February 3, 1999

SENATE BILL No. 571

DIGEST OF SB 571 (Updated February 2, 1999 2:28 pm - DI 75)

Citations Affected: IC 23-18.

Synopsis: Limited liability companies. Makes the following changes to provisions for limited liability companies that are formed after June 30, 1999 (unless the operating agreement provides otherwise): (1) Provides that if a limited liability company has more than one member, an assignee of an interest may become a member only if the other members unanimously consent. (2) Provides that if a limited liability company has only one member, an assignee of an interest may become a member in accordance with the terms of an agreement between the assignor and assignee. (3) Provides that a member may withdraw from a limited liability company only at the time or upon the occurrence of events specified and in accordance with the operating agreement. Makes changes to the specified circumstances when a limited liability company will dissolve and the company's affairs must be wound up. Makes conforming amendments.

Effective: July 1, 1999.

Merritt

January 21, 1999, read first time and referred to Committee on Commerce and Consumer Affairs.
February 2, 1999, amended, reported favorably — Do Pass.

C o p y

February 3, 1999

First Regular Session 111th General Assembly (1999)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 1998 General Assembly.

C o p y

SENATE BILL No. 571

A BILL FOR AN ACT to amend the Indiana Code concerning business and other associations.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 23-18-3-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 1. (a) **Unless otherwise provided in a written operating agreement, a limited liability company existing under this article on or before June 30, 1999, is governed by this section.**

(b) Except as provided in subsection ~~(b)~~ **(c),** each member is an agent of the limited liability company for the purpose of the limited liability company's business or affairs, and the act of any member, including the execution in the name of the limited liability company of an instrument for apparently carrying on in the usual way the business or affairs of the limited liability company, binds the limited liability company, unless:

(1) the acting member does not have authority to act for the limited liability company in the particular matter; and

(2) the person with whom the member is dealing has knowledge

of the fact that the member does not have the authority to act.

~~(b)~~ **(c)** If the articles of organization provide for a manager or managers, and except to the extent provided in the articles of organization:

(1) a member acting solely in the capacity as a member is not an agent of the limited liability company; and

(2) each manager is an agent of the limited liability company for the purpose of its business or affairs, and the act of any manager, including the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business or affairs of the limited liability company binds the limited liability company, unless the manager so acting does not have authority to act for the limited liability company in the particular matter, and the person with whom the manager is dealing has knowledge of the fact that the manager does not have the authority to act.

~~(c)~~ **(d)** An act of a manager or a member that is not apparently for the carrying on in the usual way the business of the limited liability company does not bind the limited liability company unless authorized in accordance with a written operating agreement or by the unanimous consent of all members at any time.

SECTION 2. IC 23-18-3-1.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: **Sec. 1.1. (a) A limited liability company formed under this article after June 30, 1999, is governed by this section.**

(b) Except as provided in subsection (c) or the articles of organization, each member is an agent of the limited liability company for the purpose of the limited liability company's business or affairs, and the act of any member, including the execution in the name of the limited liability company of an instrument for apparently carrying on in the usual way the business or affairs of the limited liability company, binds the limited liability company, unless:

(1) the acting member does not have authority to act for the limited liability company in the particular matter; and

(2) the person with whom the member is dealing has knowledge of the fact that the member does not have the authority to act.

(c) If the articles of organization provide for a manager or managers, and except to the extent provided in the articles of organization:

(1) a member acting solely in the capacity as a member is not

C o p y

an agent of the limited liability company; and

(2) each manager is an agent of the limited liability company for the purpose of its business or affairs, and the act of any manager, including the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business or affairs of the limited liability company binds the limited liability company, unless the manager does not have authority to act for the limited liability company in the particular matter, and the person with whom the manager is dealing has knowledge of the fact that the manager does not have the authority to act.

(d) An act of a manager or member that is not apparently for the carrying on in the usual way the business of the limited liability company does not bind the limited liability company unless authorized in accordance with a written operating agreement or by the unanimous consent of all members at any time.

SECTION 3. IC 23-18-5-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 4. Except as provided in section 5 **or 5.1** of this chapter and IC 23-18-9-6, distributions of cash or other assets of a limited liability company must be shared among the members and among classes of members in the manner provided in the operating agreement. If the operating agreement does not provide otherwise, distributions must be allocated on the basis of the agreed value, as stated in the records of the limited liability company, of the contributions made by each member to the extent the contributions have been received by the limited liability company and not previously returned. A member is entitled to receive distributions described in this section from a limited liability company to the extent and at the times or upon the happening of the events specified in the operating agreement or at the times determined by the members or managers, if any, voting under IC 23-18-4-3.

SECTION 4. IC 23-18-5-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 5. **(a) Unless otherwise provided in a written operating agreement, a limited liability company existing under this article on or before June 30, 1999, is governed by this section.**

(b) Upon the occurrence of an event of dissociation under IC 23-18-6-5 that does not cause dissolution, 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

C o p y

a reasonable time after dissociation, the fair value of the member's interest in the limited liability company as of the date of dissociation based on the member's right to share in distributions from the limited liability company.

SECTION 5. IC 23-18-5-5.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: **Sec. 5.1. (a) A limited liability company formed under this article after June 30, 1999, is governed by this section.**

(b) 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 limited liability company as of the date of dissociation based on the member's right to share in distributions from the limited liability company.

SECTION 6. IC 23-18-6-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 1. (a) Subject to subsection (b), a person may become a member in a limited liability company:

(1) in the case of a person acquiring an interest directly from the limited liability company, upon compliance with the operating agreement or if the operating agreement does not provide in writing, upon the written consent of all members; and

(2) in the case of an assignee of an interest, as provided in section 4 **or 4.1** of this chapter.

(b) The effective time of admission of a member to a limited liability company is the later of the following:

(1) The date the limited liability company is organized.

(2) The time provided in the operating agreement, or if no time is provided, when the person's admission is reflected in the records of the limited liability company.

SECTION 7. IC 23-18-6-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 3. (a) **Unless otherwise provided in a written operating agreement, a limited liability company existing under this article on or before June 30, 1999, is governed by this section.**

(b) Except as provided in a written operating agreement:

(1) an interest is assignable in whole or in part;

(2) an assignment entitles the assignee to receive, to the extent assigned, only the distributions to which the assignor would be

Copy

entitled;

(3) an assignment of an interest does not of itself dissolve the limited liability company or entitle the assignee to participate in the management and affairs of the limited liability company or to become or exercise any rights of a member;

(4) until the assignee of an interest becomes a member, the assignor continues to be a member and to have the power to exercise any rights of a member, subject to the other members' right to remove the assignor under section 5(a)(3)(B) of this chapter;

(5) until an assignee of an interest becomes a member, the assignee has no liability as a member solely as a result of the assignment; and

(6) the assignor of an interest is not released from liability as a member solely as a result of the assignment.

~~(b)~~ **(c)** Unless otherwise provided in an operating agreement, the pledge of or granting of a security interest, lien, or other encumbrance in or against any or all of the interest of a member is not an assignment and does not cause the member to cease to be a member or to cease to have the power to exercise any rights or powers of a member.

SECTION 8. IC 23-18-6-3.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: **Sec. 3.1. (a) A limited liability company formed under this article after June 30, 1999, is governed by this section.**

(b) Except as provided in a written operating agreement:

(1) an interest is assignable in whole or in part;

(2) an assignment entitles the assignee to receive, to the extent assigned, only the distributions to which the assignor would be entitled;

(3) an assignment of an interest does not of itself dissolve the limited liability company or entitle the assignee to participate in the management and affairs of the limited liability company or to become or exercise any rights of a member;

(4) until an assignee of an interest becomes a member, the assignee has no liability as a member solely as a result of the assignment; and

(5) the assignor of an interest is not released from liability as a member solely as a result of the assignment.

(b) Unless otherwise provided in an operating agreement, the pledge of or granting of a security interest, lien, or other encumbrance in or against any or all of the interest of a member is not an assignment and does not cause the member to cease to be

Copy

a member or to cease to have the power to exercise any rights or powers of a member.

SECTION 9. IC 23-18-6-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 4. (a) **Unless otherwise provided in a written operating agreement, a limited liability company existing under this article on or before June 30, 1999, is governed by this section.**

(b) Except as otherwise provided in a written operating agreement, an assignee of an interest may become a member only if the other members unanimously consent. The consent of a member may be evidenced in any manner specified in writing in an operating agreement, but in the absence of a specification, consent must be evidenced by a written instrument, dated and signed by the member.

~~(b)~~ **(c)** An assignee who becomes a member:

(1) has, to the extent assigned, the rights and powers and is subject to the restrictions and liabilities of a member under the articles of organization, any operating agreement, and this article; and

(2) is liable for any obligations of the member's assignor for unpaid contributions under IC 23-18-5-1 or for any wrongful distributions under IC 23-18-5-7.

However, the assignee is not obligated for liabilities of which the assignee had no knowledge at the time the assignee became a member and that could not be ascertained from a written operating agreement.

~~(c)~~ **(d)** Whether or not an assignee of an interest becomes a member, the assignor is not released from the assignor's liability to the limited liability company for unpaid contributions under IC 23-18-5-1 or for any wrongful distributions under IC 23-18-5-7 that are solely a result of the assignment.

~~(d)~~ **(e)** Unless otherwise provided in a written operating agreement, a member who assigns the member's entire interest in the limited liability company ceases to be a member or to have the power to exercise any rights of a member when an assignee of the member's interest becomes a member with respect to the assigned interest.

SECTION 10. IC 23-18-6-4.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: **Sec. 4.1. (a) A limited liability company formed under this article after June 30, 1999, is governed by this section.**

(b) Except as otherwise provided in a written operating agreement, if a limited liability company has at least two (2) members, an assignee of an interest may become a member only if

Copy

the other members unanimously consent. The consent of a member may be evidenced in any manner specified in writing in an operating agreement, but in the absence of a specification, consent must be evidenced by a written instrument, dated and signed by the member. If a limited liability company has one (1) member, an assignee of an interest may become a member in accordance with the terms of an agreement between the assignor and the assignee.

(c) An assignee who becomes a member:

(1) has, to the extent assigned, the rights and powers and is subject to the restrictions and liabilities of a member under the articles of organization, any operating agreement, and this article; and

(2) is liable for any obligations of the member's assignor for unpaid contributions under IC 23-18-5-1 or for any wrongful distributions under IC 23-18-5-7.

However, the assignee is not obligated for liabilities of which the assignee had no knowledge at the time the assignee became a member and that could not be ascertained from a written operating agreement.

(d) Whether or not an assignee of an interest becomes a member, the assignor is not released from the assignor's liability to the limited liability company for unpaid contributions under IC 23-18-5-1 or for any wrongful distributions under IC 23-18-5-7 that are solely a result of the assignment.

(e) Unless otherwise provided in a written operating agreement, a member who assigns the member's entire interest in the limited liability company ceases to be a member or to have the power to exercise any rights of a member.

SECTION 11. IC 23-18-6-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 5. (a) A person ceases to be a member of a limited liability company upon the occurrence of any of the following events:

(1) The person withdraws from the limited liability company as provided in section 6 of this chapter.

(2) The person ceases to be a member as provided in ~~section 4(d)~~ **section 4(e) or 4.1(e)** of this chapter.

(3) The person is removed as a member:

(A) in accordance with the operating agreement; or

(B) 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 limited liability

Copy

company.

(4) Unless otherwise provided in a written operating agreement or with the written consent of all other members, in the case of a member who is an individual, the individual's death.

(5) Unless otherwise provided in a written operating agreement or with the written consent of all other members, in the case of a member who is acting as a member by virtue of being a trustee of a trust, the termination of the trust, but not merely the substitution of a new trustee.

(6) Unless otherwise provided in a written operating agreement or with the written consent of all other members, in the case of a member that is a partnership, limited partnership, or another limited liability company, the dissolution and commencement of winding up of the partnership, limited partnership, or limited liability company.

(7) Unless otherwise provided in a written operating agreement or with the written consent of all other members, in the case of a member that is a corporation, the dissolution of the corporation.

(8) Unless otherwise provided in a written operating agreement or with the written consent of all other members, in the case of a member that is an estate, the distribution by the fiduciary of the estate's entire interest in the limited liability company.

(b) A written operating agreement may provide for other events that result in a person ceasing to be a member of the limited liability company, including insolvency, bankruptcy, and adjudicated incompetency.

SECTION 12. IC 23-18-6-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 6. (a) **Unless otherwise provided in a written operating agreement, a limited liability company existing under this article on or before June 30, 1999, is governed by this section.**

(b) Unless a written operating agreement provides that a member does not have the power to withdraw by voluntary act from a limited liability company, the member may do so at any time by giving thirty (30) days written notice to the other members or other notice required under the operating agreement. If the member has the power to withdraw but the withdrawal is a breach of the operating agreement, or the withdrawal occurs as a result of otherwise wrongful conduct of the member, the limited liability company may recover from the withdrawing member damages for breach of the operating agreement, including the reasonable cost of obtaining the replacement of services that the withdrawn member was obligated to perform. The limited

C o p y

liability company may offset the damages against amounts otherwise distributable to the withdrawn member, in addition to pursuing any remedies provided for in the operating agreement or available under applicable law.

~~(b)~~ **(c)** Unless otherwise provided in a written operating agreement, in the case of a limited liability company for a definite term or particular undertaking, a withdrawal by a member before the expiration of the term is a breach of the operating agreement.

SECTION 13. IC 23-18-6-6.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: **Sec. 6.1. (a) A limited liability company formed under this article after June 30, 1999, is governed by this section.**

(b) Unless otherwise provided in a written operating agreement, a member may not withdraw from a limited liability company before the dissolution and winding up of the limited liability company. A member may withdraw from a limited liability company only at the time or upon the occurrence of events specified in the operating agreement and in accordance with the operating agreement.

SECTION 14. IC 23-18-9-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 1. **(a) Unless otherwise provided in a written operating agreement, a limited liability company existing under this article on or before June 30, 1999, is governed by this section.**

(b) A limited liability company is dissolved and its affairs must be wound up on the first of the following to occur:

(1) At the time or on the occurrence of events specified in writing in the articles of organization or operating agreement.

(2) Written consent of all the members.

(3) An event of dissociation occurs with respect to a member, unless the business of the limited liability company is continued by the consent of all the remaining members not more than ninety (90) days after the occurrence of the event or as otherwise provided in writing in the articles of organization or operating agreement.

(4) Entry of a decree of judicial dissolution under section 2 of this chapter.

SECTION 15. IC 23-18-9-1.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: **Sec. 1.1. (a) A limited liability company formed under this article after June 30, 1999, is governed**

Copy

by this section.

(b) A limited liability company is dissolved and the limited liability company's affairs must be wound up when the first of the following occurs:

(1) At the time or on the occurrence of events specified in writing in the articles of organization or operating agreement.

(2) If there is one (1) class or group of members, written consent of two-thirds (2/3) in interest of the members or, if there is more than one (1) class or group of members, written consent of two-thirds (2/3) in interest of each class or group of members.

(3) Entry of a decree of judicial dissolution under section 2 of this chapter.

(c) A limited liability company is dissolved and the limited liability company's affairs must be wound up if there are no members. However, this subsection does not apply if, under a provision in the operating agreement, not more than ninety (90) days after the occurrence of the event that caused the last remaining member to cease to be a member, the personal representative of the last remaining member agrees in writing:

(1) to continue the business of the limited liability company; and

(2) to the admission of the personal representative or the personal representative's nominee or designee to the limited liability company as a member;

effective as of the time of the event that caused the last remaining member to cease to be a member.

SECTION 16. IC 23-18-9-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1999]: Sec. 6. Upon the winding up of a limited liability company, the assets must be distributed as follows:

(1) To creditors, including members and managers who are creditors to the extent permitted by law, to satisfy the liabilities of the limited liability company whether by payment or by the establishment of adequate reserves except for liabilities for distributions to members under IC 23-18-5-4, and IC 23-18-5-5 **or IC 23-18-5-5.1.**

(2) Unless otherwise provided in a written operating agreement, to members and former members to satisfy the liabilities for distributions under IC 23-18-5-4 and IC 23-18-5-5.

(3) Unless otherwise provided in a written operating agreement, to members in proportion to the returned contribution.

Copy

COMMITTEE REPORT

Mr. President: The Senate Committee on Commerce and Consumer Affairs, to which was referred Senate Bill No. 571, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 10, line 16, after "if" insert "**, under a provision in**".
Page 10, line 17, after "agreement" insert "**,**".
Page 10, line 17, delete "provides that".

and when so amended that said bill do pass.

(Reference is to SB 571 as introduced.)

MILLS, Chairperson

Committee Vote: Yeas 9, Nays 0.

Copy