private Corporations § 460, at 499 (1892) ("At common law no membership in a corporation of any kind could be transferred by act of the parties. One reason for this was that the enjoyment of a corporate franchise was considered a personal privilege; another was that the title to shares of stock or to membership was a chose in action and not assignable."). This rule has long been abolished. *See generally* Del. Code Ann. tit. 8, § 202 (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–20)) (providing that stock is freely transferable, but that certain restrictions on transferability may be imposed).

5. *See, e.g.*, Revised Prototype Limited Liability Company Act § 502(a)(1), (b), 67 Bus. Law. 117, 163 (2011) [hereinafter Rev. Prototype LLC Act] ("An assignment, in whole or in part, of a[n LLC]

any right to participate in the venture's management.[6] Upon the death of a member,[7] the estate and then heirs of the decedent member will be the decedent's assignee.[8] The admission of an assignee of a former member to the entity is a determination left to the other members; they decide whether the assignee will be admitted with full participation into the venture.[9]

What happens, upon assignment, to the assignor's right to participate in management is different under various statutes. Under one statutory formula, upon the assignment of all of the economic rights in the venture, the assignor is

interest: (i) is permissible . . . . (b) An assignee has right to receive, in accordance with the assignment, distributions to which the assignor would otherwise be entitled."); UNIF. LTD. P'SHIP ACT § 702(a)(1), (b) (UNIF. LAW. COMM'N 2013) (virtually same); UNIF. P'SHIP ACT § 503(a)(1), (b)(1) (UNIF. LAW. COMM'N 2013) (virtually same); UNIF. LTD. LIAB. CO. ACT § 502(a)(1), (b) (UNIF. LAW. COMM'N 2013) (virtually same). Certain statutes use "assign/assignment," while others use "transfer." The terms are herein used interchangeably.

6. *See, e.g.*, REVISED PROTOTYPE LLC ACT, *supra* note 5, § 502(a)(4)(A), at 163 ("An assignment, in whole or in part, of a[n LLC] interest . . . does not entitle the assignee to . . . participate in the management or conduct of the activities of the [LLC] . . . ."); UNIF. LTD. P'SHIP ACT § 702(a)(3)(A) (UNIF. LAW COMM'N 2013) (virtually same); UNIF. P'SHIP ACT § 503(a)(3)(A) (UNIF. LAW. COMM'N 2013) (virtually same); UNIF. LTD. LIAB. CO. ACT § 502(a)(3)(A) (UNIF. LAW. COMM'N 2013) (virtually same); DEL. CODE ANN. tit. 6, § 15-503(a)(3) (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–20)) (addressing partnerships); *id.* § 18-702(a) (addressing LLCs); KY. REV. STAT. ANN. § 362.280(1) (West, Westlaw through the 2020 Reg. Sess.) (addressing partnerships); *id.* § 362.1-503(1)(c) (same); *id.* § 362.2-702(1)(c) (addressing limited partnerships); *id.* § 275.255(1)(c) (addressing LLCs); FLA. STAT. ANN. § 605.0502(1)(c) (West, Westlaw through the 2020 2d Reg. Sess.) (addressing LLCs); Griffin v. Box, 956 F.2d 89 (5th Cir. 1992) (concluding that transferees who had not been admitted as substituted limited partners in accordance with the partnership agreement had no voting rights under the agreement); Casey v. Chapman, 98 P.3d 1246 (Wash. Ct. App. 2004) (concluding that purchaser of interest in partnership at UCC foreclosure sale acquired only the economic rights with respect to the partnership, but no right to participate in its management); Dame v. Williams, 727 N.Y.S.2d 816, 818 (App. Div. 2001) (holding that executor of former managing partner lacked power to conduct partnership affairs); Kellis v. Ring, 155 Cal. Rptr. 297, 300 (Ct. App. 1979) ("In summary, we hold that beyond the limits described in the statute a mere assignee has no voice in the internal management of a partnership. The statute does not thus deprive an assignee of property, but merely recognizes the different business associations and conditions that persons may lawfully make and the legitimate reasons therefor."); Gebroe-Hammer Assocs. v. W. Green Gables, LLC, No. A-0481-18TS, 2019 WL 3428499, at *3 (N.J. Super. Ct. App. Div. July 9, 2019) (per curiam) (affirming that, in what had been a two-member fifty-fifty LLC, after the death of one of the members, the surviving member was the sole member with sole authority to manage the LLC). *See generally* Thomas E. Rutledge, *In Delectus Personae and Proxies*, J. PASSTHROUGH ENTITIES, July–Aug. 2011, at 43, 44 ("[T]hat conveyance does not vest in the transferee the right to participate in management."); TREAS. REG. § 1.736-1(a)(1)(ii) (2020) ("[F]or purposes of subchapter K, . . . a deceased partner's successor will be treated as a partner until his interest in the partnership has been completely liquidated.").

7. As the LLC is now the predominate organizational form across the states, the moniker "member" is used generally to include LLC member and partners, whether general or limited, in partnerships and limited partnerships.

8. *See, e.g.*, Ott v. Monroe, 719 S.E.2d 309 (Va. 2011) (holding that devisee of 80 percent member is an assignee with no right to participate in LLC's management, that the deceased member did not have capacity to convey management interest in LLC, and that admission of assignee as a member requires consent of other members); SDC Univ. Circle Dev., L.L.C. v. Est. of Whitlow, 128 N.E.3d 840 (Ohio Ct. App. 2019) (holding that estate of member is assignee and not a member in LLC).

9. *See*, *e.g.*, UNIF. LTD. P'SHIP ACT § 301(b)(3) (UNIF. LAW. COMM'N 2013) ("[A] person becomes a limited partner with the affirmative vote or consent of all the partners . . . ."); *id.* § 401(b)(3) (virtually same for general partners in a limited partnership); UNIF. P'SHIP ACT § 401(a)(3) (UNIF. LAW. COMM'N 2013) (virtually same for partners in a general partnership); REVISED PROTOTYPE LLC ACT, *supra* note 5, § 401(b), at 154 (virtually same for members in an LLC).

disassociated and his or her right to participate in management terminates.[10] Certain states do not restrict this application to a requirement that "all" of the economic rights be assigned, and rather trigger it upon an assignment of "substantially all."[11] Other statutes utilize a structure in which the management rights are not lost upon assignment of the underlying interest, in which case they may still be exercised by the assignor, but those continuing management rights are subject to termination by some portion of the remaining participants electing to disassociate the assignor.[12] Regardless of whether the loss of the assignor's right to participate in management occurs automatically or requires an intervening vote, (i) the former member (assignor) is or may be disassociated from the venture, and (ii) the assignee, absent affirmative action by the incumbent members of the venture to admit,[13] is a mere assignee of the assignor's economic rights.[14] The assignor's death causes the assignor's disassociation,[15] and disassociation terminates the right to participate in management.[16]

The rule applied in unincorporated forms is historical and should not be surprising to anyone.[17] Still, the implications of this rule are often surprising to those subjected to it. It needs to be recognized that the two paradigms are of equal validity, and neither is as to the other in any matter deficient. Rather, each is a legitimate default rule.[18]

10. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-702(b)(3) (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–20)) (providing that a member ceases to be member upon assignment of all economic interests in LLC); IND. CODE ANN. § 23-18-6-4.1(e) (West, Westlaw through the 2020 2d Reg. Sess.) ("Unless otherwise provided in a written operating agreement, a member who assigns the member's entire interest in the [LLC] ceases to be a member or to have the power to exercise any rights of a member."). *But see id.* § 23-18-6-5(a)(3)(b) ("A person ceases to be a member [if] the person is removed as a member, unless otherwise provided in a written operating agreement, by the affirmative vote, approval, or consent of a majority in interest of the members after the member has assigned the member's entire interest in the [LLC].").

11. *See, e.g.*, MONT. CODE ANN. § 35-8-803(1)(e)(ii) (West, Westlaw through the 2019 Sess.) (providing that member dissociated upon a transfer of "substantially all" economic interests in LLC).

12. *See, e.g.*, UNIF. P'SHIP ACT §§ 601(4), 603(b)(1) (UNIF. LAW. COMM'N 2013); REVISED PROTOTYPE LLC ACT, *supra* note 5, §§ 602(d), 603(a), at 169, 171.

13. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-704(a)(2) (West, Westlaw through ch. 292 of the 150th Gen. Assembly (2019–20)).

14. *See, e.g.*, UNIF. P'SHIP ACT § 503(b)(1) (UNIF. LAW. COMM'N 2013) ("A transferee has the right to receive . . . distributions to which the transferor would otherwise be entitled . . . ."); UNIF. LTD. P'SHIP ACT § 702(b) (UNIF. LAW. COMM'N 2013) (virtually same); UNIF. LTD. LIAB. CO. ACT § 502(b) (UNIF. LAW. COMM'N 2013) (virtually same).

15. *See, e.g.*, UNIF. P'SHIP ACT § 601(7)(A) (UNIF. LAW. COMM'N 2013) ("A person is dissociated as a partner when, in the case of an individual, the person dies . . . ."); UNIF. LTD. LIAB. CO. ACT § 602(7)(A) (UNIF. LAW. COMM'N 2013) (virtually same); REV. PROTOTYPE LLC ACT, *supra* note 5, § 602(f), at 170 (virtually same).

16. *See, e.g.*, REVISED PROTOTYPE LLC ACT, *supra* note 5, § 603(a), at 171 ("A person who has dissociated as a member shall have no right to participate in the activities and affairs of the [LLC] and is entitled only to receive the distributions to which that member would have been entitled if the member had not dissociated."); UNIF. LTD. LIAB. CO. ACT § 603(a)(1) (UNIF. LAW. COMM'N 2013) (virtually same).

17. *See, e.g.*, Wild v. Davenport, 7 A. 295 (N.J. 1886) (holding that, on death of a partner, his representative does not become a partner—notwithstanding provisions in the decedent's will or consent of the heirs and next of kin—unless the surviving partners consent).

18. *See* CML V, LLC v. Bax, 28 A.3d 1037, 1043 (Del. 2011) (en banc) ("Ultimately, LLCs and corporations are different; investors can choose to invest in an LLC, which offers one bundle of rights,

## How the Game Changed from Partnerships to LLCs and the Adoption of Capital Lock-In

Even as LLCs use traditional partnership rules defining the rights of an assignee and the treatment of an estate as an assignee of the deceased partner, there still is an important distinction between partnerships and LLCs. Under partnership law, upon a partner's death, either the partnership dissolves,[19] resulting in a liquidating distribution to the estate,[20] or the partnership continues and the estate is entitled, under most circumstances, to a buyout of the decedent's interest for its value.[21] Either way, absent contrary agreement, upon a partner's death, his or her estate is afforded the opportunity to monetize the decedent's interest in the partnership.

The early LLC statutes followed this partnership paradigm.[22] However, after the adoption of the "check-the-box" tax classification regulations, the states began modifying their LLC statutes, typically eliminating the right to a liquidating distribution upon a member's death (or other event of disassociation),[23]

---

or in a corporation, which offers an entirely separate bundle of rights."); Thomas E. Rutledge, *Vampires and the Law of Business Organizations: The Fruitless Search for Authenticity*, J. Passthrough Entities, Nov.–Dec. 2011, at 51, 51 ("None of those constructs is more correct . . . than is any other . . . .").

19. *See* Unif. P'ship Act § 29 (Unif. Law. Comm'n 1914) ("The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on . . . of the business."); *id.* § 31(4) ("Dissolution is caused . . . [b]y the death of any partner . . . ."); Judson A. Crane, Handbook of the Law of Partnership and Other Unincorporated Associations § 77, at 333 (1938) ("The delectus personarum lies at the foundation of the agreement of the parties, and is one of the main considerations on which it rests. The personal qualities of each member of a firm enter largely into the inducements which lead parties to form a co-partnership; and if the abilities and skill, or the character and credit of any one are withdrawn, the contract between them is terminated and the co-partnership is dissolved." (quoting Marlett v. Jackson, 85 Mass. 287, 290–91 (1861)); William Watson, A Treatise on the Law of Partnership 263 (1807) ("By the death of one of the partners, the contract of partnership however is dissolved. The inducements to form this [partnership], consist chiefly in the personal character and qualification of the person with whom one enters into partnership, and his representative or legatee may be in all respects a contrast to him.").

20. *See* Unif. P'ship Act. § 40 (Unif. Law. Comm'n 1914) (setting forth rules for distribution); *id.* § 42 (addressing rights of estate of deceased partner).

21. *See* Unif. P'ship Act § 701(a) (Unif. Law. Comm'n 2013) ("If a partner is dissociated as a partner without the dissociation resulting in a dissolution and winding up of the partnership business under Section 801, the partnership shall cause the person's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b)."); *see* Robert W. Hillman, Donald J. Weidner & Allan G. Donn, The Revised Uniform Partnership Act § 701 cmt. 1 (2018–19 ed.) ("R.U.P.A. substantially expands the very limited buyout provisions of the U.P.A. . . . R.U.P.A.'s far more complete buyout provisions are applicable if a partner has dissociated but there will be no winding up and dissolution of the partnership under Article 8." (footnotes omitted)).

22. *See, e.g.*, Am. Bar Ass'n, Prototype Limited Liability Company Act § 602, at 38 (1993) [hereinafter Prototype LLC Act] ("Upon the occurrence of an event of dissociation under § 802 which does not cause dissolution, other than an event of dissociation described in § 802(A)(3)(II), a dissociating member is entitled to receive any distribution which the member was entitled to receive prior to the event of dissociation. If an operating agreement does not provide the amount of or a method for determining the distribution to a dissociating member, the member shall receive within a reasonable time after dissociation the fair value of the member's interest in the [LLC] as of the date of dissociation based upon the member's right to share in distributions from the [LLC]."); Unif. Ltd. Liab. Co. Act § 603(a)(2)(ii) (Unif. Law. Comm'n 1996) (virtually same); *see also* Carter G. Bishop, *Treatment of Members Upon Their Death and Withdrawal from a Limited Liability Company: The Case for a Uniform Paradigm*, 25 Stetson L. Rev. 255, 260–61 (1995) (discussing treatment of dissociated partners and dissociated members).

23. *See also* Donald J. Weidner, *LLC Default Rules Are Hazardous to Member Liquidity*, 76 Bus. Law. 151, 162–67 (2021).

an element that had been previously incorporated in the LLC statutes to avoid the "Kintner"[24] characteristic of continuity of life. The 1990 passage of section 2704 of the Internal Revenue Code acted as an impetus for the desire to eliminate statutory rights to redemption in order to achieve discounts on the value of business venture interests in intra-family transfers,[25] impacting otherwise settled aspects of organizational law. Previously, drafters could modify agreements to restrict or eliminate a right of redemption on death or other dissociation. Conversely, where there was not a redemption right, drafters could craft one. But now that the elimination of a right of redemption would no longer be effective vis-à-vis estate planning discounts, the decision was made by most state drafting committees to eliminate the right to a liquidating distribution. Thus, the right to a liquidating distribution enjoyed by general partners and initially carried forward into LLCs for members was reversed, not because it was ineffective or unworkable as a matter of business law, but rather to accommodate a change in the Internal Revenue Code governing the ability to take discounts on intra-family transfers.

In place of a liquidity right upon disassociation from the venture, most LLC statutes adopted a capital lock-in rule.[26] For example, under many LLC statutes, although a member's death causes that member's disassociation from the LLC,[27] there is no resultant right to a liquidating distribution.[28] Instead, the deceased

24. *See* Treas. Reg. § 301.7701-2(b)(3), repealed Jan. 1, 1997; *see also* Larson v. Comm'r, 66 T.C. 159, 175 (1976). *Cf*. Estate of Smith v. Comm'r, 313 F.2d 724, 735–36 (8th Cir. 1963).

25. *See* Christopher P. Bray, *Does Section 2703 Apply to the Valuation of Family Limited Partnerships?*, TAXES, Apr. 1997, at 198, 202 (noting that, when valuing a transaction between family members, any restriction limiting a partnership's liquidation should be ignored, but further noting that the legislature did not intend to ignore any such restrictions required by state law); Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) from Close Corporation History*, 40 WAKE FOREST L. REV. 883, 937 n.179 (2005) ("Thus, the valuation under I.R.C. section 2704(b) will be determined by reference to the default provisions of the organic statute pursuant to which the organization is formed, rather than by considering the extent to which the owners could actually create liquidation rights less restrictive than those imposed by the organic statute or could actually liquidate the interest. As such, I.R.C. section 2704(b) encourages the development of organic statutes which contain default rules that restrict or eliminate the right of an individual to liquidate the individual's interest.").

26. *See* Daniel S. Kleinberger, *The Plight of the Bare Naked Assignee*, 42 SUFFOLK U. L. REV. 587, 593–99 (2009) (addressing assignees in partnerships and LLCs); *cf*. Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003) (addressing historic role of lock-in in the corporate setting); Lynn A. Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253, 253 (describing "the capacity to 'lock-in' equity investors' initial capital contributions" as "fifth, often-overlooked characteristic of corporations"). *But see* Larry E. Ribstein, *Should History Lock in Lock-in*, 41 TULSA L. REV. 523, 523 (2006) (noting that lock-in limits effective monitoring of corporate managers).

27. *See* KY. REV. STAT. ANN. § 275.280(1)(f)(1) (West, Westlaw through the 2020 Reg. Sess.).

28. *See, e.g.*, *id.* § 275.280(6) (providing that a member's death does not entitle the estate to a special distribution or buyout of the deceased member's interest in the LLC); N.J. STAT. ANN. § 42:2C-34(b) (West, Westlaw through L.2020, c. 117 and J.R. No. 2) ("A person has a right to a distribution before the dissolution and winding up of a[n LLC] only if the company decides to make an interim distribution. A person's dissociation does not entitle the person to a distribution."); Kinkle v. R.D.C., L.L.C., 889 So. 2d 405, 411–12 (La. Ct. App. 2004) (concluding that, absent statute or provision in operating agreement to redeem interest of deceased member in LLC, no right to do so existed); *see also* Thomas E. Rutledge, Chapman v. Regional Radiology Associates, PLLC*: A Case Study in the Consequences of*

member's estate has only the few and passive rights of an assignee.[29] The Revised Prototype LLC Act[30] and the Revised Uniform LLC Act[31] adopt this paradigm.[32]

With the transition to a capital lock-in model, without an operating agreement provision for a liquidating distribution upon death, the member's estate holds a substantially illiquid asset. While the absence of liquidity may be advantageous from the perspective of minimizing values for estate tax valuation, the member's heirs, as assignees, hold an asset of questionable value.[33]

The treatment of a decedent's interest in an LLC is dependent upon the default rules of the controlling LLC statute and any permissible deviation in the LLC's operating agreement. People can have differing perspectives as to those rules; "where you stand depends on where you sit."[34] While the administrator of an insolvent estate might welcome a right to put the decedent's interest in the LLC to the company for redemption, the company's manager may view redemption as a drain on company capital that could necessitate an undesirable capital call on the other members. Depending upon state law and the particular operating agreement, the heirs of a single member may be dismayed to learn that they are not succeeding to member status even as they, as the estate administrators, are required to dissolve an LLC over which they have no managerial control.

The abolition of a right to a liquidating distribution upon death may be perceived as an imposition upon the estate, depriving it of liquidity even as its capital is retained by the LLC to be managed with no input from the estate and heirs. However, that view has no more legitimacy than does the LLC's view, namely that capital contributed to the LLC exists for furthering its business plan,[35] not

*Resignation*, 100 KY. L.J. ONLINE 15, 21 (2011) ("It is important that the *Chapman* decision not be read for the rule that, upon resignation, a member is entitled to a liquidating distribution . . . .").

29. *See, e.g.*, KY. REV. STAT. ANN. § 275.280(5) (West, Westlaw through the 2020 Reg. Sess.) (providing that the successor-in-interest of a dissociated member shall be an assignee).

30. *See* REVISED PROTOTYPE LLC ACT, *supra* note 5, § 602(f), at 170 (providing for dissociation consequent to death); *id.* § 603(a), at 171 (providing that dissociated member has no right to participate in management).

31. *See* UNIF. LTD. LIAB. CO. ACT § 603(a)(3) (UNIF. LAW. COMM'N 2013) (providing that estate of former member is an assignee).

32. Note that some states still provide a default rule of redemption upon death. *See, e.g.*, IND. CODE ANN. § 23-18-5-5.1(b) (West, Westlaw through the 2020 2d Reg. Sess.) ("Upon the occurrence of an event of dissociation under IC 23-18-6-5, a dissociating member is entitled to receive: (1) any distribution that the member is entitled to under this article or the operating agreement; and (2) unless otherwise provided in the operating agreement, within a reasonable time after dissociation, the fair value of the member's interest in the [LLC] as of the date of dissociation based on the member's right to share in distributions from the [LLC], less a distribution received under subdivision (1)."); *see also infra* notes 121–32 and accompanying text (discussing alternative paradigms).

33. *See In re* Succession of McCalmont, 261 So. 3d 903, 910 (La. Ct. App. 2018) ("We agree with Professors Holmes and Morris that 'the LLC statute manages to combine the worst features of both corporation and partnership law . . . and creates a form of property that, under the default rules of LLC law, has little transferable value.'" (quoting WENDELL H. HOLMES & GLENN G. MORRIS, 8 LOUISIANA CIVIL LAW TREATISE, BUSINESS ORGANIZATIONS § 44:20 (2018))), *rev'd on other grounds*, 271 So. 3d 194 (La. 2019).

34. Rufus E. Miles, Jr., *The Origin and Meaning of Miles' Law*, 38 PUB. ADMIN. REV. 399, 399 (1978).

35. *See* ROBERT R. KEATINGE, LARRY E. RIBSTEIN & THOMAS E. RUTLEDGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 8:2 (Dec. 2020) ("[P]roperty purchased by the LLC or contributed by a member or members to an LLC . . . is owned by the LLC."); *id.* app. 8-2.

as a reserve account to provide liquidity upon death. If a member's estate lacks a put option, then the burden of that absence will fall upon the member who did not negotiate for that protection, was unsuccessful in those negotiations, or failed to recognize the issue. But, absent such an option, there cannot be a claim of "oppression" when the estate asserts it should be afforded liquidity.[36] No less an authority than Crane has cautioned that the eventuality of death should be addressed in the partnership (now typically an operating) agreement.[37]

The foregoing brings us to the treatment of the estate's economic rights in the venture.

## The Unenviable Position of an Assignee

Upon a member's death, under the typical statutory default rule, the estate and then the heirs will be assignees of the decedent's interest in the LLC and do not become substitute members. The position of an assignee is unenviable. An assignee, absent contrary private ordering, has no right to participate in the management of the venture.[38] An assignee is not a party to the operating (or partnership) agreement, has no voice in its amendment,[39] and may not bring an action for its enforcement.[40] An assignee is not the beneficiary of any fiduciary duty[41]

36. *Cf*. Thomas E. Rutledge, *Shareholders Are Not Fiduciaries: A Positive and Normative Analysis of Kentucky Law*, 51 U. Louisville L. Rev. 535 (2013) (arguing that assertions of "oppression" should be rejected on the basis that the participants in the venture could have negotiated for particular protections and that, in the failure to do so, they are being deprived of no rights nor remedies).

37. *See* Crane, *supra* note 19, § 73, at 322. While not the focus of this discussion, keep in mind that a member's death may have negative consequences for the respective rights of the remaining members. Consider an LLC with four individuals who own the following percentages: 43/19/19/19, and with an operating agreement requiring a majority to act for the company. It takes at least two members to agree on a course of action, but not if one of the 19 percent members dies. If no substitute member is admitted (and even if a new member were admitted there is no requirement that the new member be afforded a 19 percent voting position), then the member who previously had a 43 percent voting position now wields majority control and may act unilaterally. If we assume that the allocation of voting rights among the members was intended to prevent unilateral control of the venture by one person, the death of a member will have negated the efforts to achieve that objective.

38. *See supra* note 6.

39. *See, e.g.*, Bailey v. Fish & Neave, 868 N.E.2d 956 (N.Y. 2007) (permitting amendment of partnership agreement that altered post-withdrawal benefits to already-withdrawn partners); Wiggs v. Summit Midstream Partners, LLC, No. 7801, 2013 WL 1286180 (Del. Ch. Mar. 28, 2013) (rejecting non-member's challenge to amendment of operating agreement); *see also* Ribstein, Keatinge & Rutledge, *supra* note 35, § 9.5 ("[P]erhaps the assignor should retain management and information rights in the absence of contrary agreement."); Thomas E. Rutledge & Katharine M. Sagan, *An Amendment Too Far?: Limits on the Ability of Less than All Members to Amend the Operating Agreement*, 16 Fla. St. U. Bus. Rev. 1 (2017) (discussing implications of amendment of organic agreements by less than all parties thereto).

40. *See, e.g.*, Glasser v. Cohen, No. 05-CIV-6993, 2008 WL 4104024 (S.D.N.Y. Aug. 28, 2008) (finding that the plaintiffs were assignees of limited partnership interest and, never having been admitted as substitute limited partners, lacked standing to bring action under the limited partnership agreement); OAIC Commercial Assets, L.L.C. v. Stonegate Vill., L.P., 234 S.W.3d 726 (Tex. App. 2007) (concluding that purported transferee of interest in limited partnership was not in privity with or a third-party beneficiary of limited partnership agreement and could not bring suit under it); Kellis v. Ring, 155 Cal. Rptr. 297 (Ct. App. 1979) (concluding that assignee has no standing to sue a general partner for breach of fiduciary duties owed to the partnership).

41. *See, e.g.*, Galaz v. Galaz (*In re* Galaz), No. 07-53287, 2015 WL 457850, at *9 (Bankr. W.D. Tex. Jan. 23, 2015) (concluding that no fiduciary duty owed assignee of interest in LLC); Nelson

or of the obligation of good faith and fair dealing.[42] While there are LLC statutes that provide to the contrary, an assignee may not initiate, on behalf of the venture, a derivative action.[43] An assignee may not bring an action for the venture's judicial dissolution.[44] Typically, an assignee has no right to inspect the venture's

v. All. Hosp. Mgmt., LLC, No. 11-CVS-3217, 2013 WL 4506222, at *8 (N.C. Bus. Ct. Aug. 20, 2013) ("The plain language of the statue anticipates that members and managers may owe fiduciary duties to one another or to the LLC, but does not anticipate fiduciary duties being owed to an assignee. Moreover, the LLC Act specifically provides that an assignee is not entitled to assert any rights of a member."); Haynes v. B&B Realty Grp., LLC, 633 S.E.2d 691, 696 (N.C. Ct. App. 2006) (concluding that no fiduciary duties owed to transferee of LLC interest); Landskroner v. Landskroner, 797 N.E.2d 1002, 1013 (Ohio Ct. App. 2003) (concluding that fiduciary duties are not owed to former member of LLC); Adams v. United States, No. 396-CV-3181-D, 2001 WL 1029522, at *5 (N.D. Tex. Aug. 24, 2001) (stating that remaining partners did not owe a fiduciary duty to assignees of the deceased partner); Baytide Petroleum, Inc. v. Whitmar Expl. Co., No. CJ-91-04576, 1997 WL 34690262 (D. Okla. Aug. 13, 1997) (concluding that "no fiduciary duty" is owed the assignee of a partner); Griffin v. Box, 910 F.2d 255, 261 (5th Cir. 1990) (interpreting Texas law and concluding that general partners did not owe a fiduciary duty to transferees of partnership interest who had not been admitted as substituted partners); Levine v. Murray Hill Manor Co., 532 N.Y.S.2d 130, 132 (App. Div. 1988) (concluding that an assignee of a limited partnership interest is not owed a fiduciary duty), *appeal dismissed*, 540 N.Y.S.2d 1006 (1989); *see also* Thomas E. Rutledge, Carter G. Bishop & Thomas Earl Geu, *No Cause for Alarm: Foreclosure and Dissolution Rights of a Member's Creditors*, PROB. & PROP., May–June 2007, at 35, 40 (noting that a transferee is "not owed fiduciary obligations"). *But see* Bader v. Cox, 701 S.W.2d 677, 685 (Tex. App. 1985) (stating that surviving partners owed fiduciary duties to the representative of a deceased partner under the Texas Uniform Partnership Act); TEX. BUS. ORGS. CODE ANN. § 152.204(a) (West, Westlaw through 2019 Reg. Sess.) (imposing duties of care and loyalty on partner to partnership, other partners, and a "transferee of a deceased partner's partnership interest").

42. *See, e.g.*, Bauer v. Blomfield Co., 849 P.2d 1365, 1367 n.2 (Alaska 1993) (concluding that assignee of partnership interest not owed obligation of good faith and fair dealing); Wilson v. Wernowsky, 846 S.E.2d 101, 109–11 (Ga. Ct. App. 2020) (concluding that estate of deceased member was assignee, not a party to the operating agreement, was owed no duty of good faith and fair dealing, and, regarding distributions, would have the status of a creditor).

43. *See, e.g.*, Kaminski v. Sirera, 169 A.D.3d 785, 787 (N.Y. App. Div. 2019) ("[T]he plaintiff, as a nonmember purchaser who had not been admitted as a member of the LLC, lacks standing to pursue derivative causes of action on behalf of the LLC . . . ."); Lani v. Schiller Kessler & Gomez, PLC, No. 3:16-CV-00018, 2016 WL 4250452, at *8 (W.D. Ky. Aug. 10, 2016) (concluding that former member, now an assignee consequent to resignation, does not have standing to bring derivative action on LLC's behalf); Shurberg v. La Salle Indus. Ltd., No. 04-15-00320-CV, 2016 WL 1128291, at *6–7 (Tex. App. Mar. 23, 2016) (noting that limited partnership agreement is binding on successors but insufficient to make estate's personal representative a limited partner, and concluding that personal representative lacked standing to bring derivative litigation); 7547 Corp. v. Parker & Parsley Dev. Partners, L.P., 38 F.3d 211, 217–18 (5th Cir. 1994) (concluding that assignees of limited partners lacked standing to bring a derivative action); Kellis v. Ring, 155 Cal. Rptr. 297, 300 (Ct. App. 1979) (concluding that assignee of limited partner lacked standing to object to management of limited partnership); *see also* Cordts-Auth v. Crunk, LLC, 815 F. Supp. 2d 778, 786–92 (S.D.N.Y. 2011) (concluding that former employee of LLC, not a member, lacked standing to bring derivative action on LLC's behalf). In contrast, under Delaware law, the capacity to bring a derivative action extends to assignees. *See* DEL. CODE ANN. tit. 6, § 18-1001 (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–20)) (addressing LLCs); *id.* § 17-1001 (addressing limited partnerships).

44. *See, e.g.*, Finkel v. Palm Park, Inc., No. 17-CVS-14515, 2019 NCBC 37, 2019 WL 2479403, at *6 (N.C. Bus. Ct. June 11, 2019) ("Providing a common law right to make a claim for dissolution to an economic interest holder circumvents North Carolina's express statutory right to seek dissolution, which is provided only to members of [LLCs]. . . . It is well-established by this Court that nonmembers and former members lack standing to bring claims for judicial dissolution . . . ." (citing N.C. GEN. STAT. ANN. § 57D-6-02(2) (West, Westlaw through S.L. 2020-97 of the 2020 Reg. Sess.))); Styslinger v. Brewster Park, LLC, 138 A.2d 257, 259 (Conn. 2016) ("In this appeal, we must determine whether the assignee of a membership interest in a Connecticut [LLC] has standing

books and records.[45] Not being in a fiduciary relationship with the LLC, the estate is not able to bring an action for an accounting.[46]

The assignee's position is passive and there are at best few mechanism for protecting even those passive rights. While the assignee has a statutory right to receive distributions, whether interim or liquidating,[47] there is no obvious path by which an assignee may enforce its economic right.[48]

---

to seek a court order forcing the winding up of the affairs of an LLC in the absence of the LLC's dissolution. We conclude that the assignee does not have standing to do so."). *But see* Storland v. Nordic Townhomes Ltd. P'ship, No. A18-1564, 2019 WL 1983500, at *1 (Minn. Ct. App. May 6, 2019) (affirming order that a limited partnership be dissolved in an action brought by the assignees of the limited partners); Warren v. Cuseo Fam., LLC, 138 A.2d 230, 237 (Conn. App. Ct. 2016) (permitting personal representative of a deceased member to bring an action for a receivership of the LLC); *In re* Carlisle Etcetera LLC, No. 10280, 2015 WL 1947027, at *7 (Del. Ch. Apr. 30, 2015) (permitting, on equitable grounds, assignee to move for judicial dissolution of an LLC); Thomas E. Rutledge, *Limited Partnership Dissolved at the Request of the Transferees of Limited Partners*, BUS. L. TODAY (Oct. 25, 2019), https://businesslawtoday.org/2019/10/limited-partnership-dissolved-request-transferees-limited-partners (discussing the *Storland* case).

45. *See, e.g.*, COLO. REV. STAT. ANN. § 7-80-408(1) (West, Westlaw through the 2020 Extraordinary Sess.) (empowering "[e]ach member" of LLC to inspect records); DEL. CODE ANN. tit. 6, § 18-305(a) (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–20)) (same); *id.* § 17-305(a) (same for limited partners of a limited partnership); IND. CODE ANN. § 23-18-4-8(b) (West, Westlaw through the 2020 2d Reg. Sess.) (same for members of LLCs); KY. REV. STAT. ANN. § 275.185(2) (West, Westlaw through the 2020 Reg. Sess.) (same); *id.* § 275.185(3) (imposing obligation to disclose information to members); *id.* § 275.255(1)(c) (limiting rights of assignees); *see also* Est. of Calderwood v. ACE Grp. Int'l LLC, 67 N.Y.S.3d 589, 597 (App. Div. 2017) (denying non-member's request to inspect LLC's records); Prokupek v. Consumer Cap. Partners LLC, No. 9918, 2014 WL 7452205, at *7 (Del. Ch. Dec. 30, 2014) (same); Kinkle v. R.D.C., L.L.C., 889 So. 2d 405, 413 (La. Ct. App. 2004) (same); Dame v. Williams, 727 N.Y.S.2d 816, 818 (App. Div. 2001) ("[T]he various provisions of the Partnership Law . . . operate to deprive plaintiff [the widow of a deceased partner] of two of the three property rights of a partner [*i.e.*, governance and information rights]. Further, the interest in the partnership that she did receive gives her no rights other than to receive the profits to which decedent would have been entitled had he lived."); Baldwin v. Wolff, 690 N.E.2d 632, 636 (Ill. App. Ct. 1998) (rejecting assertion that the common law of agency would compel the production of the books and records of the limited partnership to the assignees, as the assignees "cannot obtain through agency law that which they are prohibited from obtaining through the Act and the Investment Partnership Agreement"); Everest Invs., LLC v. Inv. Assocs., II, No. CX-96-554, 1996 WL 509840, at *3 (Minn. Ct. App. Sept. 10, 1996) (concluding that assignees of limited partners, never admitted as substitute limited partners by action of the general partner, had no right to inspect company books and records).

46. *See, e.g.*, Callas v. Callas, No. 14-7486, 2018 WL 566208, at *4 (D.N.J. Jan. 26, 2018) (rejecting application for accounting by estate of former LLC member); Vill. of Hoosick Falls v. Allard, 672 N.Y.S.2d 447, 449 (App. Div. 1998) (concluding that, absent a fiduciary relationship, a claim for equitable accounting cannot stand); Palazzo v. Palazzo, 503 N.Y.S.2d 381, 384 (App. Div. 1986) ("The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest.").

47. *See, e.g.*, REVISED PROTOTYPE LLC ACT, *supra* note 5, § 502(b), at 163.

48. *See In re* Succession of McCalmont, 261 So. 3d 903, 910 (La. Ct. App. 2018) ("We further note that the law as written allows for the creation of situations whereby an assignee of a deceased member's rights, while due distributions, may never be able to see company records to ensure he is actually receiving those distributions in full, because remaining members can simply withhold records that would show what, if anything, may be owed. However, the [LLC] Act and the limited jurisprudence dealing with the transfer issue before us clearly limit what Jay, as an assignee, is entitled to. While Jay and the estate may be entitled to distributions from the LLCs, they are not entitled to the records which they seek."), *rev'd in part*, 271 So. 3d 194, 195 (La. 2019) (per curiam) (permitting estate to inspect the LLC's books and records for the period the decedent was a member). While not

Although a deceased member's estate, as an assignee, may have few if any rights against the LLC, the LLC may have rights against the estate. Death does not relieve the estate from making capital contributions to the LLC promised but not made by the deceased member, including contributions of money equal to the value of any services the deceased member was required to contribute to the LLC.[49] Likewise, a member's death does not discharge the estate from any debt, obligation, or other liability to the LLC or to other members that the deceased member incurred while a member.[50]

Seeking to mitigate the effects of treating the decedent's estate as an assignee, some LLC statutes afford the estate more rights than are held by other assignees. Whether those statutes are effective in obtaining mitigation is questionable.

## The (Unclear) Statutes Affording Member Rights to the Estate of a Deceased Member

Numerous states afford special rights to the estates of LLC members, but those statutory provisions are often confusing in application. For example, the Massachusetts LLC Act provides:

> Unless otherwise provided in the operating agreement, if a member who is an individual dies . . . , the member's executor . . . or other legal representative may exercise all of the member's rights for the purpose of settling his estate or administering his property, including any power under the operating agreement of an assignee to become a member.[51]

express in the high court's decision, the estate, as the decedent's assignee, could not inspect books and records for the period after the decedent's death. *See* Kalinka, *supra* note 3, at 452–53 ("Thus, the legal representative of a decedent member may not participate in the management of the LLC, vote on the LLC's affairs, or inspect the LLC's records, unless the LLC's articles of organization or an operating agreement specifically accords such management rights to the decedent's legal representative, or unless the legal representative is admitted as a member of the LLC. Without the rights to vote and inspect records, a decedent member's legal representative will have little ability to protect the interests of the decedent's estate or heirs with respect to the decedent's interest in the LLC." (footnote omitted)).

49. *See* Unif. Ltd. Liab. Co. Act § 603(b) (Unif. Law. Comm'n 2013) ("A person's dissociation as a member does not of itself discharge the person from any debt, obligation, or other liability to the [LLC] or the other members which the person incurred while a member."); Revised Prototype LLC Act, *supra* note 5, § 603(b), at 171 (virtually same); Ky. Rev. Stat. Ann. § 275.255(1)(f) (West, Westlaw through the 2020 Reg. Sess.) (virtually same); Colo. Rev. Stat. Ann. § 7-80-502(1) (West, Westlaw through the 2020 Extraordinary Sess.) (virtually same); *see also* Unif. Ltd. P'ship Act § 502(a) (Unif. Law. Comm'n 2013) ("A person's obligation to make a contribution to a limited partnership is not excused by the person's death, disability, termination, or other inability to perform personally."); *id.* § 502 (b) ("If a person does not fulfill an obligation to make a contribution other than money, the person is obligated at the option of the limited partnership to contribute money equal to the value, as stated in the required information, of the part of the contribution which has not been made.").

50. *See, e.g.*, Ind. Code Ann. § 23-18-5-1(b) (West, Westlaw through the 2020 2d Reg. Sess.); Ky. Rev. Stat. Ann. § 275.200(2) (West, Westlaw through the 2020 Reg. Sess.); N.J. Stat. Ann. § 42:2C-33(a) (West, Westlaw through L.2020, c. 117 and J.R. No. 2).

51. Mass. Gen. Laws Ann. ch. 156C, § 42 (West, Westlaw through ch. 226 of the 2020 2d Ann. Sess.); *see also* N.Y. Ltd. Liab. Co. Law § 608 (West, Westlaw through L.2019, ch. 758 & L.2020, chs. 1–347) (virtually same). It is important, in considering statutes of this nature, to carefully differentiate between those that recognize the estate as an assignee and those that afford the estate some set of the rights of a member. For example, in contrast to the Massachusetts LLC Act, the Prototype LLC Act

But what are those "member's rights for the purpose of settling [the decedent's] estate"? Is that only the right to inspect books and records in order to value the estate's interest in the LLC? Does it extend to voting the decedent member's interests either generally or for the purpose of increasing the value of the estate? Assume that the deceased member was a one-third member in an LLC that owns appreciated real estate. Assume as well that the LLC's operating agreement provides that, upon a member's death, the estate shall receive the appropriate portion of the company's book value. Book value will not include, however, the appreciation in the value of the real estate that is the asset of the company. Assume as well that the operating agreement affords any member the right to trigger the dissolution of the company and the sale of its property. In this instance, could the estate, in the "exercise [of] all of the member's rights for the purpose of settling his estate," trigger the LLC's dissolution and the sale of its property? Alternatively, assume the operating agreement requires the members' unanimous approval to sell an appreciated asset. Could the estate, desiring to avoid the recognition of taxable income, exercise what had been the member's right to veto the transaction? In a third example, assume that the executor of the estate, in the course of its administration, comes to believe that the other members have engaged in violations of their fiduciary duties, thereby giving rise to a potential derivative claim. Perhaps, the other members, while not breaching any fiduciary duty, violated the operating agreement giving rise to a claim for damages. Should the estate be treated as a member with standing on the LLC's behalf to initiate a derivative action? Is the estate a party to the operating agreement able to bring suit alleging its breach by another party thereto? If the decedent had a majority interest in an LLC when a majority of the members could amend the operating agreement, could the estate vote to amend the operating agreement to create a put right or to eliminate a call right exercisable upon death?[52]

Generally speaking, the courts have not addressed these and similar questions. However, in *Holdeman v. Epperson*,[53] the court—interpreting an Ohio statute similar to the Massachusetts statute quoted above—reached a questionable conclusion. In that case, the intermediate appellate court affirmed the trial court's summary judgment order ruling that the executor of the deceased controlling member's estate had the status of, and enjoyed all of the rights and privileges of, a member. The operating agreement explicitly provided that the successor in interest of a deceased member "shall not become a member"[54] without the

treated the estate as only an assignee. *See* PROTOTYPE LLC ACT, *supra* note 22, § 707, at 51 ("If a member who is an individual dies . . . , the member's executor . . . or other legal representative shall have all of the rights of an assignee of the member's interest."); *see also* UNIF. LTD. LIAB. CO. ACT § 504 (UNIF. LAW. COMM'N 2013) ("If a member dies, the deceased member's . . . legal representative may exercise the rights of a transferee provided in Section 502(c); and, for the purpose of settling the estate, the rights the deceased member had under Section 410."); UNIF. LTD. P'SHIP ACT § 704 (UNIF. LAW. COMM'N 2013) (virtually same for limited partnerships).

52. Here positing that the operating agreement may be amended by that majority vote. *See generally* Rutledge & Sagan, *supra* note 39, at 2.

53. Holdeman v. Epperson, No. 2004-CA-49, 2005 WL 1714210 (Ohio Ct. App. July 22, 2005), *aff'd*, 857 N.E.2d 583 (Ohio 2006).

54. *Id.* at *2 (quoting operating agreement).

consent of the LLC, which had been refused. The court held that the provision of the Ohio LLC Act providing that the estate "may exercise all of [the decedent's] rights as a member for the purpose of settling his estate or administering his property, including any authority that he had to give an assignee the right to become a member,"[55] controlled over the operating agreement.

The court reasoned that the statute refers to the rights the deceased member "had," and therefore did not refer to the absence of such member rights after death. The court also relied on an Ohio professional association case and a Florida limited partnership case that gave the legal representative a right to bring an accounting, and on the Oklahoma statute that had been identical to the Ohio statute, but was amended to give the legal representative only the rights of an assignee, indicating that the representative had had broader rights before amendment.[56] According to a leading treatise:

> In general, the court was obviously concerned about achieving a balance. On the one hand, the court noted that leaving the estate in the helpless position of (unlike the estate of a deceased partner) not even being able to compel an accounting under Ohio LLC law could leave it vulnerable to waste or fraud. On the other hand, the court recognized the danger of giving the representative unlimited authority to participate in a business it may know nothing about. Thus, the court was careful to hold that the executor's power was limited to the period of her administration, and did not extend to the power to appoint herself or other person as a member. However, it is not clear how to square this language with the court's affirmance of the trial court's order making the executor a full-fledged member.[57]

The Ohio Supreme Court affirmed on the basis that the statute did not permit variation by the operating agreement and that it referenced the member's rights as they existed prior to death.[58] The court held that the rights were limited to those needed to settle the estate, but did not otherwise clarify their scope.[59] Again, the commentary is illuminating:

> These opinions are a questionable interpretation of the Ohio statute. It is particularly doubtful whether this provision should be expansively interpreted when the members have explicitly provided for an alternative result in their agreement. The emphasis on rights the decedent "had" rather than "has" after death is peculiar, since it is not clear how someone could have rights after death. Moreover, the court

55. *Id.* at *3 (quoting Ohio Rev. Code Ann. § 1705.21(A) (2005), *amended by* 2007 Ohio Laws 134 (permitting opt-out via operating agreement or articles of organization)).

56. *Id.* at *6–9 (citing Lehtinen v. Drs. Lehtinen, Mervant & West, Inc., 788 N.E.2d 1079 (Ohio 2003); Frye v. Manacare Ltd., 431 So. 2d 181 (Fla. Dist. Ct. App. 1983); Okla. Stat. tit. 18, § 2036(B) (West, Westlaw through the 2d Reg. Sess. of the 57th Leg. (2020))).

57. Ribstein, Keatinge & Rutledge, *supra* note 35, § 9:7 n.4.

58. Holdeman v. Epperson, 857 N.E.2d 583 (Ohio 2006). Responding to that decision, the Ohio legislature amended the LLC Act to expressly permit modification by the operating agreement or the articles of organization. *See* Ohio Rev. Code Ann. § 1705.21(A) (West, Westlaw through file 60 of the 133d Gen. Assemb. (2019–20)); Jason C. Blackford, Baldwin's Ohio Practice Business Organizations § 15:19 (2020 ed.).

59. *Holdeman*, 857 N.E.2d at 556. A dissent focused on the problem of not defining the rights incident to settling the estate and that allowing the estate to control the LLC put the minority members under its control. *Id.* at 557–59 (Stratton, J., dissenting).

> ignored Ohio Rev. Code Ann. § 1705.44, which provides that winding up after dissolution is only by the "members" and that "upon application of any member of a dissolved [LLC] or his legal representative or assignee, the court of common pleas may wind up the affairs of the company or may cause its affairs to be wound up by a liquidating trustee appointed by the court." This provision not only explicitly distinguishes members and legal representatives, but gives the legal representative a remedy short of full membership powers—i.e., the power to seek winding up by the court.[60]

In a 2019 decision, *Coast Plaza LLC v. RCH Capital LLC*,[61] the Mississippi Court of Appeals considered a provision of the Mississippi LLC Act providing that the estate of the deceased member may, with respect to the LLC, continue to exercise the decedent's right to participate in the LLC's management. As applied, those continuing rights had the effect of forcing the LLC's property into foreclosure and, as a result, the possibility of the LLC's members performing personal guarantees of that debt.

Coast Plaza LLC, organized in Mississippi, had two members. The LLC's only asset was a strip mall. It served as security for a promissory note that was in turn personally guaranteed by each of the members. RCH was the holder of the note. One member died in mid-2016. Later that year, RCH issued a notice of default for undefined failures to perform under the promissory note.

A number of email exchanges followed with respect to a possible resolution of foreclosure by the voluntary surrender of the property which, if accomplished, would have resulted in no deficiency judgment to which the guarantees would be subject. Those efforts did not, however, result in a clean settlement. At this juncture, the default rules of the somewhat atypical Mississippi LLC Act came to bear because the LLC had no operating agreement. First, the Act requires the approval of at least a majority of the members for any sale or other disposition of the assets that "would leave the [LLC] without a significant continuing business activity."[62] Second, the Act provides, *inter alia*, that after the death of an individual member, the personal representative of the estate "may exercise all rights for the purpose of settling the estate, including the governance rights that were held by such member at the time of the member's death and any other power under an operating agreement of an assignee to become a member."[63]

RCH eventually revoked the offer to settle. Coast Plaza LLC sued to enforce the alleged settlement agreement. After the chancery (trial) court determined that there had been no settlement agreement reached between the parties, an appeal followed.

60. Ribstein, Keatinge & Rutledge, *supra* note 35, § 9:7 n.4 (quoting Ohio Rev. Code Ann. § 1705.44 (West, Westlaw through file 60 of the 133d Gen. Assemb. (2019–20)).

61. 281 So. 3d 1125 (Miss. Ct. App. 2019) (interpreting Miss. Code Ann. § 79-29-709 (West, Westlaw through the 2020 Reg. Sess.)).

62. *Id.* at 1132 (quoting Miss. Code Ann. § 79-29-233 (West, Westlaw through the 2020 Reg. Sess.)).

63. *Id.* (quoting Miss. Code Ann. § 79-29-709(2) (West, Westlaw through the 2020 Reg. Sess.)).

The court of appeals held that there was no settlement agreement because Coast Plaza LLC lacked the authority to enter the agreement:

> Pursuant to section 79-29-233(c), the LLC needed the approval of both Thompson and the Gagnon Estate to agree to dispose of its sole asset via a deed in lieu of foreclosure to RCH. Nothing in the record shows that the Gagnon Estate voted to accept RCH's offer, consented in writing to accept RCH's offer, or timely authorized Thompson to vote as its proxy. Rather, the record reflects that the LLC lacked the necessary authority to accept RCH's offer on November 30, 2016. Accordingly, the LLC could not validly accept RCH's offer, and there was no agreement for the chancellor to enforce.[64]

Other acts are more precise as to the rights that may be exercised by the estate. For example, the Revised Prototype LLC Act limits the deceased member's representative, for purposes of settling the estate, to exercise the rights of a current member under section 408, which addresses information rights.[65] Narrower than the language employed in Massachusetts,[66] the Revised Prototype LLC Act limits the circumstances in which the rights may be exercised (only death, not also incompetence), limits, with specificity, those continuing rights (access to books and records), and limits the purpose for which those rights may be exercised ("settling the estate"). Still, there is the open question of what is "settling the estate"? Is the meaning of those words limited to the determination of the value of the interest as of the date of death, or does it extend to the identification of the other members of the LLC to solicit a purchase/sale of the interest with a view to providing liquidity to the estate?

## The Unclear Statutes Affording Assignee Rights to the Estate of a Deceased Member

Another class of statutes affords the estate of a deceased member the rights of an assignee.[67] But what are those rights? As previously noted, most statutes do not give an assignee the right to inspect books and records. An assignee is not a party to the operating agreement and has no voice as to either its enforcement or its amendment. An assignee is not owed fiduciary duties. It is difficult to see how providing an estate the rights of an assignee gives the estate anything of value.

64. *Id.* at 1134–35 (footnote omitted) (citing Miss. Code Ann. § 79-29-233 (West, Westlaw through the 2020 Reg. Sess.)). As additional grounds for its holding, consequent to the anticipated timeline for settling the Gagnon Estate, the court observed that the LLC would not have been in a position to deliver the deed in lieu of foreclosure for several years. *Id.* There being no contract that could be enforced, claims for violation of the implied covenant of good faith and fair dealing were likewise set aside. *See id.* (refusing to address on appeal an issue that was not raised before the trial court).

65. Revised Prototype LLC Act, *supra* note 5, §§ 408, 504, at 160, 168; *see also* Ala. Code § 10A-5A-5.04 (West, Westlaw through Act 2020-206); N.J. Stat. Ann. § 42:2C-44 (West, Westlaw through L.2020, c. 117 and J.R. No. 2).

66. *See supra* note 53.

67. *See, e.g.*, Colo. Rev. Stat. Ann. § 7-80-704(1) (West, Westlaw through the 2020 Extraordinary Sess.); *see also* Unif. Ltd. Liab. Co. Act § 504(1) (Unif. Law. Comm'n 2013); Unif. Ltd. P'ship Act § 704 (1) (Unif. Law. Comm'n 2013).

But even if the estate as an assignee were allowed to inspect books and records, it is unclear, vis-à-vis the LLC, how any knowledge derived therefrom would benefit it. That information could assist the estate in effecting a valuation for estate tax purposes, but that is not a right as to the LLC. It is possible that a provision in the operating agreement affording the estate a put option would be useful information if the decedent had not previously advised the heirs and administrator of that right. But for that eventuality, a provision saying the estate is an assignee adds nothing.

## Liquidating Distribution Upon Death

The states use a variety of approaches for providing liquidity to an estate upon a member's death. Most LLC statutes do not provide a right to redemption upon death. In those states, absent the creation in the operating agreement of a put option exercisable by the deceased member's estate, there is no redemption right.[68] Rather, first the estate and then the heirs will be assignees of the decedent's interest in the LLC. If the estate is illiquid, the assignee's right may be sold, but the purchaser will also be an assignee of the interest. In contrast, under the New York LLC Act, upon dissociation, including by reason of death, the disassociated member "is entitled to receive, within a reasonable time after withdrawal, the fair value of his or her membership interest in the [LLC] as of the date of withdrawal."[69]

## The Prerogative of the Remaining Members

Before one concludes that the interests in an LLC should be fully inheritable and that the estate (and then the heirs) of a deceased member should enjoy all rights of membership, one must consider the other members in the venture. As a default rule, LLCs use the principle of *delectus personae*. Both the decedent's estate and the decedent's heirs are different persons from the decedent. Whether the estate and heirs should be admitted as members in the LLC is a determination vested first in the other members, acting by unanimity, majority, or other threshold they have elected to use.[70] With respect to the LLC and its members, the estate and the member's heirs are as much strangers as would be an

68. *See supra* note 28 and accompanying text.

69. N.Y. Ltd. Liab. Co. Act § 509 (West, Westlaw through L.2019, ch. 758 & L.2020, chs. 1–347).

70. *See, e.g.*, Del. Code Ann. tit. 6, § 702(a) (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–20)) (providing that assignee of interest admitted to membership "upon the vote or consent of all of the members of the [LLC]"); Revised Prototype LLC Act, *supra* note 5, § 401(b)(3), at 154 (requiring the consent of all surviving members before the estate of a deceased member may be admitted as a member of the LLC).

inter-vivos voluntary assignee. Absent private ordering, the decedent may not force a new participant upon the existing LLC members.[71]

Clearly, the statutes affording the rights of a member to the estate of a deceased member call for far greater specificity as to what rights are afforded an estate. Those statutes beg another important question, namely whether an estate should be afforded any right to participate in the management of the LLC, even the passive right to inspect books and records. Starting from the *delectus personae* rule of unincorporated associations, why should an estate have any rights unless provided for in a particular operating agreement? Each of the states' LLC statutes provides that an assignee has no right to participate in the management of the LLC. Why should there be a carve-out for estates? If anything, death is the one eventuality for which every person knows they need to plan, and it would be expected that every operating agreement would address whether the estate of a deceased member should have a right to participate in the LLC's affairs. Certain LLCs will determine that the estate should have no rights, while other LLCs will determine that the estate should have some set of rights, but not the status, of a member. Other operating agreements will provide that the estate and the heirs will be admitted as replacement members upon the execution of a joinder to the operating agreement. Regardless of the approach employed, it is hoped that those operating agreements will be better written than the statutes that afford an estate certain rights. Either way, private ordering, not a statutory default, would determine the outcome. Carrying forward venerable principles of partnership law, it would be difficult for anyone to suggest that this rule is in any manner surprising and to claim ignorance as a defense.[72]

## Waiving the Rights of the Decedent's Successor

In *Estate of Calderwood v. ACE Group International LLC*,[73] a New York court applied Delaware law to address whether an operating agreement could restrict the few rights enjoyed by an assignee of an interest in a Delaware LLC.

Calderwood, the decedent, had been the founder of the ACE brand of boutique hotels. At the time of his death, those hotels were operated through ACE Group International LLC, in which Calderwood held a 51.74 percent interest. The balance of the company was owned by Ecoplace LLC, which had invested $10,000,000 in return for a 33.33 percent interest, a $10,000,000 preferred return, and veto rights over certain "major decisions."[74] The remaining

71. *See, e.g.*, Milford Power Co. v. PDC Milford Power, LLC, 866 A.2d 738, 760 (Del. Ch. 2004) ("[I]t is far more tolerable to have to suffer a new passive co-investor one did not choose than to endure a new co-manager without consent.").

72. *See* Watson, *supra* note 19, at 263 ("We come now to consider the effect produced on partnership affairs by an event which may happen every day, and must at last, whether business goes on prosperously or adversely, *viz.*, the death of one of the copartners. This generally is, and always ought to be, contemplated and provided for in the articles of partnership.").

73. 67 N.Y.S.3d 589 (App. Div. 2017).

74. *Id.* at 592.

interests were held by executives to whom Calderwood had transferred his interests.[75]

Calderwood's estate, in order to prepare an estate tax accounting, requested company documents. That request was not satisfied. Thereafter, Ecoplace offered to redeem the estate for $200,000, justifying that price on the basis of its priority return and the need for substantial capital infusions into the LLC to, in part, remedy the disruption caused by Calderwood's death.[76] The estate refused and filed suit, arguing that the estate succeeded to all of Calderwood's rights in the LLC and was itself a member that could require the production of books and records. After the claim for books and records had been satisfied, the motion court struck certain portions of the complaint, including those asserting that the estate stepped into Calderwood's shoes and was a member of the LLC.[77]

In opposition, Calderwood's estate asserted that the operating agreement could not modify the estate's statutory right to exercise the member's rights for purposes of settling the estate.[78] Rejecting that assertion, the court stated that the parties to an LLC agreement may structure their internal affairs as they see fit, noting that the LLC Act itself has a gap-filling function.[79] The court rejected the notion that the estate was owed fiduciary duties and, on the same basis, rejected the assertion it is entitled to inspect the LLC's books and records.[80]

75. *Id.*

76. *Id.*

77. *Id.* According to the court:

> Ultimately, the parties disagree on the Estate's rights and status under the LLC Agreement. The Estate contends that it stepped into Alex's shoes upon his death, and that it possesses all of his rights and privileges as a Member under the LLC Agreement. Defendants, on the other hand, contend that under the terms of the LLC Agreement, the Estate is considered the successor in interest of a Withdrawing Member (Alex) with rights only to potential distributions, and no rights to control or participate in the running of the company. In support of their argument, defendants point to section 9.7(b) of the LLC Agreement, which provides, in relevant part, that:
>
> "[u]pon the death or disability of a Member . . . (the "*Withdrawing Member*"), the Withdrawing Member shall cease to be a Member of the Company and the other Members and the Board shall . . . have the right to treat such successor(s)-in-interest as assignee(s) of the Interest of the Withdrawing Member, with only such rights of an assignee of a[n LLC] interest under the Act as are consistent with the other terms and provisions of this Agreement and with no other rights under this Agreement. Without limiting the generality of the foregoing, the successor(s)-in-interest of the Withdrawing Member shall only have the rights to Distributions provided in Sections 4 and 10.3, unless otherwise waived by the other Members in their sole discretion.

*Id.* (footnote omitted) (quoting the LLC agreement).

78. *Id.* (citing DEL. CODE ANN. tit. 6, § 18-705 (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–20))).

79. *Id.* at 593–95; *see also* DEL. CODE ANN. tit. 6, § 18-1101(b) (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–20)) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of [LLC] agreements.").

80. *See Est. of Calderwood*, 67 N.Y.S.3d at 595 ("The Estate's argument that it is owed fiduciary duties by defendants is based on a strained interpretation of the law."); *id.* at 597 ("Finally, the Estate was not entitled to inspect AGI's books and records . . . because it is not a member of AGI . . . .").

## The Special Case of the Death of the LLC's Only Member

Under almost every LLC statute, an LLC must have at least one member.[81] What happens when the sole member dies and is thereby disassociated? The states fall into three camps with respect to this issue. Most statutes are silent as to what is the outcome. As such, the rules of general application apply, namely, (i) the estate is an assignee of a former member without any right to participate in the LLC's management, and (ii) now lacking a member, the LLC must proceed to wind up its affairs and terminate.[82]

What then is the effect of the provision of the deceased member's will that transfers its entire interest in the LLC? Does such a provision allow the successor to exercise the decedent's voting rights?[83] In short, the answer is typically "no." The LLC statutes generally provide that, upon the member's death, he or she ceases to be a member, i.e., one holding management rights with respect to the LLC. It is as if, at the moment of death, the member's management rights in the LLC evaporated. Those rights having evaporated, there is nothing that may be conveyed pursuant to the will or the laws of descent and distribution. Simply put, the decedent cannot convey that which does not exist, and the only rights that may be transferred at or after death are the economic rights of an assignee.[84] Now lacking a member, the LLC must proceed to wind up and terminate.[85]

It is conceivable that an operating agreement could provide that: (i) the death of a member shall not cause or effect the member's disassociation, and (ii) upon a member's death, any heir shall receive the member's LLC interest and become a substitute member in place of the decedent. While that may be effective within the confines of an LLC statute and the LLC's operating agreement, there is a

81. *See* Ribstein, Keatinge & Rutledge, *supra* note 35, app. 4-4 ("Minimum Number of Owners"). As with most categorical statements, there are exceptions. *See* Unif. Ltd. Liab. Co. Act § 401(a) (Unif. Law. Comm'n 2013) (contemplating the "shelf" LLC); Va. Code Ann. § 13.1-1038.1(A)(3) (West, Westlaw through the 2020 Reg. Sess.) ("[A] person may become a member in a[n LLC] . . . [, i]n the case of a[n LLC] that has no members as of the commencement of its existence . . . , as provided in any writing signed by both the initial member or members and the managers, if any are designated in the articles of organization, or, if no managers are so designated, the organizers . . . .").

82. *See, e.g.*, Ky. Rev. Stat. Ann. § 275.285(4) (West, Westlaw through the 2020 Reg. Sess.) ("A[n LLC] shall be dissolved, and it shall commence to wind up its affairs . . . [if t]here are no remaining members . . . .").

83. It is here assumed that the will did not further provide that the assignee would be admitted as a member in the LLC. *See infra* notes 86–87 and accompanying text. It might have been helpful had it done so.

84. *See* Ribstein, Keatinge & Rutledge, *supra* note 35, § 9:7 ("Only the member's economic interest in the LLC, and not specific LLC property, passes on the member's death."); Carter G. Bishop & Daniel S. Kleinberger, Limited Liability Companies: Tax and Business Law ¶ 8.04 ("A member's dissociation from an LLC typically ends the person's role in the LLC's governance, eliminates any right to participate in the LLC's affairs, and ends or severely curtails the person's access to information concerning the LLC."). Conceivably, it could be argued that the will providing for transfer functioned as an amendment or supplement to the operating agreement, but it does not appear that a court has to date been presented with that argument.

85. Nevada deviates from this rule. There, the LLC interest of a sole member may be transferred by will, and the transferee becomes a substitute member. *See* Nev. Rev. Stat. Ann. § 86.491 (West, Westlaw through the 32d Spec. Sess. (2020)).

debate as to whether it is effective under other law, specifically, a state's code that addresses wills and the requirements for the transfer of property after death ("Statute of Wills"). If the operating agreement does not of itself satisfy the applicable Statute of Wills, is the transfer of the decedent's interest in the LLC to an heir effective? Ultimately, the question will turn on the definition of a "will." A will contemplates a disposition by means of the probate system.[86] Therefore, subject to a state statute directly subjecting an operating agreement containing a disposition of a membership interest upon death to the Statute of Wills, the requirements of the Statute of Wills should not apply.[87]

But now change the facts—there was no nonprobate transfer and the former sole member, now the decedent, made no specific disposition of the interest in the LLC. We are left with an LLC that lacks a member. Except (at least outside of a few states) there is no such structure, and whatever it is must proceed to wind up and terminate its affairs.[88] But under the authority and direction of whom? There is no member to provide instructions, and the assignee of that last member has no authority to act on behalf of or to manage the LLC or to alter its status from that of an assignee to that of a member.[89] If the LLC is manager-managed, assuming that the decedent was not also the manager, is that manager going to feel comfortable acting in an agency capacity?

A second group of states have statutory provisions providing that, upon the death of the last member, the successor in interest thereto may be admitted as a member in accordance with the terms of the operating agreement or, by default, pursuant to statute.[90] Based upon the two reported decisions applying

86. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (AM. LAW INST. 2003) ("[A] will substitute is in reality a nonprobate will."); *id*. § 7.1 cmt. a ("To be valid, a will substitute need not be executed in compliance with the statutory formalities for a will because a will substitute is not a will. A will transfers ownership of probate property at death. Property subject to a will substitute is not probate property at death because it is then treated as no longer owned by the donor." (citation omitted)); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984) ("[W]ill substitutes are simply 'nonprobate wills'—'wills that need not comply with the Wills Act.").

87. *See* Blechman v. Est. of Blechman, 160 So. 3d 152, 158 (Fla. Dist. Ct. App. 2015) ("Where supported by adequate consideration, such contracts transferring a property interest upon death are neither testamentary nor subject to the Statute of Wills, but are instead evaluated under contract law."); *In re* Est. of Cook, 601 S.W.3d 453, 457–58 (Ark. Ct. App. 2020) (enforcing tranfer-upon-death provision of LLC agreement, notwithstanding (i) the absence of payment to the estate for the transferred interest, and (ii) the LLC's assets included the decedent's house); *see also* UNIF. NONPROB. TRANSFERS ON DEATH ACT § 101 (UNIF. LAW. COMM'N 1991) (addressing nonprobate transfers of assets including certificated and uncertificated securities, but not specifically addressing LLC interests agreements); F. Philip Manns, Jr. & Timothy M. Todd, *Issues Arising Upon the Death of the Sole Member of a Single-Member LLC*, 99 MARQ. L. REV. 725, 738–39 (2016) (recommending that transfer-on-death provisions be the norm in a "default or template [single-member] LLC operating agreement"); *id*. at 748 (suggesting template language).

88. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-801(a)(4) (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–20)); REVISED PROTOTYPE LLC ACT, *supra* note 5, § 706(d), at 176.

89. *See* MATTHEW ARNOLD, STANZAS FROM THE GRANDE CHARTREUSE (1855) ("Wandering between two worlds, one dead, the other powerless to be born . . . .").

90. *See, e.g.*, N.H. REV. STAT. ANN. § 304-C:153 (West, Westlaw through the 2020 Reg. Sess.) ("Unless the operating agreement provides otherwise, a person who succeeds to the [LLC] interest of a deceased member of a single-member [LLC] is admitted as the member of the [LLC]."); *see also*

provisions of this nature, it is important that there be strict compliance with the statute.

In the first of those decisions, the Alabama Supreme Court considered what happens when the sole member of an LLC dies and the statutory requirements for the admission of the successors to the decedent's financial interests are not strictly satisfied.[91]

In an effort to centralize control over a 50 percent block of the voting stock of a family company, L.B. Whitfield organized an LLC of which he was the sole member; he then contributed the stock to the LLC. L.B. and his son, Louie, were identified as the LLC's managers. L.B. died, and, while his estate was fully probated, neither Louie nor any of his three sisters, they being L.B.'s heirs, took any specific actions to address the LLC and their place in it. Louie did, however, take certain steps, such as applying for a federal taxpayer identification number for the LLC on the basis that it was now a multi-member LLC classified for tax purposes as a partnership. Louie continued to run the LLC, and distributions were made from time to time, 25 percent to each of Louie and his three sisters.

Some ten years after L.B.'s death, tension began to arise between Louie, who was employed in the family business, and his sisters who were not, including that the sisters were barred from meetings of the board of directors other than the annual meeting. By letter, the sisters sought rescission of a transaction pursuant to which they had exchanged certain voting interests in the company for non-voting interests. In response, the LLC and Louie brought suit seeking a determination that the sisters did not have the right to unwind the prior transaction. The sisters filed a counterclaim which, when ultimately amended, sought a determination that the LLC had been dissolved at the time of L.B.'s death and that the LLC must proceed to wind up and terminate in accordance with Alabama law.

Both the trial court and the Alabama Supreme Court addressed whether an LLC must dissolve upon the death of its sole member. At the time, the Alabama LLC Act provided that the successors of the last member may, subject to certain procedural requirements, elect themselves to membership and thereby continue the LLC.[92] Because it was clear that the sole member of the LLC had died, the

RIBSTEIN, KEATINGE & RUTLEDGE, *supra* note 35, app. 14-4 (noting, by code 7, states with special rules for death). The Delaware LLC Act contains a provision providing that, unless specifically waived, if a sole member assigns all interests in an LLC to a single assignee, the assignee shall become a member. DEL. CODE ANN. tit. 6, § 18-704(a)(3) (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–20)). The provision, however, is triggered by a "voluntary assignment," *id.*, and death is seldom characterized as "voluntary," which the statute defines as "consented to by the member at the time of assignment." *Id.* Consequently, the provision does not appear to benefit an estate or an heir. *See also* Ott v. Monroe, 719 S.E.2d 309, 311 n.1 (Va. 2011) (rejecting the assertion that a member's death was a voluntary attempt to resign from the LLC).

91. L.B. Whitfield, III Fam. LLC v. Whitfield, 150 So. 3d 171 (Ala. 2014).

92. *See id.* (citing ALA. CODE § 10A-5-7.01(3) (2013) (prior to amendments in 2014, 2016, 2020)); *see also* ALA. CODE § 10A-5A-7.01(c) (West, Westlaw through Act 2020-206) (effective Jan. 1, 2021) ("A[n LLC] is dissolved and its affairs shall be wound up [if] there is no remaining member, unless either of the following applies: (1) The holders of all the transferable interests in the [LLC] agree in

"family LLC must prevail, if at all, on its argument that it continued its normal existence following L.B.'s death by demonstrating that one of the two exceptions described in subparagraphs (a) and (b) of § 10A-5-7.01(3) is applicable."[93] Because the LLC made no argument with respect to subsection (b) of § 10A-5-7.01(3), only subsection (a) was at issue. Finding that the statutory requirements for the LLC's continuation by the successors of the sole deceased member had not been satisfied, the court determined that it had been dissolved by operation of law.

The takeaway is simple; where a statute sets forth requirements that must be satisfied in order for an LLC to be continued after the death of the sole member, those requirements must be strictly satisfied, and persons seeking to rely upon these springing-member provisions should carefully document compliance with the statutory requirements. For example, the documentation evidencing a timely election into member status (with the consequent continuation of the company after the death of what had been the sole member) should be notarized to confirm the date of execution, and consideration should be given to filing an amendment to the articles of organization reciting that a springing member (even if not named in the amendment) elected to continue the company.[94] Also, if the now-deceased member was as well the manager, and the new member is to be the manager going forward, the LLC's annual report should be updated via amendment.[95]

In the 2019 decision of *Felt v. Felt*,[96] the Iowa Court of Appeals considered whether a springing member had satisfied the operating agreement's requirements for admission of a replacement member. The appellate court found the operating agreement's requirements were not satisfied with the effect the LLC dissolved by operation of law. Richard Felt organized an LLC to hold certain farm properties, and was the sole member. David, one of Richard's sons, was appointed a co-manager of the LLC. Richard had two other children, Daniel and Susan. Richard's spouse pre-deceased the transactions subject to this dispute. Richard's will provided that his property would be divided equally between his three children.

writing, within 90 days after the dissociation of the last member, to continue the activities and affairs of the [LLC] and to appoint one or more new members[; or] (2) The activities and affairs of the [LLC] are continued and one or more new members are appointed in the manner stated in the [LLC] agreement.").

93. *L.B. Whitfield, III Fam. LLC*, 150 So. 3d at 185–86.

94. *See, e.g.*, *In re* Del. Acceptance Corp. CACV of Colo., LLC v. Est. of Metzner, No. 8861-MA, 2016 WL 632893, at *3–4 & n.13 (Del. Ch. Feb. 17, 2016) (addressing discovery of meta-data of document purporting to elect into springing-member status in order to determine its timeliness, and noting that, while the document called for witnesses, no witnesses signed the election).

95. *See* KY. REV. STAT. ANN. § 14A.6-010(1)(d)(2) (West, Westlaw through the 2020 Reg. Sess.) (requiring annual report of manager-managed LLC to identify all managers); *id*. § 14A.6-010(5) (authorizing amendment of annual report). *But see* COLO. REV. STAT. ANN. § 7-90-501(1) (West, Westlaw through the 2020 Extraordinary Sess.) (requiring annual report but not requiring identification of LLC managers or members).

96. No. 18-0710, 2019 WL 2372321 (Iowa Ct. App. June 5, 2019).

Richard died on November 4, 2015. Under the Iowa LLC Act, upon the death of its sole member, an LLC will be dissolved unless a new member is admitted within ninety days.[97] After the ninety-day period had elapsed, Daniel and Susan filed suit challenging a number of David's actions and the continuing existence of the LLC. The trial court found that David had been admitted as a member in the ninety-day period, and it was that determination that was the subject of the appeal. "The only question before [the appellate court was] whether the LLC had a member in compliance with the operating agreement within the ninety days following Richard's death . . . ."[98]

The appellate court began by noting the operating agreement did not provide that the heirs of the LLC interests would be admitted as members. In the face of David's assertion that he admitted himself as a member, it was noted that he had not satisfied the operating agreement's requirement that a new member execute a joinder to the operating agreement. Rather, while David had, as a manager, signed a joinder to the operating agreement at the time the LLC was formed, there was no joinder as a member.[99] The appellate court concluded that "none of the unit holders of Felt Farms LLC complied with the contractual requirements for membership by signing a joinder agreement prior to the end of the ninety-day statutory period. Therefore, the LLC dissolved as of February 3, 2016."[100]

What happens if the LLC loses its sole member to death and there is no springing-member statute (or equivalent provision in the operating agreement)? The initial answer is that there exists an LLC with no member. Except in most states there is no such LLC form, and whatever it is must proceed to wind up and terminate its affairs. But under the authority and direction of whom? There is no member to provide instructions, and the assignee of that last member (the estate) has no authority to act on behalf of or to manage the LLC.[101] Assume Creditor X is owed $100 to satisfy an outstanding invoice and the LLC's debt is uncontested. But who has the right, on behalf of the LLC, to apply its assets to the satisfaction of this obligation? Conversely, when Creditor Y presents a demand for $1,000 to satisfy its account payable, who has the authority to contest that claim? If the LLC is manager-managed, and that manager was not the

97. *See id*. at *4 (citing Iowa Code Ann. § 489.401(4) (West, Westlaw through the 2020 Reg. Sess.); *id*. (citing Iowa Code Ann. § 489.701(1)(c) (West, Westlaw through the 2020 Reg. Sess.)) ("Once the ninety days passed, if the LLC had no member it dissolved as a matter of law.").

98. *Id*.

99. *Id*. at *5. A letter from Richard's attorney to the heirs informed them that they succeeded in equal shares to the LLC, but "did not mention membership in the LLC . . . [or] offer membership [or] . . . include a joinder agreement." *Id*. at *6. The LLC's insurance policy, which identified the three children as "members," was insufficient to remedy "the contractual deficiency of the missing joinder agreement." *Id*. at *7.

100. *Id*. at *7. The appellate court named the attorney who prepared the LLC for Richard, noting his lack of experience, his use of a form operating agreement acquired from the bar association, and his lack of appreciation for the distinction between assignees and members. *Id*. at *1–2, *5–6. While it made no determination as to those deficiencies, the court seemingly cautioned attorneys regarding the complexity of LLCs.

101. *See supra* note 6.

decedent, is that manager going to be comfortable acting in an agency capacity? If the operating agreement had provided that, "upon the death of the Member, the Manager shall proceed to effect the winding up and liquidation of the Company," then the manager would have express authority to act[102] and might be comfortable doing so. No similar comfort is derived from an operating agreement that empowers the manager with only "control of the day-to-day operations of the Company" because winding up and liquidating are the antithesis of day-to-day operations.

Nevada has a curious and atypical rule. Under the Nevada LLC Act, a member is not disassociated by death.[103] The statute provides that, in the context of a single-member LLC, the deceased's "member's interest" will transfer to his/her heirs, and they will be admitted as substitute members in the LLC.[104] Then the statute gets more curious. The Nevada LLC Act defines a "member's interest" exclusively as an economic interest,[105] and it is provided that an assignee has only the right to receive the economic benefits of the member's interest, without a right to participate in management.[106] Thus, the statute is not consistent in an effort to constitute the successor of a sole member as a substitute member. In the context of a multiple-member LLC, if a member's death does not effect disassociation, what is the status of the decedent's estate and heirs vis-à-vis the LLC? Nevada otherwise requires the consent of a majority-in-interest of the other members for a transferee to be admitted as a member.[107] How does that apply if there has been a death but not a disassociation?[108]

These springing-member provisions present a policy question concerning who should be permitted to elect into member status—the successor(s) of the last member only or, in addition to those successors, all other assignees. Most of the existing statutes provide for the former, creating a circumstance not

102. The manager is the agent of the LLC, not of the decedent, so the manager has a principal.

103. *See* NEV. REV. STAT. ANN. § 86.491(4)(a) (West, Westlaw through the 32d Spec. Sess. (2020)).

104. *See id.* § 86.491(5) ("Except as otherwise provided in the articles of organization or operating agreement, upon the death of a natural person who is the sole member of a limited-liability company or the sole member associated with a series, the status of the member, including the member's interest, may pass to the heirs, successors and assigns of the member by will or applicable law. The heir, successor or assign of the member's interest becomes a substituted member pursuant to NRS 86.351, subject to administration as provided by applicable law, without the permission or consent of the heirs, successors or assigns or those administering the estate of the deceased member.").

105. *See id.* § 86.091 ("'Member's interest' means a share of the economic interests in a limited-liability company, including profits, losses and distributions of assets.").

106. *See id.* § 86.351(1) ("The interest of each member of a limited-liability company is personal property. The articles of organization or operating agreement may prohibit or regulate the transfer of a member's interest. Unless otherwise provided in the articles or operating agreement, a transferee of a member's interest has no right to participate in the management of the business and affairs of the company or to become a member unless a majority in interest of the other members approve the transfer. If so approved, the transferee becomes a substituted member. The transferee is only entitled to receive the share of profits or other compensation by way of income, and the return of contributions, to which the transferor would otherwise be entitled.").

107. *See id.*

108. This would not be the first time a Nevada statute has been ambiguous regarding the treatment of an economic interest in a business venture. *See* Thomas E. Rutledge, *Nevada's Corporate Charging Order: Less There than Meets the Eye*, J. PASSTHROUGH ENTITIES, Mar.–Apr. 2008, at 21, 22–24.

dissimilar from a tontine,[109] except it is the successors to the last participant who succeed to the control of the venture. Assume an LLC originally comprised of members Larry, Curly, and Moe. Larry dies on Monday, leaving his assignee interests in the LLC to Linda and Laura; Curly and Moe now control the LLC, and they do not admit Linda or Laura to membership. Curly dies on Wednesday, leaving his assignee interests in the LLC to Cindy and Caroline; Moe now controls the LLC, and he does not admit any of Linda, Laura, Cindy, or Caroline to membership status. Moe has full control of the LLC until he dies on Friday. Moe's children, Mary and Megan, being the successors of the last member, may elect themselves into member status and in doing so thereafter control the LLC, including the distributions (if any) made to the other assignees. Meanwhile, the assignees of Larry and Curly do not have the right to elect into member status; they were not the successors to the last member. Mary and Megan, going forward, will decide, a decision not constrained by either fiduciary considerations or the obligation of good faith and fair dealing, whether the successors of Larry or Curly will be admitted as members.

But should that be the rule? Mary and Megan are no less strangers to the venture than are the heirs of Larry and Curly. They have succeeded to control of the LLC only by happenchance. Being the successors to the last surviving member is no assurance that they have the background, training, or willingness to manage the LLC well. Perhaps the statutes should afford all assignees (or at least all assignees consequent to any member's death) the equal right to elect into member status upon the death of the last member.[110]

This is not to suggest that any succession mechanism, if not carefully implemented in an operating agreement, will not be fraught with problems and opportunities for disagreement. If all assignees of decedents are admitted as members, on what terms are their respective rights to be determined? If the LLC was held 50 percent by Larry, 25 percent by Curly, and 25 percent by Moe, are their respective heirs to succeed to the rights as members in those proportions? While the initial reaction may be "of course," the statutes that give an assignee the right to elect into member status speak only to status and not to the allocation of rights among the assignees making that election.

Ultimately, the springing-member statutes are without ambiguity only in the instance in which there is a single successor of a single decendent. In more complicated fact patterns, the statutes are inadequate. Furthermore, regardless of the

109. *See generally The Simpsons: Raging Abe Simpson and His Grumbling Grandson in "The Curse of the Flying Hellfish*," (Fox television broadcast Apr. 28, 1996) (presenting Mr. Burns and Abe Simpson as the only surviving members of a tontine created during World War II and Mr. Burn's failed assassination attempt on Abe).

110. *See* ALA. CODE § 10A-5A-7.01(c)(1) (West, Westlaw through Act 2020-206) (providing that, upon the death of the last member, all assignees participate in deciding whether to continue the LLC and who will be appointed as new members). The question could have been avoided if Moe had made an inter-vivos transfer of LLC interests to Mary and Megan, whereupon Moe's death would not leave the LLC with no members.

fact pattern, they are effective only if the successors are aware of and satisfy time and other requirements for making an election.

## What Happens Upon the Death of a Member in a Multiple-Member LLC?

Let's step back and assume a multiple-member LLC in which one member dies. At one time, many LLC statutes provided that an LLC would undergo a dissolution upon any member's disassociation,[111] avoiding the characteristic of "continuity of life"[112] and carrying forward the partnership and limited partnership principles on which the first LLC statutes were based.[113] Today, no state mandates dissolution upon a member's disassociation, and the few states that provide for dissolution upon disassociation also provide that the remaining members may elect out of dissolution.[114] Although the LLC generally survives a member's death,[115] the member's status as a member does not similarly survive. Further, while the deceased member's economic interest in the LLC may ultimately be distributed to the heirs, there are no management rights that the estate may exercise. Meanwhile, the other members remain, and they have the managerial control of the LLC.

Absent contrary provisions in an operating agreement creating a right to put the interest of the deceased to the LLC or the unilateral right to elect into member status, the estate and then the heirs of an interest in an LLC have no affirmative and essentially no passive rights vis-à-vis the LLC. As assignees, the estate and heirs typically have no right to inspect books and records, and, even where there is a right to inspect books and records, there is no opportunity to act on any matter identified therein. An assignee is not a party to the operating

111. *See, e.g.*, Prototype LLC Act, *supra* note 22, § 901(c), at 58; *see also* Thomas Earl Geu, *Understanding the Limited Liability Company: A Basic Comparative Primer (Part One)*, 37 S.D. L. Rev. 44, 71–73 (1992); Thomas E. Rutledge & Lady E. Booth, *The Limited Liability Company Act: Understanding Kentucky's New Organizational Option*, 83 Ky. L.J. 1, 34–36 (1994); Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 Bus. Law. 375, 421 (1992).

112. *See supra* note 24 and accompanying text.

113. *See* Unif. P'ship Act § 29 (Unif. Law. Comm'n 1914) (providing that partnership dissolved upon dissociation of a partner); Unif. Ltd. P'ship Act § 801(3) (Unif. Law. Comm'n 2013) (providing that limited partnership dissolved upon dissociation of last general partner unless the limited partners elect a new general partner).

114. States that continue to provide that, absent remedial action by the remaining members, the dissociation of a member affects the dissolution of the LLC are Louisiana, Massachusetts, Maryland, Missouri, Oklahoma, Texas, and Wisconsin. *See* Ribstein, Keatinge & Rutledge, *supra* note 35, apps. 14-3 to -6; *see also* Ind. Code Ann. § 23-18-9-1(b)(3) (West, Westlaw through the 2020 2d Reg. Sess.) (providing, for LLCs formed on or before June 30, 1999, that LLC dissolved upon an event of dissociation of a member unless remaining members determine to continue the company).

115. *See, e.g.*, Del. Code Ann. tit. 6, § 18-801(b) (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–20)) (providing, generally, that "the death . . . of any member . . . shall not cause the [LLC] to be dissolved"); *see also id.* § 18-801(a)(4) (listing events of dissolution, including when LLC has no members for ninety days); Unif. Ltd. Liab. Co. Act § 701 (Unif. Law. Comm'n 2013) (same). In other states, it may be best practice for the operating agreement to provide for automatic continuation of the LLC after a member's death.

agreement (although they may be bound to its terms) and, except as to its rights thereunder, lacks standing to bring an action for its enforcement or to challenge a breach thereof.

In his blog, *New York Business Divorce*, Peter Mahler reviewed a trial court decision in which a Minnesota court, in the unpublished case of *Lotton v. Savich Herefords, LLC*,[116] afforded the assignees of certain interests in an LLC the right to inspect the LLC's books and records.[117] In *Lotton*, the judge wrote:

> In cases where the member who transferred the financial rights remains alive and retains governance rights, that member can act to protect the rights of his assignees. Where, as here, the rights were transferred upon the death of a member, there is no one left with governance rights to protect the interests of the assignees and there must be some mechanism for the assignees to protect their financial interest . . . .[118]

The court recited the axiom of equity that where there is a right, there must be a duty whose breach would give rise to a remedy. What the court failed to acknowledge is that not every perceived imposition involves a legally cognizable right. There is an equally venerable principle of equity law, *damnum absque injuria*—not every damage gives rise to a legally cognizable injury—that is here applicable.[119]

Setting aside those few state statutes that expressly afford an assignee the right to inspect books and records,[120] assignees' complaints that they are denied the right to inspect books and records falls within the *damnum absque injuria* doctrine. While a mere assignee may suspect damage, the assignee has no rights that have been negatively affected. If the organizational statute governing the entity provides that the assignee has no right to inspect books and records, then no court should, under the guise of equity, modify the legislature's policy decision. Yes, it is entirely true that, absent the venture's dissolution, this leaves an assignee with few if any remedies regarding the right to receive distributions that would have otherwise gone to the assignor. The fault for that outcome lies with the assignor for not better protecting the interests of the assignees. Neither the venture nor the other participants therein should bear the burden of that lack of forethought.

116. No. 31-CV-06-177 (Minn. Dist. Ct. July 24, 2007).

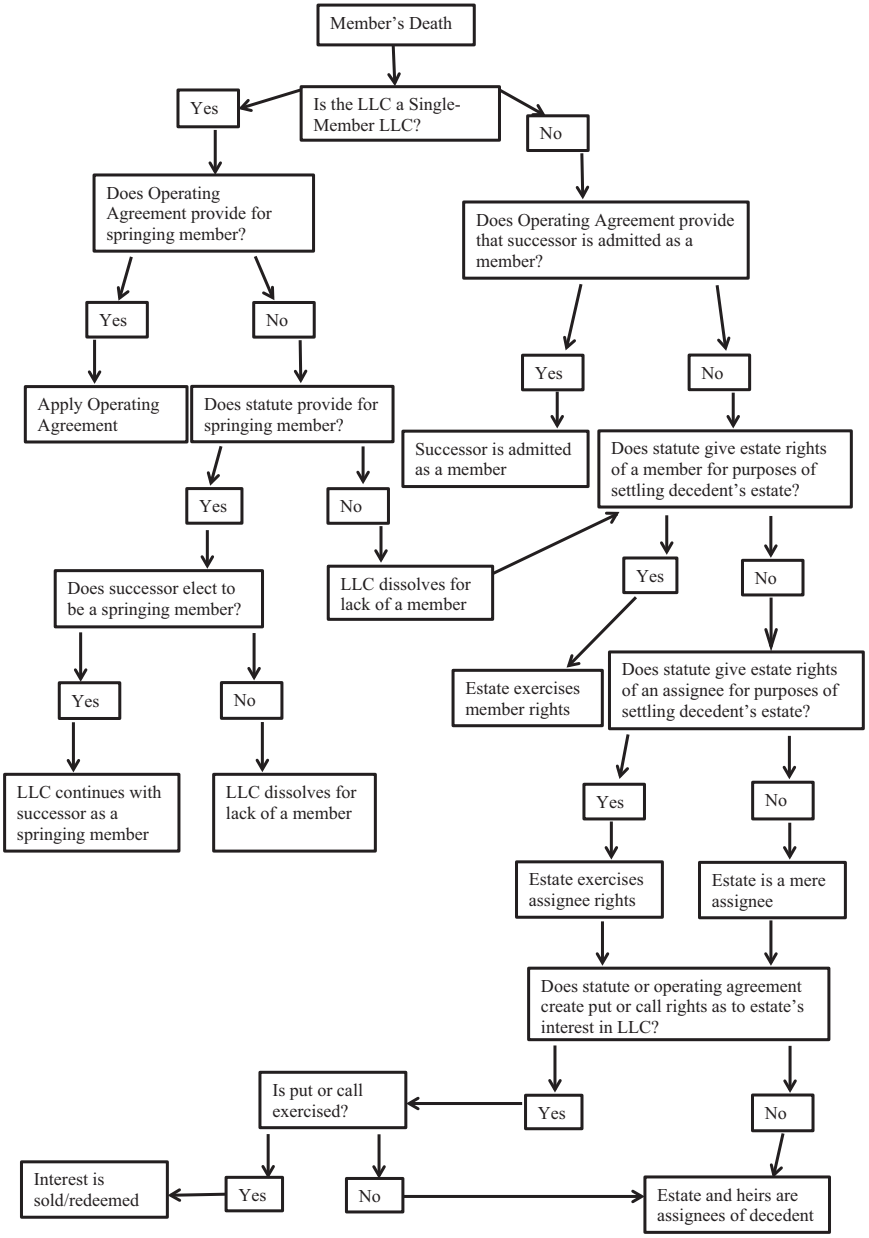
117. *See* Peter Mahler, *Can the Bare Naked Assignee Demand Access to LLC Records?*, N.Y. BUS. DIVORCE (Nov. 20, 2017), https://www.nybusinessdivorce.com/2017/11/articles/access-to-books-and-records/can-bare-naked-assignee-demand-access-llc-records/.

118. *Id.* (quoting opinion).

119. *See* Ala. Power Co. v. Ickes, 302 U.S. 464, 479 (1938) ("'[I]f the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain . . . . Want of right and want of remedy are justly said to be reciprocal.' . . . The converse is equally true, that where, although there is damage, there is no violation of the right no action can be maintained." (quoting Parker v. Griswold, 17 Conn. 288, 302 (1846)).

120. *See* RIBSTEIN, KEATINGE & RUTLEDGE, *supra* note 35, app. 12-3.

With a necessary degree of simplification, the various LLC statutes generally provide:



## Alternative Paradigms

There is no shortage of criticism of the paradigm here described. The lack of automatic succession of the heir to membership status in a single-member LLC, even where an LLC statute provides for a springing-member, has been described as a "trap for the unwary."[121] Generally, springing member provisions may be ineffective for lack of knowledge of their requirements on the part of the estate and the heirs. The restriction of the capacity to elect into membership status to the successor of the last-to-die member places the successors of prior decedents at a significant disadvantage.[122] The lack of liquidity imposes costs on the estate and the heirs because they lose the opportunity to access funds to satisfy the estate's other expenses. Assuming an alternative LLC structure is desired, what mechanisms may be employed?

### 1. Electing Out of Death Equals Disassociation

LLC statutes generally permit modification of the events effecting disassociation.[123] As noted above, an operating agreement could provide that a member's death does not cause that member's disassociation. However, the decedent cannot attend meetings, vote, or inspect books and records. Will the estate be treated as the representative of the decedent with the capacity to vote the decedent's interest? If so, is the executor in a fiduciary relationship with the LLC and the other members? If yes, is that fiduciary obligation in conflict with the executor's fiduciary obligations to the estate and its beneficiaries? Against whom will obligations to contribute capital or guarantee company obligations be enforced? Alternatively, is the estate a substitute member? Or should the decedent's heirs become substitute members? Simply opting out of the disassociation by death

121. *See, e.g.*, Stuart L. Pachman, *The Sole Member's Death: A Modest Proposal?*, Bus. L. Today (July 18, 2019) ("Some business people form [single-member] LLCs without the benefit of counsel; some engage counsel who are not business lawyers; and some, when advised to adopt an operating agreement to avoid the default rule, are pennywise and pound foolish. Whether the member's failure to provide for succession results from ignorance or refusal to follow sound advice, there appears to be no reason why the entire bundle of rights in the 100-percent LLC interest held by a sole member, like the entire bundle of rights in all of the corporation's issued and outstanding shares held by a sole shareholder, should not pass to the estate. The distinction between economic and management rights in the [single-member] LLC is an unnecessary trap for the unwary.").

122. *See, e.g.*, Farrar & Hamill, *supra* note 24, at 930–31 (addressing the risk of oppression). *But see* Rutledge, *supra* note 36, at 558–65 (rejecting, in the corporate setting, assertions of oppression and the claimed need for a put option because the participants in the venture could have negotiated for protection and, in failing to do so, they or their assignees are being deprived of neither rights nor remedies).

123. *See, e.g.*, Ky. Rev. Stat. Ann. § 275.280(f)(1) (West, Westlaw through the 2020 Reg. Sess.) (permitting opt-out by a written operating agreement); Ind. Code Ann. § 23-18-6-5(a)(4) (West, Westlaw through the 2020 2d Reg. Sess.) (same); *see also* Bishop & Kleinberger, *supra* note 84, ¶ 8.04 ("An LLC's organic documents can permit the dissociated member to have a continuing role in the LLC's governance. It is essential, however, that any such permission be clearly delineated.").

does not address the rights of third parties (e.g., the estate or heirs) or whether any of them become members.[124]

The operating agreement could provide that upon a member's death the estate will be automatically admitted as a substitute member, and that upon distribution by the estate of the interest in the LLC to the decedent's heirs, they, in substitution for the estate, will be admitted as members. Under this formula, the rights of the decedent-member continue and are fully assigned initially to the estate, and then to the heirs. While there is the question as to how those interests would be exercised in the typical period between death and appointment of the administrator of the estate, likewise, there will be questions as to when the interests are transferred by the estate to the heirs, divesting the estate of any further right to participate in the LLC's management and transferring that right to the heirs.

In sum, simply providing that a member's death does not effect the decedent's disassociation from the LLC may be a starting point, but it does not fully address the issue.

### 2. Provide Liquidity/A Put Right to the Estate

The operating agreement could provide that the estate has the right to put the decedent's LLC interest back to the LLC. From there the questions are of valuation and terms of payment, including:

- The "as of" date of the valuation?
- Who is to perform the valuation?
- What is the measure of value?
- Who bears the costs of the valuation?
- Will the redemption price be paid in a single installment and, if not, on what terms will it be financed?
- If part of the redemption is to be financed, will the debt be secured or guaranteed and, if so, by whom?
- What are to be the rights of the estate to enforce the redemption obligation?
- Is the LLC obligated to make a capital call in order to fund the redemption, and, if so, what are the consequences of a member's failure to perform on that obligation?[125]

124. *See* Unif. Ltd. Liab. Co. Act § 602 cmt. (Unif. Law. Comm'n 2013) (providing for dissociation by death and stating that "it would make no sense to vary some of the rules—e.g., to provide that the death of a member who is an individual does not cause the individual's dissociation as a member, or that an entity remains a member even after the existence of the person has terminated" (citations omitted)).

125. *See also* Subcomm. on Ltd. Liab. Cos., Am. Bar Ass'n, *Model Limited Liability Company Membership Interest Redemption Agreement*, 61 Bus. Law. 1197 (2006).

Essentially the issues to be addressed resemble the issues addressed in a well-drafted corporate stock restriction agreement.[126]

### 3. Admit Successor as Member

An operating agreement could provide, if the successor of the deceased member is not admitted as a substitute member, then that successor may exercise a put option requiring that the LLC make a liquidating distribution. The operating agreement, in addition to addressing the aforementioned questions of valuation and terms of purchase, will need to address the time requirement within which the admission must take place in order for the put option to be avoided and what constitutes "admission." On the one hand, in order to take advantage of the put option, the assignee should not be able to thwart admission by failure to deliver a joinder and a W-9. On the other hand, the assignee may have a legitimate objection to becoming a member in an LLC with significant capital and service contribution obligations. Admission as a substitute member may require undertaking the fiduciary duties of a member in violation of existing obligations of the assignee. There will be as well questions as to the terms upon which the assignee is to enjoy rights as a member in the LLC. May the admission be on the basis of becoming a non-voting member, or at an economic sharing ratio different from that of the decedent? Obviously, this approach will require significant bespoke drafting.

### 4. Address Post-Death Capital Contribution Obligations

In the course of representing a member in an LLC whose operating agreement provides for ongoing capital contribution obligations, there should be sought an express cut-off of the future contribution obligations upon death.[127] In addition, counsel should argue for indemnification by the LLC and the other members to the extent that, notwithstanding the LLC's waiver of those additional contribution obligations, a creditor relied on those obligations and seeks to enforce

126. *See also* Howard M. Zaritsky et al., Structuring Buy-Sell Agreements: Analysis with Forms ch. 9 (2020).

127. *See* Ky. Rev. Stat. Ann. § 275.200(4) (West, Westlaw through the 2020 Reg. Sess.) ("Unless otherwise provided in an operating agreement, an obligation of a member to make a contribution may be compromised only with the unanimous consent of the members."); Del. Code Ann. tit. 6, § 18-704(c) (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–20)) ("Whether or not an assignee of a[n LLC] interest becomes a member, the assignor is not released from liability to a[n LLC] under subchapters V and VI of this chapter."); N.J. Stat. Ann. § 42:2C-33(a) (West, Westlaw through L.2020, c. 117 and J.R. No. 2) ("A person's obligation to make a contribution to a[n LLC] is not excused by the person's death . . . ."). The Alabama LLC Act does a better job than do most statutes in addressing the dichotomy of holding a "member" liable on a contribution obligation when, upon death, the decedent's estate is an assignee. *See* Ala. Code § 10A-5A-4.04(a) (West, Westlaw through Act 2020-206) ("A member's obligation to make a contribution to a[n LLC] . . . is not excused by the member's death . . . . If a member does not make a contribution required by an enforceable promise, the member or the member's estate is obligated, at the election of the [LLC] . . . to contribute money equal to the value of the portion of the contribution that has not been made . . . .).

them.[128] While any natural person member may want those protections, any LLC member not facing or not concerned about death may object on the basis that capital is capital. The needs of the LLC for capital in order to thrive is not dependent upon the life or death of any member. It is a matter of negotiation, and the person representing the member may argue that the LLC may offset the claim against the estate against distributions that would otherwise go to the estate and the heirs.

### 5. Provide Assignees an Enforcement Mechanism for Distributions

As previously noted, while assignees may have a right to receive the distributions that would have gone to the assignors, there is no default enforcement mechanism for that right. However, the operating agreement may create enforcement mechanisms. An operating agreement could provide for (i) mandatory disclosure to all assignees (or at least all who are assignees consequent to death) of financial records, including as to declared distributions, and (ii) a right to bring suit or an action in arbitration to compel a distribution that should have been paid but was not. Another point that should be addressed is the definition and treatment of functional distributions, such as excessive compensation for the services of the remaining members. In crafting a means by which an assignee may enforce a right to a declared but unremitted distribution, the drafter should not empower the assignee to compel a distribution or otherwise participate in (interfere with) the management of the LLC.

### 6. Provide for a Class of Permitted Substitute Members

An operating agreement may define by class (e.g., spouse and children), by specific identification (e.g., Sally Smith), or by function (a trust for the benefit of a member's spouse and children for which the member or the member's spouse is the trustee) a person or persons to whom, upon death, the interest in the LLC will be assigned and that, upon the assignment, will be admitted as a substitute member.[129] If there are concerns that a particular assignee should

128. *See, e.g.*, Prototype LLC Act, *supra* note 22, § 502 cmt., at 35 (suggesting the addition of subsection (e): "Notwithstanding the compromise, a creditor of a[n LLC] who extends credit or otherwise acts in reliance on that obligation after the member signs a writing which reflects the obligation and before the compromise may enforce the original obligation."); Ind. Code Ann. § 23-18-5-2(b) (West, Westlaw through the 2020 2d Reg. Sess.) (virtually same); Del. Code Ann. tit. 6, § 18-502(b) (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–20)) (virtually same); Colo. Rev. Stat. Ann. § 7-80-502(2) (West, Westlaw through the 2020 Extraordinary Sess.) (virtually same); W. Va. Code Ann. § 31B-4-402(b) (West, Westlaw through 2020 Reg. Sess.) (virtually same); Ky. Rev. Stat. Ann. § 275.200(5) (West, Westlaw through the 2020 Reg. Sess.) (virtually same).

129. With respect to a "permitted transferee" provision, if it is intended that a permitted transferee be admitted as a substitute member upon the assignor member's death, the agreement needs to be express as to that point. In *Grand-Waukegan, LLC v. GMAK Investments, LLC*, No. 2-19-0432, 2020 WL 1922408 (Ill. App. Ct. Apr. 20, 2020), one of the members in the original LLC, in anticipation of his death, organized a second LLC into which he transferred his entire interest in the original LLC. *Id.* at *2. Subsequent to his death, his widow, in control of the assignee LLC, sought to

not be a member, the operating agreement could provide for a call option against the substitute member's interest in the LLC.

### 7. Transfer on Death Provisions

Especially in the context of a single-member LLC, when failure to exercise a springing-member provision will result in the LLC's dissolution, a transfer on death ("TOD") provision should be considered. TOD assets do not go through probate, and, upon the decedent's death, the TOD recipient takes full title to the property. Assuming that the decedent has made clear that the TOD recipient will be admitted as a replacement member, there is no point at which the LLC will lack a member and be at risk of dissolution.

If a single-member LLC has a TOD provision that results in the recipient being a replacement member, the recipient may find herself subject to satisfying accrued but unpaid capital contributions, obligations that may be enforceable by third-party creditors. The new member may find herself thrust into the position of the operator of a CERCLA site or find herself a "responsible person" with respect to unpaid federal employee trust fund taxes. In short, there may be factual circumstances in which the TOD substitute member may not appreciate having been made a member.

In the context of a multiple-member LLC, the use of a TOD provision is more complicated. The specific provisions required in the operating agreement to effect a TOD, including the possible incorporation therein of a TOD Agreement as an exhibit to the operating agreement, are points dependent upon individual state law and beyond the scope of this discussion. Still, it should be recognized that attention must be paid to whether the member has a unilateral right to name and alter the TOD beneficiary, whether the TOD beneficiary must be preapproved by some threshold of the other members, and whether the approval of a TOD beneficiary is subject to either rejection or delivery requirements (e.g., a Form W-9, a joinder to the operating agreement) binding the TOD beneficiary before the LLC is obligated to recognize the transfer. Transfers may be held to constitute a will substitute, and a surviving spouse may have rights under an elective share statute.[130]

participate in the original LLC's management and affairs as a member, citing the provision of the operating agreement which spoke of a "permitted transferee." *Id.* at *1–2. The remaining members of the original LLC objected. *Id.* The court held that, as the operating agreement of the original LLC did not expressly provide that a permitted transferee would be admitted as a substitute member, no such substitution took place. *Id.* at *4–5. When the decedent's widow asserted that such a reading would render the "permitted transferee" language of the operating agreement a nullity, the court noted that the operating agreement contained a right of first refusal ("ROFR"), and that a transfer to a permitted transferee is not subject to the ROFR. *See id.* at *5. On that basis, the court was able to determine that the permitted transferee language was not a nullity.

130. *See, e.g.*, Young v. Young, 808 S.E.2d 631, 639–42 (W. Va. 2017).

### 8. Provide for Full Assignability

As heretical as it may first strike those steeped in the default rules of unincorporated entity law, it is also possible—and not particularly innovative[131]—to make the interest fully transferable.[132] As is the case in other alternative situations already reviewed, obligations of the substitute members who would be otherwise assignees need to be considered and in doing so a right to a lesser status not subject to those obligations may need to be created.

## Where You Stand Depends on Where You Sit

Just because an operating agreement may provide an alternative rule does not mean that it should. As noted previously, the doctrine of *delectus personae* serves as a central principle of unincorporated entity law. Allowing an estate and then the heirs of a deceased member to succeed to the rights of membership introduces a stranger into the relationship, a stranger who may have objectives at odds with those that were accepted by the participants in the venture.[133] That introduction of an alternative vision may negatively affect both the LLC and the other members. Recalling that the LLC and its remaining members have the right to admit the estate and the heirs as members, it may be advantageous for the operating agreement to simply acknowledge that the estate and heirs may be admitted on a vote of the members and to address other matters of logistics such as the execution of a joinder to the operating agreement, perhaps an express undertaking of existing capital contribution obligations and delivery of a Form W-9, but with the assignee status of the estate and heirs affirmatively set forth.[134] Then, with the capacity and requirements detailed, a decision

131. *See, e.g.*, Walter A. Shumacker, A Treatise on the Law of Partnership 8 (2d ed. 1912) ("Of course, consent to the transfer of a partner's interest, and the reception of the transferee into the firm, may be given in advance, and it is not unusual to insert such a stipulation once for all in the original partnership articles, at least so far as the personal representatives of a deceased partner are concerned." (footnotes omitted)); Francis M. Burdick, The Law of Partnership, Including Limited Partnerships 131 (1899) ("While the death of a partner ordinarily dissolves the firm and vests the partnership title in the survivors, this result may be prevented by the agreement of the partners.").

132. *See* William A. Neilson, *Uncertainty in Death and Taxes—The Need to Reform Louisiana's Limited Liability Company Law*, 60 Loy. L. Rev. 33, 52 (2014) (recommending that Louisiana LLC Act be revised to add "a provision effectively treating the membership interest as a heritable asset").

133. It is for this reason that I disagree with the following position advocated by Neilson: "Additionally, because the amendment would apply only to transfers at death, it arguably retains elements of the 'pick your partner' principle because the members would be unable to transfer their shares during their lifetime—to a buyer or otherwise." Neilson, *supra* note 132, at 53. Of all of the events of disassociation, death is the one certainty for all natural persons; bankruptcy and incompetency are relatively rare. Second, irrespective of whether occasioned by death, the admission of a new member consequent thereto is no less an imposition upon the relationship among the members than if otherwise occasioned.

134. For example, the operating agreement could provide:

> Upon the death of a Member, the decedent's estate and his or her heirs, to the extent they should inherit an [Interest / LLC Interest / Membership Interest] in the Company, shall be [assignees / transferees] of the decedent's interest in the Company. As [assignees / transferees], the holder of the assigned interest will not be a member in the Company and shall have no right to participate in its management or affairs, including but not limited to participation in any vote or consent to

may be made as to the admission (or not) of a particular assignee based upon an assessment of whether he or she is desirable for the LLC and the members. Using this model allows the LLC and the members to differentiate among heirs. The *delectus personae* doctrine affords the incumbent members the capacity to determine that some heirs will be admitted to membership while others will not; those not admitted will have no legitimate complaint that they were not admitted to membership, because they had no legal right to be admitted.[135]

amend its operating agreement. Nothing contained herein shall release the decedent's estate from any liability, including a liability to contribute additional capital, to the Company.

135. I would like to thank my friends Stuart Pachman and Robert Keatinge for the numerous discussions that have contributed to this article.