

Department of Legislative Services
Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 261

(Senator West)

Judicial Proceedings

Economic Matters

**Corporations and Associations - Limited Liability Companies and Partnerships -
Operating Agreements and Partnership Agreements**

This bill specifies that operating agreements and partnership agreements may provide for interests in limited liability companies (LLCs) and partnerships to be transferred or assigned to other persons, including to nonmembers/nonpartners. The bill further specifies that transfers on death, pursuant to the terms of an LLC operating agreement or a partnership agreement of a general or limited partnership, are effective according to the agreement and are not to be considered testamentary. The bill applies to all LLC operating agreements, general partnership agreements, and limited partnership agreements in effect upon the bill's effective date.

Fiscal Summary

State Effect: General fund revenues may decrease each year, potentially only minimally, as discussed below. Expenditures are not affected.

Local Effect: The bill does not directly affect local operations or finances.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Transferring Interests (Generally): Limited Liability Companies and Partnerships

The bill specifies that the operating agreement of an LLC may establish that a membership interest, an economic interest, or a noneconomic interest may or must be transferred or assigned in whole or in part to one or more persons, including on the occurrence of specified events (including the death of a member), regardless of whether the persons to

whom the interest is transferred or assigned are members. The bill further specifies that, upon assignment of a member's full economic interest in an LLC, the member need not cease to be a member of the LLC or forfeit the member's noneconomic interest in the LLC (if such an arrangement has been agreed to).

With respect to general and limited partnerships, the bill similarly specifies that a partnership agreement may provide that a partner's transferable interest in the partnership (or partnership interest) may or must be transferred or assigned in whole or in part to one or more persons, including on the occurrence of certain events (including the death of a partner), regardless of whether the persons to whom the interest is transferred or assigned are partners.

Transfers upon Death

In addition to the general provisions described above, the bill specifies that transfers on death, pursuant to the operating agreement of an LLC or a partnership agreement, are effective according to the operating agreement or partnership agreement and are not to be considered testamentary (*i.e.*, interests transfer according to the terms of the agreement and not by a will or the laws of intestacy).

Current Law:

Agreements Governing Limited Liability Companies and Partnerships

Generally, members and partners may enter into agreements that regulate the conduct of the LLC or partnership consistent with State law, including provisions relating to the assignment of interests, the rights of persons to whom interests are transferred, and the circumstances under which a person ceases to be involved with the business.

Property of a Deceased Person

Under the Estates and Trusts Article, all property of a decedent (deceased person) is subject to the estates of decedents law, and upon the person's death must pass directly to the personal representative (a fiduciary who settles and distributes the estate of the decedent in accordance with the terms of any will and the estates of decedents law) for administration and distribution. "Property" is all real and personal property of the decedent and any right or interest in the property, which does not pass, at the time of the decedent's death, to another person by the terms of the instrument under which it is held, or by operation of law.

In *Potter v. Potter*, 250 Md. App. 569 (2021), the Maryland Court of Special Appeals held that a provision in the operating agreement of a Maryland LLC purporting to transfer a member's interest to a designated successor upon the member's death is not effective

unless the operating agreement was executed in accordance with the provisions of Maryland's statute on wills (§ 4-102 of the Estates and Trusts Article).

State Revenues: General fund revenues may decrease each year, beginning in fiscal 2023, due to reduced probate fee and inheritance tax revenues collected by the registers of wills, which oversee administration of decedents' estates. Interests transferred upon death under the bill are transferred outside of the probate estate, removing property from the probate estate, and probate fees are collected by the registers of wills based on the value of the probate estate. The transfers will still be subject to inheritance tax if the beneficiary is a taxable individual, but if the decedent has no other probate assets, the transfer may not be reported, and the tax may not be collected. The extent of any decrease in general fund revenues cannot be reliably estimated but may only be minimal. Registers of wills' salaries and office expenses are paid from fees and inheritance tax revenues collected by the registers, with the remainder of the revenues deposited in the State general fund.

Transfers upon death under the bill are also still subject to estate tax if otherwise applicable; the Comptroller advises that the bill is not anticipated to affect estate tax revenues.

Small Business Effect: Small business LLCs and partnerships potentially benefit to the extent the bill eases or expands the options for structuring an LLC or partnership, especially in the context of transferring interests upon a member's or partner's death.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 342 (Delegate Brooks) - Economic Matters.

Information Source(s): Maryland State Bar Association; Comptroller's Office; Office of the Attorney General; Judiciary (Administrative Office of the Courts); Maryland Department of Labor; State Department of Assessments and Taxation; Department of Legislative Services

Fiscal Note History: First Reader - February 1, 2022
rh/jkb Third Reader - March 22, 2022
Revised - Amendment(s) - March 22, 2022
Revised - Clarification - April 7, 2022

Analysis by: Tyler Allard

Direct Inquiries to:
(410) 946-5510
(301) 970-5510